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THE

Weekly Reporter:

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE MOFUSSIL SMALL CAUSE COURTS AND THE RECORDER'S COURTS; TOGETHER WITH LETTERS IN CRIMINAL CASES, AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF H. M.'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

By D. SUTHERLAND.

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(1) A Civil Court is not competent to order the name of a purchaser of the rights of the plaintiff in a suit to be substituted for that of the plaintiff, or, upon the application of the party so substituted, to allow the suit to be withdrawn.
Such an order, if made, is made without jurisdiction, and is not an order of that description in respect of which the Legislature intended either to give or to deny the right of appeal. But the order is one which the High Court may set aside in the exercise of the superintendence vested in it by Section 15 of 24 and 25 Victoria, C. 104... 309
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The ownership of the old site does not give a title to re-formation ...
(3) Where a decree is obtained against a Hindoo widow as guardian of her son as well as in her own right for a debt contracted jointly by her and her husband, the husband's property is liable to satisfy the whole decree; and the wife is, therefore, entitled to sell as much of the estate as is necessary to raise the full amount of the debt ...
(4) HELD *by the Divisional Bench* that the widow of a Mussulman in possession of her husband's estate under a claim of dower has a lien upon it, and is entitled to possession as against those entitled as heirs, till her claim is satisfied. Should the widow, in such a case, be deprived of possession by a decree in favor of heirs who take with notice of her claim to dower, and more particularly where her right to sue has been expressly reserved, the heirs take subject to a lien of which the property is not divested by the decree. If the widow, under such circumstances, sued to establish the lien, her suit would come under Clause 16, Section 1, Act XIV. of 1859; if she sued to declare that landed property was subject to the lien, her suit would come under Clause 12.
HELD *by the Appellate Bench* that, in a case in which a Mahomedan widow had, after many years of possession as above, been compelled to make over one-sixth of her estate to her mother-in-law, and then sued her mother-in-law for one-sixth of her dower without interest, she was entitled to recover her claim without deduction on account of wasilat ... 3
(5) Where a Mahomedan husband was found to have paid the purchase-money for a putnee-talook standing in the name of his wife, it was held that his having been in possession of the money was *primâ-facie* evidence that the putnee-talook belonged to himself, and not to his wife, and that presumption was not rebutted by the fact that he purchased the putnee in the name of his wife.

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Judge in this country is Judge both of law and fact; but if, in deciding upon the facts, he deals improperly with the presumptions which the law would raise, he commits an error in law which the High Court can correct in special appeal.

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The rules laid down by Regulation X. of 1822 were intended to take effect only within the tract of country described in Section 2, within which the administration of civil and criminal justice, &c., was, by Section 3, declared to be vested in an officer to be denominated the Civil Commissioner of the north-eastern parts of Rungpore. The proviso in Section 8 was not intended to give substantive powers to the Governor-General in Council in respect of *other* tracts of the country, and Clause 2 of the same Section did not intend to take away the power of any Civil Court, except within that tract.

The proviso contained in Section 8 does not authorize Government to separate any part of the Garrow country beyond that description in Section 2 from the district and from the General Regulations, but merely directs the separation of such tract from the estates of neighbouring zemindars, and the discontinuance of the collection of cesses by the zemindars from the Garrows.

By Clause 2, Section 8, the jurisdiction of the Civil Courts is taken away, only with respect to acts of the above description, done under the authority of the Government; but that does not take away the right of a zemindar to contest a survey-award drawing a line which deprives him of part of his zemindary and his permanently-settled estate.

Where a Rajah had exercised rights and collected dues in certain hills and forests north of an alleged line, and it was the unanimous opinion of all the Revenue authorities that the forests were within his permanently-settled estate, the assumption by them and Government of such line as the boundary of the Rajah's estate, throwing upon him the *onus* of proving his claim to any portion north of that line, was held to be arbitrary and

F.B. RULINGS BY THREE JUDGES.—*(Continued.)*

anomalous. If adopted under Clause 12, Section 5, Regulation IX. of 1825, their proceedings were wholly irregular, and the irregularity can be no ground for excluding the Court from examining them.

When a man is found exercising on both sides of a boundary-line, without objection, rights of ownership or incorporeal rights, and when it is not shown that there is any other owner of the soil, or that any objection to the exercise of such rights was made during a long course of years, his acts cannot be treated as the encroachments of a wrong-doer.

HELD (*by Phear, J.*).—Where Government wrongfully draws a boundary-line cutting off a portion of an estate settled with a zemindar's ancestors, and forbids his enjoyment of zemindaree-rights beyond such line, a cause of action is constituted upon which the zemindar can sue for a declaration of right under Section 15, Act VIII., 1859.

Where acts of user illustrate all the mode of enjoyment of which a disputed property can reasonably be expected to be capable, it can be rightly attributed to proprietorship of the tract upon which they were exercised ... 426

FULL BENCH RULINGS BY FOUR JUDGES.

(1) *A* obtained a decree against *B* for possession of land. On appeal by *B*, that decree was reversed by the late Sudder Court, and *B* applied to the Lower Court for restitution of the land and for mesne-profits. She was put in possession of the lands, and the Principal Sudder Ameen ordered an investigation into the amount of the mesne-profits, and eventually directed the same to be paid to her. On appeal, the Sudder Court reversed this last-mentioned order, holding that the Principal Sudder Ameen went beyond his jurisdiction in giving mesne-profits when the decree of the Sudder Court had not awarded mesne-profits, and observing that *B* should have either applied to the Sudder Court for review of its judgment, or should bring a separate suit. The present suit was brought by *B* to recover the mesne-profits.

HELD *by Peacock, C.J.*, and *Kemp* and *Macpherson, JJ.* (*Loch, J., dissenting*), that in the proceedings which *B* took in the former suit to

F.B. RULINGS BY FOUR JUDGES.—*(Continued.)*

obtain the mesne-profits, she was prosecuting the suit upon the same cause of action within the meaning of Section 14, Act XIV. of 1859.

HELD *by Macpherson* and *Kemp, JJ.(Loch, J., concurring, Peacock, C.J., dissenting)*, that the order of the Principal Sudder Ameen had not been reversed on the ground of "defect of jurisdiction or other cause" mentioned in Section 14, and that, therefore, the time during which *B* was engaged in endeavoring to obtain the mesne-profits in the former execution-proceedings could not be deducted, and that the present suit was barred ... 402

(2) HELD *by Peacock, C.J.*, and *Macpherson, J.* (reversing the decree of the Lower Court), that, according to the law as current in Lower Bengal, the widow of a son who has died leaving nothing cannot compel her deceased husband's father to make her a pecuniary allowance by way of maintenance, if she refuses to live with him as a member of his family.

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FULL BENCH RULINGS BY FIVE JUDGES.

(1) When there is an unregistered bond to secure the payment of a sum of money with interest, by which bond lands also are charged (by way of simple mortgage) with the payment of the debt, a suit to have it declared that the lands are charged with the payment of the debt, and for an order for the sale of the lands (as subject to the charge) in satisfaction of the debt, falls within Clause 12, Section 1, Act XIV. of 1859, and must be brought within 12 years from the cause of action ... 170

(2) Section 19, Act XI. of 1865, provides merely for cases in which the decree-holder wishes to have immediate execution, and makes an application for it either against the person or against the moveable property of the judgment-debtor.

Notwithstanding Sections 19 and 20, Act XI. of 1865, the provisions of Section 286, Act VIII. of 1859, apply to Small Cause Courts. A decree of a Small Cause Court may be sent to another Court for execution, if no property is found within the jurisdiction of the Court passing the decree; and, if the Court to which the decree is sent be in another zillah, the decree must be sent

F. B. RULINGS BY FIVE JUDGES.—*(Continued.)*

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(3) After a debtor has been arrested in execution of a decree, and discharged at the request of the creditor, his personal property may be taken in execution under the same decree ... 178

(4) An appeal lies from the order of a Lower Court deciding what is just and reasonable cause for admitting an application for review after the prescribed period of 90 days have elapsed, and an Appellate Court has power to look at the reasonableness or sufficiency of the cause assigned for admitting such review.

Sections 377 and 378 of Act VIII. of 1859 must be read separately: the words "whether for rejecting the application or granting the review shall be final," applying solely to the application under Section 378, and not to the application under Section 377; and the latter Section relates only to the question of the time at which the Court is first asked to review its judgment.

A new exposition of the law by the High Court is not a just and reasonable cause for not having applied for a review within the period of 90 days; but, when a review has been properly granted, the case should be governed by any new exposition of the law which may have been laid down since the date of the original decision ... 181

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(6) The *onus* in a suit by a landlord for enhancement under Section 17, Act X. of 1859, on the ground that the productiveness of the land has increased, rests on the plaintiff, who must prove that the productiveness was increased otherwise than by the agency or at the expense of the ryot.

The general rule of evidence is that, if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove it

F. B. RULINGS BY FIVE JUDGES.—*(Continued.)*

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HELD *by the Full Bench* that a suit for the price of goods sold wholesale, if there was no written agreement, must be brought within three years from the time the cause of action accrued under Clause 9, Section 1, Act XIV., 1859 ... 193

(8) *Bonâ-fide* purchasers for valuable consideration, and without notice of a sale in execution of a decree, are not in every case protected from having the sale set aside under the present or former law. It must be decided in each case in accordance with the principles of justice, equity, and good conscience, as to whether the sale ought to be set aside or not ... 196

(9) HELD *(Jackson, J., dissenting)* that no special appeal will lie against an order of the Judge on appeal, setting aside a sale for irregularity under Section 257 of the Code of Civil Procedure ... 218

(10) *A*, a judgment-debtor, has funds in the hands of a public officer, which *B*, *C*, and *D*, severally attached in execution of decrees obtained by them respectively in the same Court against *A*. *B* attached before *C* and *D*, and applied by petition that his decree might be first satisfied. *C* and *D* put in similar petitions. The Court below took up all the petitions together, and ordered that *B*, *C*, and *D*, should each receive, rateably, a part of the fund in question. *B*, *C*, and *D*, appealed separately, each making *A*, the judgment-debtor, and the other decree-holders respondents.

HELD, *nem. con.*, that the decree-holders, *B*, *C*, or *D*, had no right of appeal as against the rival decree-holders; that the order of the Lower Court, taking up all the cases together, practically made *B*, *C*, and *D*, parties to the hearing; and that, having been made parties regularly, they could not be struck off by the Appellate Court on the ground that they should not have been made parties.

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(11) One of several judgment-debtors, who purchases a decree against himself and his co-debtors, cannot issue execution against his co-debtors, and recover from them the whole amount of the common debt. His only remedy is to sue them in a regular suit for contribution, and to compel them to pay him their shares of the amount for which the decree was purchased.

An appeal, under Section 11, Act XXIII. of 1861, against the order for execution, would not affect a purchaser at a sale under the execution ... 230

(12) Process of execution is executed within the meaning of Section 119, Act VIII. of 1859, when an attachment of the property takes place; and, if a party means to contest the validity of the decree, on the ground that he had no notice of the summons, he must come in within 30 days from that time, and not from the time that the property is actually sold in cases under Act VIII. of 1859, and within 15 days in cases tried under Section 58, Act X. of 1859 ... 236

(13) The proper principle applicable to a case in which the person liable to mesne-profits has not let the lands to tenants, but has himself occupied and cultivated it, growing on it indigo and other crops, is not to assess wasilat according to the value of the manufactured indigo or other crops, but according to what would have been a fair and reasonable rent for the land, if the same had been let to a tenant during the period of the unlawful occupation of the wrong-doer ... 445

(14) A party wishing to stay execution, under Section 338, Act VIII. of 1859, of a money-decree, is bound to show sufficient grounds to the Court for staying it, and the rule is equally applicable to decrees for immoveable property and to other decrees.

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(15) When a childless Hindoo widow is the heiress and legal representative of her husband, the reversionary heirs are bound by decrees relating

F. B. RULINGS BY FIVE JUDGES.—*(Continued.)*
to her husband's estate, which are obtained against her without fraud or collusion; and they are also bound by limitation, by which she, without fraud or collusion, is bound.
The words 'cause of action' in Act XIV. of 1859 refer, not to a new cause of action accruing to the reversionary heir personally, but to the cause of action which accrued to the heir or representative for the time being of the deceased.
When alienations of her husband's estate are improperly made by the widow, they are good as against her for life; and the reversionary heir's cause of action does not accrue until her death. But, when property belonging to the husband's estates is held adversely to the widow, and never reaches her hands, the cause of action accrues to her, and a suit, whether by her or by the reversionary heir, must be brought within the usual period counting from the commencement of the adverse possession ... 506
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In a suit under Clause 6, it is necessary to determine the question whether the plaintiff has been illegally ejected: this involves the question whether the tenancy was at an end or not when the ejectment took place; if it was at an end, the plaintiff must fail.
If a landlord ejects a ryot of his own authority, without the intervention of a Court of law or the Collector, the case will fall within Section 15 of Act XIV. of 1859; and, if the ryot sue him in the Civil Court within six months, he will be entitled to recover possession without reference to the title of the landlord to eject him ...*513
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HELD *by Bayley, Norman*, and *Seton-Karr, JJ.—Contra.*
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(1) A person against whom information has been falsely given with a view to his injury has a right to bring a civil action for damages, with or without the consent of the —— against whom the offence was com-

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mitted, but he cannot bring a criminal charge under Section 189 or any other Section of Chapter X. of the Penal Code, without the permission of such——, the law looking upon the conduct of the person who gives the false information as an offence, not against the individual charged, but against the —— to whom the false information was given ... 31

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(2) HELD, further, that as against *R A* herself, plaintiff could only get a personal decree for payment of the amount due on the —— on which plaintiff sued, and that he could not in the present suit rely on the second *ib.*
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(1) A Hindoo banker dying intestate left two widows (*D* and *M*) as his co-heiresses. A document put forward by a third party (*H*) as a will of the deceased having been set aside by the Courts, an order was passed in a summary suit under Act XIX., 1841, by which the property was equally divided between the widows. One of them (*D*) subsequently died, leaving a will disposing of her share to her relatives. Steps were taken during *D's* life by the other widow (*M*) and by *H* to resist the registration of the will; and, after *D's* death, *M* applied for the attachment of *D's* share and

HINDOO WIDOW.—*(Continued.)*
the appointment of a curator. Her application being dismissed, she commenced a regular suit.
HELD that *M's* original acquiescence in the title set up by *H* did not deprive her of any rights which accrued to her as one of the co-heirs of her husband, when that claim was decided to be untenable, nor could her alleged alienation of her share bar her present suit ... 23
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The present suit was brought by some of the grandsons of *A*, who claimed to be co-heirs with *B* under the ordinary Hindoo Law of Inheritance, and contended that the will was a forgery; that *A* had no power to make it; and that the special law of inheritance ceased when the first proprietor was expelled ... *ib.*
It was observed that a person who rests his title on so uncertain a foundation as the spoken words of a man since deceased is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place. The finding below as to the *factum* of the will in this case was, however, upheld ... *ib.*
It was also found from the acts of the Government, and its dealings with the property, that *A* derived his title by grant from the Govern-

SUCCESSION.—*(Continued.)*
ment who had full dominion over the estate. The estate consequently must be taken to have been the separate and self-acquired property of *A*, and the nature of the estate granted was held to be a fresh grant of the family Raj, as it had existed before the confiscation, with its customary rule of descent, the omission of the title of Raj in the grant (there being no sunnud in this case) not affecting the question, the title of Rajah not being absolutely essential to the tenure of the estate as a Raj ... 15
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(3) A testator directed his sons, using the words "living jointly in respect of food," to take care of, and look after, his property, moveable and immoveable, and carry on his trading business. HELD that this interest is not accurately represented by the words "joint estate" in England, nor is it analogous to the case of a testator in England who gives property to executors for the purpose of carrying on his trade, but is more analogous to the tenancy in common which prevails in England ... *ib.*
(6) The will also directed that, on the death of a son, if that son died leaving a son, the share of that son was to go to that son's son, and if the son dying left no son, that the share should go to the survivors. HELD that the share of profits made during the joint lives of the sons, which belonged to the deceased son, goes over to the other sons of the testator as they would according to law as from a consideration of the various terms of the will itself, there was an absence of all directions on the part of the testator to accumulate the profits, or to dispose of the profits which were the property of the son ... *ib.*
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The Weekly Reporter.

APPELLATE HIGH COURT.

The 14th December 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, J. P. Norman, W. S. Seton-Karr, L. S. Jackson, and A. G. Macpherson, *Judges.*

Section 10, Regulation XIX. of 1793—Retirement of Judges before delivery of judgment.

Case No. 253 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 21st November 1862, affirming a decision of the Sudder Ameen of that District, dated the 21st July 1862.

Mahomed Akil (Defendant), *Appellant,*

versus

Assadun-nissa Bibee (Plaintiff), *Respondent.*

Mr. J. S. Rochfort, Moulvie Murhummut Hossein, and *Baboo Mohineee Mohun Roy* for Appellant.

Baboos Mohendro Lall Shome and *Mutty Lall Mookerjee* for Respondent.

Case No. 1116 of 1862.

Special Appeal from a decision passed by the Judge of Sarun, dated the 17th February 1862, affirming a decision of the Collector of that District, dated the 27th June 1861.

Mutty Lall Sen Gywal (Defendant), *Appellant,*

versus

Deshkar Roy (Plaintiff), *Respondent.*

Baboo Tarucknauth Sein for Appellant.

Baboo Debendur Narain Bose for Respondent.

HELD by *Peacock, C.J.*, and *Jackson* and *Macpherson, JJ.*—That the grant by a zemindar for valuable consideration of a piece of land to be held without payment of rent *is* valid as against the heir of the grantor or a purchaser from him by private sale of the zemindary; and that, under Section 10, Regulation XIX. of 1793, such heir or purchaser is *not* entitled to resume the land.

HELD by *Bayley, Norman*, and *Seton-Karr*, JJ.—*Contra.*

HELD *nem. con.*—That the opinions (reduced to writing) of Judges who heard the case, but who had ceased to be Judges of the High Court before judgment was pronounced, could not be treated as judgments in the case, but must be regarded as mere minutes or memoranda.

These cases were heard by a Full Bench of nine Judges in January 1866. The circumstances under which they were referred are fully set forth in the judgment of the Chief Justice. The first of the two cases was referred to a Full Bench under the following order recorded by L. S. Jackson and Campbell, JJ. :—

THIS special appeal raises the question how far the grant for valuable consideration by a zemindar of a specific portion of land to be held without payment of rent is valid as against the heirs of the grantor or purchaser by private sale of the estate.

We observe that there has been some conflict of decision upon the point, and we are informed that in two very recent cases, the learned Chief Justice and Mr. Justice Levinge have held one view, and Mr. Justice Norman and Mr. Justice Kemp, another.

We ourselves entertain doubts upon the subject, and we think the matter ought to be decided by a Full Bench.

The judgments of the Full Bench were delivered as follow :—

Macpherson, J.—In these cases, there are two questions to be decided. The one is whether a grant by a zemindar of a portion of his estate to be held free of rent is a grant void as against the grantor and those claiming under him : the other is whether a similar grant made by a mouroseedar is void as against the grantor and those claiming under him.

The lands which are the subject of discussion in the first of the two cases before us were granted on the payment of sums of money to the grantor—were, in fact, sold. Whether the lands were given for a valuable consideration or otherwise, does not, however, as it appears to me, materially affect the questions the Court has to decide; for, whether sold or given, the conclusions at which I arrive will be the same.

The contention on behalf of the respondents is that, under Section 10 of Regulation XIX. of 1793, such grants are null and void, and the lands may, at any time, be resumed by the grantor or those holding under him.

I shall first consider the case of grants by a zemindar. It is admitted and is beyond dispute that, although by Regulation XLIV. of 1793 (passed contemporaneously) with Regulation XIX. of that year) a zemindar could not make a valid lease for a period exceeding ten years, still he was not by that or any other law under any restriction whatever as to the amount to be reserved by him on any lease he might make. Whatever might be the amount of Government revenue payable by the zemindar, the lease, if not for a period in excess of the prescribed limit, would be valid, although but a nominal rent were reserved. By Regulation V. of 1812, the restriction as to the length of lease was removed, and from that time (to which the grants now under consideration are subsequent) a zemindar or other proprietor of land was competent to grant leases for any period he pleased, and for any rent, whether nominal or not, which he pleased. It is argued that, although, when the grants (the effect of which the Court has now to determine) were made, the grantors might have given leases in perpetuity, and for a cowree or other nominal rent, which would have been valid and binding on their heirs and representatives, still the provisions of Section 10 of Regulation XIX. of 1793 are such that any gift or grant of any portion of the estate—any absolute transfer of it—whether for full valuable consideration or not, is invalid. It is said that the zemindar must always, when disposing of his lands, do so by way of lease, with a reservation of something, however small, in the way of rent, and that an absolute parting with his interest in any portion of his lands is void.

It appears to me that Section 10 of Regulation XIX. is intended to apply to grants of land to be held exempt from the payment of Government revenue, and that the meaning of it is that, when any attempt is made to dispose of lands, so that they shall be held as against the Government free from Government revenue, such attempt shall fail. The whole object of Regulation XIX. of 1793 is to secure the Government revenue. The title declares it to be a Regulation for trying the validity of the titles of persons claiming to hold lands exempt from the payment of *revenue to Government;* and for determining the amount of the annual assessment to be imposed on lands liable to the payment of *public* revenue.

Section 1, the preamble, recites that, by the old law, the Government was entitled to a certain proportion of the produce of every beegah, and that, therefore, "if a zemindar "made a grant of any part of his lands *to be* "*held exempt from the payment of revenue,*" it was void from being an alienation *of the dues of Government*, for otherwise, if such grants were upheld, obviously the revenue of Government would have been liable to gradual diminution. Further on, the Section recites that Government had declared void "all grants for holding land exempt from the payment of revenue" made without sanction since the Company's accession, but that the Government had recognized and upheld certain grants made prior to the accession; that many grants existed which were invalid in reality; "that, therefore, "the Governor-General in Council deemed it "is incumbent on him to *recover the public* "*dues thus alienated,*" as well as to "*resume* "*the revenues* of all lands the grants for "which might expire." It recites also that it had been enacted that the *jumma* assessed upon the estates of individuals was to be considered as exclusive of all existing "lakheraj" lands, "whether exempted from "the kheraj or *public revenue,* with or with-

"out due authority," and that it was expressly stipulated in the Proclamation declaring the Decennial Settlement permanent that the Governor-General in Council would impose such assessment as he might deem equitable on lands alienated "and *paying no public revenue*" and held under an invalid title. The preamble continues that the Governor-General desires that the claims of the public on these lands shall be tried in the Courts of Judicature, "that no such exempted lands may be subjected to the *payment of revenue*" till the titles of the proprietors have been adjudicated upon. Upon these grounds (the Section concludes), and with a view *to facilitate the recovery of the public dues* from lands held exempt under invalid grants, as well as to prevent any similar alienations being made thereafter "to the prejudice of the security of the public revenue," and, further, that the Government officers employed in the collection *of the public revenue* may have a correct register of lands exempt *from the payment of revenue*, the rules contained in the subsequent Sections of the Regulation are enacted.

In this preamble, I fail to see any indication of an intention to declare void grants of land free of rent payable to the zemindar. Throughout, it is the public revenue, and that alone which is kept in view, and, reading the preamble by itself, I should not hesitate to say that the only alienations complained of, and which it was desired to check, were attempts on the part of the zemindars to alienate their estate so as to free them from the payment of *Government revenue, not* alienations free from rent payable to the grantor himself.

It is argued that the recital of the Government right to a quota of the produce of each beegah shows that the Government, while enacting Regulation XIX., considered that it was then entitled to a quota from each beegah. But the Settlement was then made, and the Government, in fact, no longer had a right to more than the revenue reserved. The interest in each beegah of land which the Government originally had ceased with the Settlement, save that each beegah belonging to the zemindaree remained charged with the whole revenue payable in respect of the zemindaree—the Government accepting in lieu thereof a fixed amount of revenue from the zemindar. I do not, therefore, consider that the mere fact of the Government having originally had a share of the produce of each beegah is sufficient to lead to the conclusion that the preamble of Regulation XIX. is to be read as referring to grants of land free of rent to the zemindar, as well as to grants of lands free of revenue to Government. To take away from the zemindar the right to grant his lands free of rent to himself and those claiming under him is such a restriction of and detraction from his rights (given to him by Regulation I. of 1793, Sections 9 and 10), that it must be done distinctly and undoubtedly; and the law, when questions arise as between the grantor and the grantee, is certainly to be construed rather in favor of the validity of such grants than against them.

As the preamble, so I think the enacting Sections of Regulation XIX. as well as the contemporaneous legislation of the Government, are all alike to be read as invalidating grants of lands free of revenue payable to Government, and not as invalidating grants free of rent to the zemindar.

I agree in much that is said by the late Mr. Justice Levinge in his judgment in the case of Peezarooddeen *versus* Modhoo Soodun Pal Chowdhry (II. Weekly Reporter 26), and many of his arguments, which I shall not here repeat, seem to me to be very pertinent. As Mr. Justice Levinge remarks: "A grant of land *rent-free* by a proprietor does not more interfere with the revenue of the Government, or the position of the proprietor, than a lease in perpetuity at a nominal rent of one rupee annually. This lease in perpetuity has just as much effect on the revenue (which is *nothing*) and on the income and resources of the zemindar, as a grant free of rent payable to the zemindar. Yet, it is not disputed that the lease is binding on the zemindar and his heirs. But it is said the grant is not legal, because it is contrary to the Regulations and against the policy of the law which will protect the zemindar from *improvident* alienations, though made on good *consideration*."

As to any reference to what is supposed to be the "policy of the law," it is clear that all that we, sitting here, have to decide is what the law actually is; we can have nothing to do with any so-called "policy" other than such policy as is to be found in the law itself.

The law was, in my opinion, correctly stated by Mr. Abercromby Dick, one of the Judges of the late Sudder Court, in his judgment of the 18th of July 1855, when he said: "I concur with the Principal Sudder Ameen that the grant is not resumable by the

heirs of the grantor, and that Section 10, Regulation XIX. of 1793, does not apply to the case. The law could not intend to declare that the party who had made the grant could at pleasure resume it, whether given for valuable consideration or not; or intend to entitle the heirs of such grantor to resume. This would be authorizing such persons to repudiate their own acts, and the acts of their ancestors. Grants of the nature in question, *quoad* the grantors and their heirs, affect not the public revenue. They affect merely their own rental. The grantor continues himself to pay the revenue, and, if he do not, the estate is sold, and then the grant becomes null and void. The law (Section 10, Regulation XIX. of 1793) was enacted to prevent alienations prejudicial to the security of the public revenue, not to enable proprietors and their heirs (whose ancestors' acts are theirs) to profit by their own wrong. The proprietors and their successors, who are authorized to resume at pleasure, are not those who made the grants, or their hereditary ancestors. An auction-purchaser can annul grants and alienations. This the law declares. All *bonâ-fide* alienations are binding on those who made them and on their heirs. This justice requires, and our precedents have decided."

Regulation XLIV. of 1793 has been dwelt upon as showing that the intention of the Legislature must have been to render grants free of rent to the zemindar absolutely void. It is true that that Regulation recites the weakness or viciousness of the zemindars and their tendency to grant pottahs of their lands improvidently so as to diminish "the "revenue of Government arising from the "lands, in the event of the rent or revenue "reserved by such proprietors being insuffi-"cient for the discharge of the amount of "the public demand upon their estates," and that it limited the period for which a lease could be granted to ten years. But Section 6 declares that nothing in the Regulation shall be construed to prohibit any zemindar, &c., from *selling, giving, or otherwise disposing* of any part of his lands as a *dependant* talook. And I cannot understand how the fact of the Government having thought it necessary to limit the length of leases to ten years, while it did not think it necessary to provide for the reservation of a rent proportionate to the Government revenue, or any substantial rent at all, can be said to afford any logical argument in favor of the respondents.

The position of the holders of grants declared void by Section 10 of Regulation XIX. is considerably altered by Act X. of 1859, and the suits now in appeal before us were instituted after Act X. of 1859 came into force. Section 25 of that Act, while it leaves untouched, so much of the old law as declares grants for holding land exempt from the payment of revenue null and void repeals that portion of it by which proprietors, &c., were "authorized and required to collect the rents of such land, to dispossess the grantor, and to annex the land to the estate in which it might be situate," and declares that any proprietor, &c., who may desire to dispossess a grantee, &c., shall bring a suit before the Collector within twelve years from the time when the title of the person claiming the right to assess the land, or of some persons claiming under him, first accrued. As the law now stands, there is merely a declaration that these grants are null and void, but no proprietor, &c., can of his own authority act on their being so; he must invoke the aid of the Revenue Courts. Whereas such grants were under the old law absolutely void, they now apparently are only voidable. And, if they are only voidable, it may be doubted whether the grantor or those claiming through him will be permitted by the Courts to come forward in fraud of their own act and to set aside the grant.

Section 10 of Regulation XIX. of 1793 expressly declares that "no length of pos-"session shall be hereafter considered to give "validity to any such grant." But it has been recently ruled by the Privy Council that, notwithstanding this declaration, sixty years' undisturbed possession under such a grant *does* give validity as against the heirs of the grantor. This was in the case of Chundrobullee Debia *versus* Luckhee Debia Chowdhrain (V. Weekly Reporter, I. P. C. cases), in which suit a grant of land free of rent for the worship of an idol was sought to be set aside. The only point decided by the Privy Council is the one of limitation, and there is no decision of the general question of the right of the representative of a grantor to impeach the grant of his grantor.

On the whole, putting a reasonable construction upon Section 10, Regulation XIX. of 1793, and ascertaining its meaning upon the principles indicated by their Lordships of the Privy Council in the case of Ranee Shurno Moyee *versus* Moharajah Sutesh Chunder Roy (II. Weekly Reporter 14,

P. C. cases), I am of opinion that, when a zemindar has granted a portion of his land free from rent, such grant cannot be set aside or rendered void by the grantor or those claiming through him. Lands granted by a zemindar, whether he reserves any rent or not, must, of course, always remain liable for the Government revenue due in respect of the zemindaree of which, at the time of the grant, they form part; but, as against the grantor and those claiming through him, the lands will belong to the grantee free of rent payable to the zemindar, so long as the grant is not set aside by Government.

The position of a grantee from a mouroseedar may, perhaps, be stronger than that of a grantee from a zemindar. It certainly cannot be weaker; and, therefore, it is unnecessary for me to go further into that question; for, in holding that such a grant is good against the zemindar who made it, and those claiming through him, I necessarily also hold that such a grant, when made by a mouroseedar, is good against him and those claiming through him.

As regards the written minutes or memoranda, in the nature of judgments, which have at various times been put into the hands of the Registrar of the Court by Mr. Justice Trevor, Mr. Justice Campbell, and the late Mr. Justice Shumbhoonath Pundit (who sat on the Bench when these appeals were argued, but who are none of them now members of the Court), I have no sort of doubt that no one of these three minutes or memoranda can be treated as a judgment. I agree with the learned Chief Justice in the opinion which he has formed upon this question, and generally in the reasons upon which that opinion is founded.

Jackson, J.—The first question which we have to determine is that which has been adverted to by the Chief Justice, and, which has also been specified in the notice that judgment would be delivered this morning, that is, whether the minutes written by three Judges of this Court, who have retired or are no longer members of the Court, should be looked on as judgments, and should, therefore, influence the decision, to be given in these appeals.

The Chief Justice has gone very fully into this point, and, in the opinion which he has expressed, I believe all my learned colleagues have concurred, subject to such arguments as might be advanced this morning. I myself should have been inclined to go further, and to regard that point as not open to argument.

It has been suggested that it was the practice of the late Sudder Court, and is still to some extent the practice of the High Court, to hand into the office written judgments instead of pronouncing them in open Court. If such was the practice of the late Sudder Court, I can only say that it was in direct contravention of the provisions of Section 359 of the Code of Civil Procedure. That Section declares that the judgment of the Appellate Court is to be "pronounced in open Court," and it proceeds to lay down what is to be contained in the judgment, and in what language it should be delivered. If, therefore, a judgment, instead of being pronounced in open Court, was handed into the office, it must only have been by a species of fiction that the judgment so handed in was to be regarded as read by the Judges, they being present in Court, on the day when it was put in, and able to read it if they had been so minded; and I am not aware of any instance in which a judgment or opinion written by a deceased Judge, or by a Judge who had left the Court, was treated as a valid judgment.

The Section I have quoted, it is true, does not apply to the High Court, because it is one of the Sections which, by Section 5, Act XVIII. of 1862, are declared not to apply to the High Court. I have, however, always understood that it was necessary in strict practice that judgments should be delivered and pronounced in open Court. Clearly, we are met to-day for the first and only time to give judgment in these appeals; and it appears to me, beyond question, that Judges who have died or have retired from the Court cannot join in the judgment which is to be delivered to-day, and express their dissent from it. I myself would, therefore, exclude argument on this point; but, as opportunity has been afforded to the pleaders to argue it, and none has been offered, I have, therefore, only to add that I concur entirely in the view which has been expressed by the Chief Justice on this point upon general principles.

Having had the opportunity of reading the judgment in these cases prepared by the Chief Justice, and being able very generally to adopt the conclusions and the reasons set forth in that judgment, so far as they bear upon the provisions of law referred to, and the cases cited before us, I consider that I am relieved from the necessity of

such proportion of the produce and the sum payable to the public is the absolute property of the zemindar so long as he continues to discharge the latter. And is the zemindar less than other owners free to do what he will with his own? In other words, is not the zemindar, as long as he continues proprietor, and pays the Government revenue assessed on his estates, absolute owner of the rents, being at liberty to collect or not, to enhance (if the nature of the tenure permit) or to abate, to collect by his own servants, to farm out the rents, to commute the payment, or to bind himself not to require any?

But, for the security of the public revenue, it is a part of the law of the country that, with certain exceptions, the purchaser of an entire estate, in the permanently-settled districts, sold under the sale-law, acquires it free from all incumbrances which may have been imposed upon it after the time of settlement.

In this positive provision of law, it seems to me, and not in any theoretical rights of the estate, does the safety of the public revenue and the security of the purchaser consist?

But, moreover, if any such principle existed, and the public revenue were at all endangered by such grants, who would be the party entitled to complain and to avoid the grant?

Surely, not the person who had himself created it; who had benefited himself while he endamaged or imperilled the interests of the State.

I could conceive such an action as this brought by the Collector *ne quid detrimenti respublica capiat.*

I could also, by an exertion of the fancy, imagine a case of such a grant made in ignorance of the law on both sides, and a proposal by the zemindar to set aside the contract and make mutual restitution; but to entertain a suit by the zemindar to replace him *in statu quo*, while the grantee remained in neither one estate nor the other, to decree a one-sided observance of the law, and not compel the landlord to restore that, which *he* took under an illegal contract, this, I think, would be something like an abetment of fraud, which I should be sorry to require from any inferior Court in Her Majesty's dominions.

For these reasons, therefore, chiefly, I am of the same opinion with the Chief Justice, and, in saying so, I feel that, if one is safe in being on the same side with profound and careful study of the law relating to the subject under consideration, I have that security in the present case.

I also refer, with particular satisfaction, to the case cited from VI. Select Reports, page 281, and that from the Sudder Dewanny Reports for 1852, page 967.

I would answer the question put by the Division Bench in the affirmative, and would, therefore, reverse the decisions of the Courts below with costs.

Such arguments as I have employed are addressed to the case of a grant by the zemindar himself, and the case of a grant by a mouroseedar or other middleman is, of course, even stronger in favor of the grantee.

Seton-Karr, J.—This case was argued on the 16th, 17th, and 18th of January 1866 before a Bench of nine Judges. After hearing full arguments of Counsel, and discussing the matter with several of my colleagues, I formed conclusions which I recorded on the 12th of March 1866; and from those conclusions I have not, after further and more mature consideration, seen any reason to depart.

The question which we have to consider in this case is, whether a grant for valuable consideration by a zemindar, of a specific portion of land to be held without payment of rent, is valid against the heirs of the grantor or against subsequent purchasers by private sale.

This question, simple as it is, appears to me to involve a consideration of the whole policy of the Revenue Laws regarding the burden imposed on land on behalf of the State, and the creation of the rent-free tenures subsequent to the Permanent Settlement, quite as much as it involves any rights or privileges conceded to the zemindars of Bengal by that great measure.

In the course of the argument, which lasted three days, the authorities, laws, and cases noted in the margin were referred to.

Authorities.
Shore's Minute, 18th of June 1789, para. 218.
Fifth Report of the House of Commons.
Colebrooke's Supplement, page 239.
Harington's Analysis, Volume II., page 58, edition of 1814-15.

Laws.
Old Regulations, 1780-88-90, Sections 4 and 5
Regulation III. of 1793, Section 1.
" XIX. of 1793, Section 10.
" XLIV. of 1793, Sections 6 & 7.
" VIII. of 1800.
" II. of 1819, Section 30, Clauses 1, and 2.
Act X. of 1859, Section 28.

Cases.
Sadder Dewanny Adawlut, January 28th, 1840, Vol. VI.
Sadder Dewanny Adawlut, 1847, Volume VII., page 384.
Sadder Dewanny Adawlut, 1852, page 967.
" 1853, page 968.
" 1855, 18th July.
Sevestre's Reports, Volume VIII., part 3.
High Court, 28th April 1861, No. 303 of 1862 Norman & Kemp, JJ.).
Weekly Reporter, January 9th, 1865, Full Bench Decision.

The cases referred to us by the Divisional Bench in this instance comprise several grants. Grant No. 2 is for a tank excavated for the convenience of men and of cattle; and it appears to me that this grant ought to be governed by the decision of the majority of the Full Bench of the 9th of January 1865, and that it must hold good against the heirs and successors of the grantor, or against any purchasers, save the purchaser at a sale for arrears of public revenue.

The other grants, numbered 1, 6, 7, 8, 9, 10, and 11, were all made for no particular purpose, and for considerations of 200 rupees, 100 rupees, and other sums. Some of the grants are of very small extent, being of a few beegahs, but the greater or less size of the grant can hardly enter into our consideration. The real point at issue is, whether grants made rent-free for land of any extent, after the Perpetual Settlement, can or cannot be voided by the heirs of the grantor. The case of a purchaser at a public sale for arrears of revenue is not before us, nor is it raised in these cases in any way. It is quite clear to me that, as against such a purchaser, such grants would be utterly void, and I do not gather that any doubt is anywhere entertained on this point.

The Lower Courts, relying on the late Sadder Court's decision of the 18th July 1855, have decreed the plaintiff's claim for resumption, and have declared the land liable to assessment. This is the result in both the cases, Nos. 253 of 1863 and 1116 of 1862, referred to us. One great contention raised before us is the intent and meaning of Regulation XIX. of 1793, and especially of Section 10 of that Regulation, as well as the meaning of the word "revenue" used in that law, and in several other enactments.

After much consideration, I am driven to the conclusion that the word revenue at that time was not invariably employed to mean only the revenue demandable by Government, but that it also practically comprised the rent receivable by the zemindar who was accountable for the revenue. No doubt, in some of the Sections of that law and in the preamble, the term "revenue" is employed with special reference to the demands of Government; but Section 10, which refers to grants made after the 1st of December 1790, appears to me to have little or no practical force if the term revenue be confined or restricted to the demand on account of Government.

The difficulty that I feel in restricting the term "revenue" to the Government demand only arises in some measure from the consideration that, after 1790, it was not very likely that persons should take on themselves to exempt any lands from the payment of revenue strictly so called.

Further, rents were practically the source and nucleus of revenue. I admit that the exact meaning to be applied to these terms is the source of perplexity, and that I had at times had some doubts on the subject; but, on the whole, I have now come to the conclusion that "revenue" in Section 10 was intended to include, and, in litigation, did include, the rents or the collections made by the zemindars from the ryots. Alienations of what the natives would term *kharij* or land-dues were, by that Section, declared absolutely null and void if made by any one, or on any account, after December 1790. This view is, to my thinking, strongly confirmed by the preamble to Regulation XLIV. of 1793, in which the "rent or revenue reserved by proprietors" is used apparently to designate one and the same thing. As the preamble of this Regulation is important, as showing the views of the Government of the day in regard to the powers of zemindars under the Permanent Settlement, I here set it out at length:—

"The public demand upon the estates of "the proprietors of lands with whom a "settlement has been or may be concluded "under the original Regulations for the "Decennial Settlement having been declared "fixed for ever, it is to be apprehended that "many proprietors, either from improvidence, "ignorance, or with a view to raise money, "or from other causes or motives, may be

"induced to dispose of dependant talooks "to be held at a reduced jumma, or fix the "jumma of such dependant talooks as now "exist in their respective estates at an under-"rate, or let lands in farm or grant pottahs "for the cultivation of land at a reduced "rent for a long term, or in perpetuity. "Such engagements, if held valid, would "leave it in the power of weak, improvident, "or ill-disposed proprietors, to render their "property of little or no value to their "heirs; promote vice and injustice; occasion "a permanent diminution of the resources "of Government arising from the lands, in "the event of the rent or revenue reserved "by such proprietors being insufficient for "the discharge of the amount of the public "demand upon their estates, be an abuse of "the great and lasting benefit which has "been conferred upon the landholders by "the possession of their lands being se-"cured to them in perpetuity at a fixed as-"sessment, and, moreover, be repugnant to "the ancient and established usages of the "country, according to which the dues of "Government from the lands (which consist "of a certain proportion of the annual "produce of every beegah of land demand-"able, according to the local custom, in "money or kind, unless Government has "transferred its right to such proportion to "individuals for a term or in perpetuity, "or fixed the public demand upon the whole "estate of a proprietor of land, leaving him "to appropriate to his own use the differ-"ence between the value of such proportion "of the produce and the sum payable to the "public, so long as he continues to discharge "the latter), are unalienable without its "express sanction. It is at the same time "essential that proprietors of land should "have a discretionary power to fix the "*revenue* payable by their dependant ta-"lookdars, and to grant leases, or fix the "rents of their lands for a term sufficient to "induce their dependant talookdars, under-"farmers, and ryots, to extend and im-"prove the cultivation of their lands, and "that such engagements should be held "inviolable in all cases, except where "they may interfere with or affect in any "shape the primary and indefeasible rights "of Government." These are very weighty "and significant words, and I contend "that they strongly support the views which "I have expressed above. This view also "seems to be confirmed by the following "passage from Harington's Analysis, Volume "II., page 58. In alluding to the report of Messrs. Anderson, Croft, and Bogle of 25th of March 1778, the author says: "It is not "perfectly accurate, especially in the indefinite "use of the term rent, as sometimes denoting "the return or compensation for the occupancy "of land paid by the immediate occupant or "tenant, to a superior landholder or his re-"presentative, and at other times signifying "the *public land-revenue* payable to Govern-"ment." The same contention is further countenanced by the language of the old Regulation, anterior to the Code of 1793, of the 1st of December 1790; and by Colebrooke's Supplement to the Digest of the Regulations.

That this view, right or wrong, has had a practical effect given to it, can, I submit, hardly be denied. For, if the language of the first lines of Section 10 of Regulation XIX. of the same year 1793 could not have been held to refer to or include rents, it is not very easy to see under what Law or Regulation zemindars could resume and re-annex, as they have done, grants of rent-free lands improperly set up or created after 1790. No one, as I have already observed, was very likely to alienate revenue, properly so called, after 1790; and, looking to rents as the basis and foundation of revenue, I must conclude that this Section has been applied so as to allow zemindars to resume grants made free of rent after a certain date, and thus to draw from every part of their estates a proper contribution to the fixed portion of revenue which they were bound to pay into Government. This is really the construction which has been put on this Section by our Legislators and our Courts for years. Possibly, the language of the law has not been very critically examined and tested at any time; but I think it will scarcely be denied that this is the one law to which all zemindars were accustomed to look for a series of years, as empowering them offhand to re-annex lands which any one claimed to hold rent-free, and that this was the view taken of the language of the Regulation by those who framed and passed Act X., and who, in rescinding Section 10 of Regulation XIX. of 1793, and in passing instead Section 28 of the new Law, clearly and unmistakeably treated the enactment as the one by which zemindars were entitled to dispossess alleged grantees, and to assess their invalid grants with the proper amount of *Rent*. In fact, if we exclude these laws, or treat them as exclusively applicable to the Government revenue, and not to rent, it is not easy to see to what part of any Code zemindars could resort to

claim their rights against parties who set up invalid and unauthorized rent-free titles on their estates.

What again, I may ask, is the construction which has been put on that well-known Regulation II. of 1819, Section 30? Have all zemindars, all the Courts, all authorities, been wrong in allowing suits not merely against, but by, zemindars to be instituted under that Section for the resumption of rent-free grants for a long series of years?

The first Clause of that Section is as follows: "All suits preferred in a Court "of Judicature by proprietors, farmers, or "talookdars, to the revenue of any land "held free of assessment, as well as all suits "so preferred by individuals claiming to hold "lands exempt from revenue, shall, imme-"diately on their institution, be referred "for investigation to the Collector, or other "officer exercising the powers of Collector: "provided also that proprietors, farmers, or "talookdars, who may deem themselves "entitled to the revenue of any land held "free of assessment in their respective "estates, talooks, or farms, or individuals "claiming as aforesaid to hold lands free of "assessment, shall be at liberty to prefer "their claims, in the first instance, to the "Collector, provided, further, that the party "so preferring his claim directly to the "Collector shall, in his petition to the Col-"lector, state the particulars of his claim, "and the grounds on which it is founded, in "like manner as if the suit were instituted "in a Court of Judicature; and the pe-"tition shall be written on stamped paper "of the value prescribed for petitions of "plaint in suits instituted in those Courts."

It is impossible to deny that, whether the language of the laws has been correctly interpreted or not, the interpretation has been that suits to avoid rent-free grants can be brought under it. This view has been acted on practically all over the Lower and Upper Provinces for a long series of years. And it seems to me too late now to set a different meaning to that which has had the seal of suitors and pleaders of Courts and Judges for more than 50 years. It may, in fact, be said that the zemindar has been regarded as the transferee of the rights of Government, and, under the term 'revenue' mentioned in the Regulations, he has been allowed to claim his 'rents' of which all land-revenue is made up.

The next point, and an equally important point in this reference, is the policy of the Revenue Law. It appears to me wholly impossible, and indeed unjust, to discard a consideration of this policy, if we can discover it. And on this point I have arrived at this conclusion, that the deliberate policy of our whole revenue-legislation has been against the creation of any such grants. The law so much quoted, Section 10, is clear against the alienation of revenue for such purposes. But, even if it could be contended that rents are not included in the term revenue, the general policy of the State on this subject can be collected from other enactments, and to my mind it is impossible to treat this question fairly without considering that policy. Landholders, by Regulation XLIV. of 1793, Section 2, were prohibited from making leases or engagements with their under-tenants or ryots for a term exceeding ten years, and this marked restriction was not removed until the year 1812. The whole theory of the revenue in Bengal, and, I understand, in Upper India, is that a certain proportion of the annual produce of every beegah of land is due to the State; and, if this be admitted, as it must be on all hands, then how can the zemindar deprive his heirs of the right to receive portions of produce from any distinct portion of land, or number of beegahs, without at the same time theoretically, and, if the grants be of any size, in positive practice, imperilling the realization of the dues of Government which are made up of such produce?

The early writers on revenue, such as Shore, Harington, and others, support this view. The decisions of the Judges of the late Sudder Court, with the exception of that of Mr. A. Dick, who dissented from the judgment of the 18th of July 1855, seem to me to take up, and to act on this view of the law, though the decisions are not very numerous.

The decision of our Full Bench of January 9th, 1865, does not finally *rule* more than that water is in the nature of the rent which the zemindar might receive from a tract otherwise barren and profitless. Water, obviously, is essential to the well-being and even to the very existence of the population, and the tank in that case was, in several ways, a benefit to the land, and a return to the zemindar.

It may be said, on the other hand, that there is no difference, practically, as regards the security of the public revenue, between leases at pepper-corn rents which any zemindar may legally create, and rent-free grants,

which, in this view, he may not create. But looking to possible and probable results, there is a difference, and a somewhat substantial difference. In the case of land leased at however low a rent, some record of the same must still be kept in the zemindaree papers. The rent, if it were only one rupee for a large village, would still be collected, and traces would be found of the tenant who paid the rent. Land held absolutely rent-free is at once severed from the estate. All connection between the two would cease, and, in a few years, all traces of the origin, size, and details of the grant might entirely pass away, or be only in the power of the grantee.

Lastly, it is a question whether, if the rent-free grant could not be created by a zemindar, it might be created by a mourosee talookdar, such as we have in the case before us, and be of force. In my opinion, we should not be justified in making any distinction between the two. If the zemindar cannot be permitted to imperil the security of the revenue, or to thwart the policy of the State, by such creations, neither can a subordinate or under-tenant. In the event of a sale for arrears of revenue, the assets of the land, which make up first rent and, ultimately, revenue, might equally be frittered away or diminished, and the rights of Government might be equally injured, whether the alienation had been made by a subordinate tenant, or by the superior landholder. The burden of the revenue falls on the land, and the law has laid it down that the land must not be cut down or impaired so as to become unable to meet this burden. If the zemindar cannot bind his heir in this way, neither ought any subordinate holder, whether of the putneedar class, or of that of mouroseedars and others.

Section 28 of Act X. of 1859 has not altered the policy of the law. It has only changed the mode of procedure to which zemindars must resort. The alienations are still voidable by legal process, if any proprietor or farmer desires to avoid them. The only difference between this law and that of 1793, is that the grants are not, in the later law, declared at once "null and void."

It is no argument, to my mind, to say that there is, at present, little danger of these alienations becoming general, and that liberal zemindars are not so easily found, at this period of our social history, to make presents of land to be held rent-free to venerable Brahmins, impoverished retainers, or respectable individuals, whose fortunes a conditions are dilapidated and impair This is a consideration for the Legislature it chooses to change its policy.

The settlement of Lord Cornwallis wa wise and liberal measure; and, in some poi of view, it deserves all the praise that been lavished on it. But it must not forgotten that, though the Legislature express terms then declared the zemind to be "the proprietors of the soil," th property so declared was something ess tially different from the real property of English Squire, with which we are fami in England. The rights of ryots were, e in 1793, guaranteed and secured; valua under-tenures were recognized, and w made the subject of special legislation; a a positive restriction was laid on zemind as already pointed out, whereby their po of granting leases was limited to ten ye A disregard of these fundamental disti tions; a neglect to consider the policy Lord Cornwallis as it affected, first, the St next, the zemindar, and lastly, the r and a desire to apply the English Law real property to zemindaries in Beng would lead, in my opinion, to the most gri ous confusion and to the most mischiev errors. If it be admitted that the Legi ture of Lord Cornwallis prohibited zemind expressly from making improvident lea from creating under-tenures at a redu rent, or in perpetuity, and from permane diminishing the resources of the Governm (Regulation XLIV. of 1793), is it in smallest degree probable that the Legislat of that day would have quietly looked while zemindars, so confined, so restrict so tied down, so patriarchally dealt w were making rent-free grants in all directio and were thereby lessening the product area of their estates?

It seems to me no reflection on the exc lent Cornwallis policy to say that such p ceedings could never have had its sanction contemplation. All questions, therefo which might otherwise arise as to the inj tice or impropriety of the repudiation of grantor's acts or agreements by his heirs assignees, must be considered with, and controlled by, considerations of public p cy. And the arguments on this head favor of the obvious justice of recognizi such grants do not, in my opinion, apply the case.

For, let us for a moment consider what results of permitting these alienations mi be.

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Hitherto no hardship whatever has been inflicted on any one. Men, who purchase rent-free grants, old or new, are perfectly well aware that all such grants have been treated hitherto with marked disfavor, and that the holders of them are liable to be called on at any moment to prove their title. They buy them, therefore, with all the chances of having to prove the origin of their title, and, until the celebrated ruling in Khelat Chundra Ghose's case, two years ago, of having to prove it under difficulties which lapse of time only strengthened and increased.

But they are now to be told that, though old titles may be annihilated by the landlord suing in the Courts, new grants are to be recognized, and are absolutely binding on unwilling heirs and successors. Would not such a ruling give rise to endless attempts to create rent-free grants, ostensibly in favor of deserving individuals, but, in reality, in favor of the zemindar himself? We all know the temptation to fraud and collusion held out by the *benamee* system unhappily so prevalent. And it appears to me, judging from past experience, that a ruling of this kind will only foster this spirit still more, and that private purchasers might at some future day find an estate so stripped and denuded of its assets that, in despair, they would have no resource but to allow it to go to the Collector's sale. It is true that, in such a case, the grants would no longer be binding on the purchaser, but the purchaser would have much difficulty in tracing out the origin of these alienations, and in replacing himself in the position of the Government, as he would have an undoubted right to do. And it surely cannot be right to encourage such public sales for arrears of revenue. Yet, it is to such a consummation that this practice, if recognized and generally acted on, would assuredly tend, for there would be no other way of avoiding these grants, if, as between private vendor and purchaser, and ancestor and heir, they were upheld by the Courts. I cannot conceive in the present state and feelings of native society that such permission would be widely used for really beneficent and praiseworthy purposes. I can easily conceive, on the other hand, scores of cases in which it would be used only for purposes of selfishness and fraud.

If rent-free alienations at this day are desirable, and are to become general, let the Legislature declare this by a new Act. If grants are required by any liberal and large-minded individuals for a special purpose, such as a people's park, let a private bill be introduced for that purpose in each case.

We have to administer, however, the law as it stands; and, looking to the language of the Statutes, to the broad policy of the whole Perpetual Settlement as it affects Government as well as the zemindars, to the general course of the decisions of the late Sudder Court, to the avowed and recognized treatment of this very question hitherto by the parties most interested in it, and to the probable confusion and evil consequences of new rent-free creations, I have no doubt now left that, though a zemindar for himself may decline to take rents from any one for his own lifetime, we ought to return to the Divisional Bench our answer to the effect that a new purchaser, public or private, is not bound by any such grants or remissions, whether made from motives of real benevolence, or from mere carelessness and neglect of interests.

The above is my written judgment on the main question; but I came here to-day, hoping to hear some arguments as to the propriety or otherwise of admitting the three opinions which have been delivered by our colleagues, one of whom unfortunately has been removed by death, while the other two have retired from the Bench, and I should have been glad to have heard what could have been advanced on either side on the question as to the propriety or impropriety of regarding the opinions of my late colleagues as mere opinions; of looking on them, either as final and conclusive judgments on the one hand, or as mere indications on the other, of what turn their opinions in all probability would have taken.

I conferred with two, if not with all three, of my late colleagues, and certainly, as far as I can recollect, they appeared to have fully made up their minds on a subject which they had very seriously considered, and on which they had had abundant opportunities of forming a final determination. I am, however, not prepared to say that they might not on further consideration have changed their opinions by the forcible arguments set forth by the Chief Justice and by others of my colleagues on the other side on this important subject, on which it is quite clear that we hold divergent and absolutely irreconcileable opinions.

This, therefore, is one reason why I am disinclined to treat the opinions of my late

colleagues as final. But there is another reason. I have had the advantage of reading what the Chief Justice has written, and I have conferred with some of my colleagues on the judicial practice of the highest and most authoritative tribunals elsewhere.

There appears to be some uncertainty as to the practice of delivering judgments by the several Division Benches. By some Benches, all judgments are delivered orally; by others, they are sometimes pronounced orally, and sometimes not; and by others again, they are always put in on a stated day by the Judges forming each Bench, without being read out at length in Court, while the Counsel and Pleaders are briefly informed of the determination which has been finally come to on the various points in issue.

But, on the whole, I cannot think that, in a case which has been argued before more than five, and in this case before nine Judges, it would be right or seemly that one Judge should put in his own judgment without at least having read the judgments, or ascertained the opinions, of their brethren who sat with them on the Bench.

No instance where this practice has been deliberately countenanced has been brought to our notice; and, looking to the undoubted practice of the Highest Courts in England evinced in two or three celebrated instances of late, and to the propriety and the seemliness of judicial proceedings, I own with some regret that I am under the necessity of stating that, in my opinion, the minutes of my late colleagues are *not* judgments, and that they cannot and ought not to be so treated.

I believe I am stating the unanimous opinion of the Bench; but I have thought it necessary to give, as concisely as I could, my reasons for concurring with my colleagues on this point.

Norman, J.—These cases were submitted by Division Benches, in order to raise the question whether grants for valuable consideration by zemindars, of specific portions of land to be held rent-free and without payment of revenue, are valid as against the heirs of the grantor or purchasers of the zemindaree by private sale.

I am of opinion that the question must be answered in the negative.

Counsel were heard on the 16th, 17th, and 18th of January 1867.

Shortly after the argument, the Judge met to debate the question amongst themselves, and immediately afterwards, *viz.*, o the 9th of March 1866, I wrote a judgmen and sent it to the office of the Court. Fiv other Judges sent in their judgments a different dates. Of the Judges, who s sent in their judgments, one is dead, an two have left the Court. Speaking fo myself, my judgment was intended for th perusal and consideration of my colleagues and, if any one of them had suggested an modification of it, I should have been pre pared to discuss the matter, and alter o add to it, or strike out parts of it if, o further consideration, it seemed proper o desirable to do so. The paper in that stat was, in fact, a deliberative minute, rather tha a judgment.

I concur with the Chief Justice in thinking that the papers sent in by Mr. Justic Trevor, Mr. Justice Shumbhoonath Pundit and Mr. Justice Campbell, cannot be treate as judgments.

The question submitted for our opinio turns on the construction of Section 10 Regulation XIX. of 1793. By Regulation I of 1793, Section 1, certain articles of th proclamation relating to the limitation o the public demand upon the lands, addresse by the Governor-General to the zemindars independent talookdars, and other actua proprietors of land paying revenue to Government in the provinces of Bengal, Behar and Orissa, were enacted into a Regulation which was to have force and effect from the 22nd of March 1793, the date of the proclamation. Article I. is as follows:—

"In the original Regulations for the Decennial Settlement of the public revenues of Bengal, Behar, and Orissa, it was notified to the proprietors of land, with or on behalf of whom a settlement might be concluded, that the jumma assessed upon their lands under those Regulations would be continued after the expiration of ten years, and remain unalterable for ever, provided such continuance should meet with the approbation of the Honorable Court of Directors for the affairs of the East India Company and not otherwise."

Article II.—"The Marquis Cornwallis, the Governor-General in Council, now notifies to all zemindars, independent talookdars, and actual proprietors of land paying revenue to Government in the provinces of Bengal, Behar, and Orissa, that he has been empowered by the Honorable Court of Direct-

"ors for the affairs of the East India "Company, to declare the jumma which "has been or may be assessed upon their "lands under the Regulations above men-"tioned fixed for ever."

Article III.—"The Governor-General "in Council accordingly declares to the "zemindars, independent talookdars, and "other actual proprietors of land, with or "on behalf of whom a settlement has been "concluded under the Regulations above "mentioned that, at the expiration of the "time of the settlement, no alteration will "be made in the assessment which they "have respectively engaged to pay, but "that they and their heirs and lawful suc-"cessors *will be allowed to hold their estates at such assessment for ever.*"

Article VIII.—"That no doubt may be "entertained whether proprietors of land are "entitled, under the existing Regulations, "to dispose of their estates without the "previous sanction of Government, the "Governor-General in Council notifies to "the zemindars, independent talookdars, and "other actual proprietors of land, that they "are privileged *to transfer to whomsoever "they may think proper, by sale, gift, or "otherwise,* their proprietary right in the "whole or any portion of their respective "estates, without applying to Government "for its sanction to the transfer, and that all "such transfers will be held valid, *provided* "that they be conformable to the Mohomed-"an and Hindoo Laws (according as the "religious persuasions of the parties to each "transaction may render the validity of it "determinable by the former or the latter "Code), and that *they be not repugnant to "any Regulations now in force, which "have been passed by the British Admin-"istration or to any Regulations that they "may hereafter enact.*"

Section 10, Article IX., declares that "it "is essential that a notification should be "made of the principles upon which the fix-"ed assessment charged on any estate will "be apportioned on the several divisions of "it, in the event of the whole of it being "transferred by public or private sale, or "otherwise, in two or more lots, *or of a "portion of it being transferred* in one, or "in two, or more lots, or of its being joint "property, and a division of it being made "amongst the proprietors; otherwise for "the want of a declared rule for estimating "the proportion of the fixed jumma, with "which the several shares would be charge-"able in such cases, the real value of each "share would be uncertain, and consequent-"ly the benefits expected to result from "fixing the public assessment on the lands "would be but partially obtained. *The "Governor-General has accordingly pre-"scribed the following rules for apportion-"ing the fixed assessment in the several "cases abovementioned; but, as the Govern-"ment might sustain a considerable loss of "revenue by disproportionate allotments "of the assessment, were the apportioning "of it in any of the cases above specified to "be left to the proprietors, he requires that "all such transfers or divisions as may be "made by the private act of the parties "themselves be notified to the Collector* of "Revenue of the zillah in which the lands "may be situated, or such other officer as "Government may, in future, prescribe, in "*order that the fixed jumma assessed upon "the whole estate may be apportioned on "the several shares* in the manner hereinafter "directed, and that the *names of the pro-"prietors of each share, and the jumma "charged thereon, may be entered upon the "public registers, and that separate en-"gagements for the payment of the jumma "assessed upon each share may be exe-"cuted by the proprietors, who will thence-"forward be considered as actual pro-"prietors of the land.* And the Governor-"General in Council declares that, if the "parties to such transfers or divisions shall "omit to notify them to the Collector of "the Revenue of the zillah, or such other "officer as may be hereafter prescribed for "the purposes before mentioned, the whole of "such estate will be held responsible to "Government for the discharge of the fixed "jumma assessed upon it, in the same man-"ner as if no such transfer or division had "ever taken place.

The case of grants by a zemindar of portions of his zemindaree is dealt with by Clause 3. "When a zemindar, independent "talookdar, or other actual proprietor of "land, with or on behalf of whom a set-"tlement has been or may be concluded, shall "transfer the whole of his or her estate in "two or more distinct portions, to two or "more persons, *or a portion thereof to one "person, or to two or more persons as joint "property by private sale, gift, or otherwise,* "the assessment upon each distinct portion "of the estate so transferred shall be fixed at "an amount which shall bear the same pro-"portion to its actual produce, as the assess-

"ment upon the whole of the estate of the "transferring proprietor, of which the "whole or a portion may be so transferred, "may bear to the whole of its *actual pro-* "*duce.* This produce shall be ascertained "in the mode that is or may be prescribed "in the existing Regulations, or such other "Regulations as Government may hereafter "adopt, and the person or persons to whom "such lands may be transferred, and his, or "her, or their heirs and lawful successors "*shall hold them at the jumma at which* "*they may be so transferred for ever;* and "where only a portion of such estates shall "be transferred, the remainder of the public "jumma, which will consequently be pay-"able by the former proprietor of the whole "estates, on account of the lands that may "remain in his or her possession, shall be "continued unaltered for ever."

We have now seen that, under Regulation I. of 1793, it is declared that the jumma assessed or to be assessed under the Regulations for the Decennial Settlement on the lands of zemindars is fixed for ever; that such zemindars, their heirs and successors, will be allowed to hold their estates at such assessment for ever; that they are privileged to transfer to whomsoever they may think proper, by sale, gift, or otherwise, their proprietary right in the whole, or any portion of their estates, without applying to Government for its sanction to the transfers —and that such transfers will be held valid, *provided* * * *they be not repugnant to any Regulations now in force,* which have been passed by the British Administration, or to any Regulations that they may hereafter enact.

Rules are laid down for the apportionment of the fixed assessment charged on any estate on the division of it, or of a portion being transferred. The Governor-General *requires* that all such transfers as may be made by the private act of the parties shall be notified to the Collector, in order that the fixed jumma may be apportioned on the several shares, and the names of the proprietors charged therewith, entered upon the public registers; and that separate engagements, for the payment of the jumma assessed upon each share, may be executed by the proprietors, who will thenceforward be considered as actual proprietors of the land.

Then comes Clause III.—"When a ze-"mindar shall transfer * * a portion of his "estate to one person, the assessment thereof "*shall* be fixed at an amount which shall "bear the same proportion to its actual pr "duce as the assessment of the whole "the estate of the transferring proprietor, "which the whole or a portion may be "transferred, may bear to the whole of "actual produce."

It must be observed that Section 10 Regulation I. of 1793 provides for the ca of divisions and transfers of portions of t estate. Where the parties to such di sions and transfers *omit to notify the to the Collector of Revenue,* for t purpose of enabling him to apportion t fixed jumma on the several shares, and cau separate engagements to be entered into f the payment of the jumma assessed on ea share, in *such cases* the whole of the esta is to be *held responsible* to the Governme for the discharge of the fixed jumma, as if r apportionment had taken place.

Such is the effect of a mere omission notify the transfer to the Collector.

That is not the case we have to deal wit The question proposed is as to the effect a grant by a zemindar to hold land rent-fr or, as it is expressed in the grants in th case before us, "lakheraj."

I understand by that, a grant of land t hold in absolute proprietary right, not onl free from the payment of any rent in mone but without any dependence on or duty t the zemindar.

Where the grantee holds subject to th performance of any duty or conditions, th Regulations appear to treat him as a lease holder, not as a person having an absolut ownership. *See* Section 7, Regulation VII of 1793. Regulation XLIV. of 1793, Sectio 8, shows that it is contemplated that, unde certain circumstances, leases may be grante in perpetuity. In other words, that ther may be a lease, though there is no reversion ary estate in the lessor. Perhaps it is nc very material whether the liability to perforn the duty is strictly in the nature of rent o not. In a former case, I stated my opinio that rent may be a payment in money or i kind, or may consist in a duty to be per formed by the tenant. That is in accordanc with the definition of the word rent by Lor Coke. It is the legal construction of a plai English word, a construction which ha been put upon it in Courts of Justice fron the time of the Second Institute to the cas of Doe, on the demise of Edney agains Benham, decided by the English Court o Queen's Bench in 1845, reported 7 Q. B. 976

I, therefore, at once lay aside cases like that of the grants of land for a tank, where, by the grant, the grantee holds subject to the obligation of permitting water to be taken by or for the benefit of the inhabitants of the zemindaries or their cattle. It seems to me that, in the Code of 1793, such persons are treated, not as holding under grants, but as lease-holders.

I now come to the Regulation which we have to construe.

The preamble of Regulation XIX. of 1793 recites that, "by the ancient law of the "country, the ruling power is entitled to a "certain proportion of the produce of every "beegah of land (demandable in money or "kind, according to local custom) unless it "transfers its right thereto for a term, or in "perpetuity, or limits the public demand "upon the whole of the lands belonging to "an individual, leaving him to appropriate "to his own use the difference between the "value of such proportion of the produce, "and the sum payable to the public, whilst "he continues to discharge the latter. As "a necessary consequence of this law, if a "zemindar made a grant of any part of his "lands to be held exempt from the payment "of revenue, it was considered void from "being an alienation of the dues of Govern-"ment without its sanction. Had the vali-"dity of such grants been admitted, it is "obvious that the revenues of Government "would have been liable to gradual diminu-"tion. Previous, however, to the Company's "accession to the Dewanny, numerous grants "of this description were made, not only by "the zemindars, but by the officers of Go-"vernment appointed to the temporary super-"intendence of the collection of the revenue, "under the pretext that the produce of the "land was to be applied to religious and "charitable uses. Of these grants, some "were applied to the purposes for which "they professed to have been made, but, in "general, they were *given for the personal* "*advantage of the grantee*, or with a view to "the clandestine appropriation of the produce "to the use of the grantor, or *sold to supply* "*his private exigencies*. In conformity with "the principles which prevailed under the "native administration, the British Go-"vernment have at various times declared "all grants for holding land exempt from "the payment of revenue made since the "Company's accession to the Dewanny, "illegal and void."

After some recitals, which I do not think it necessary to set out, the preamble proceeds to state that, "with a view to facilitate "the recovery of the public dues, from "lands held exempted under invalid grants, "as well as to *prevent any similar alienations* "*being hereafter made to the prejudice of* "*the security of the public revenue which has* "*been assessed in perpetuity upon the estate* "*of individuals*," *&c.*, the following rules, containing the rules passed on the 1st of December 1790, with modifications, have been enacted.

By Clause 2, grants for holding land exempt from the payment of revenue, made previous to the 12th of August 1765, are declared valid, provided the grantee actually obtained possession previous to that date, and has since held possession without having been subjected to the payment of revenue.

By Clause 3, all grants for holding land exempt from the payment of revenue, made since the 12th of August 1765, and previous to the 1st of December 1790, by any other authority than that of Government, and which may not have been confirmed by Government, or by any officer empowered to confirm them, are declared invalid.

Clauses 4 to 9 contain provisions declaring who are to be deemed entitled to the proprietary rights, and to the revenue of such last-mentioned lands, and for fixing the assessment thereon.

Clause 10 is as follows: "All grants "for holding land exempt from the payment "of revenue, whether exceeding or under "100 beegahs, that have been made since "the 1st of December 1790, or that may be "hereafter made by any other authority "than that of the Governor-General in "Council, are declared null and void, and "no length of possession shall be here-"after considered to give validity to any "such grant, either with regard to the "property in the soil, or the rents of it. "And every person, who now possesses or "may succeed to the proprietary right in "any estate, or dependant talook, or who "now holds or may hereafter hold any es-"tate or dependent talook in farm of "Government, or of the proprietor, or any "other person, and every officer of Govern-"ment appointed to make the collections "from any estate or talook held khas, "*is authorized and required to collect the* "*rents from such lands at the rates of the*

"*Pergunnah, and to dispossess the grantee* "*of the proprietary right in the land,* "and to re-annex it to the estate or talook "in which it may be situated, without mak- "ing previous application to a Court of "Judicature, or sending previous or subse- "quent notice of the dispossession or an- "nexation to any officer of Government; "nor shall any such proprietor, farmer, or "dependent talookdar be liable to an in- "crease of assessment on account of such "grants which he may resume and annul "during the term of the engagements that "he may be under for the payment of the "revenue of such estate or talook when "the grant may be so resumed and annulled. "The managers of the estates of disqualifi- "ed proprietors and of joint undivided "estates are authorized and required to "exercise, on behalf of the proprietors, the "powers vested in proprietors by this Sec- "tion."

We have to consider what is meant by the expression, "grants for holding land exempt from the payment of revenue that have been made since the first of December 1790, or that may hereafter be made."

The first thing to be observed is, that the Legislature is dealing with grants.

By the term grants, as here used, I understand grants of the absolute proprietary right in the soil, as distinguished from leases.

Reading Regulations I. of 1793, Section 10, and VIII. of 1793, Section 5, Clauses 2, 3, 4, and 5, it seems clear that those persons only who pay revenue are, under the Regulations, considered proprietors of the lands held by them.

Leases are dealt with by a separate enactment, Regulation XLIV. of 1793. If a zemindar makes a grant of the proprietary right in the land, and the object and meaning of the grantor and grantee, to be collected from the grant itself, is, that the grantee should hold the land without payment of revenue, the case falls within the terms of the enactment.

Now, there are two modes in which the grantee may hold subject to the payment of revenue: either by holding at a revenue assessed on the alienated share, and under engagement in respect thereof, with the Government under Section 10, Regulation I. of 1793; or by holding the land granted, as a dependent talook, as provided for by Regulation I. of 1793, Section 10. In this latter case, the Legislature contemplates tha the revenue must be paid by the dependen talookdar through the zemindar. On re ferring to Sections 5, 6, and 7 of Regulatio VIII. of 1793, it appears that there are tw classes of dependent talookdars: *first*, thos who are owners of the soil, and pay revenu through the zemindar; and, *secondly*, thos who are considered as lease-holders onl Now, from Section 10, Regulation I. of 179 and the preamble, and Section 6 of Regula tion XLIV. of 1793, it is clear that a ze mindar may create a dependent talook c either description, and, if so, he can make grant subject to the payment of *revenue* pay able through himself.

Regulation VIII. also shows that a zemin dar, after the Decennial Settlement, coul make a grant *exempt from the payment o revenue* for a limited period. The definitio of Jungleboore talookdars in Section 8 i as follows: "The pottahs granted to thes "talookdars, in consideration of the grante "clearing away the jungle and bringing th "land into a productive state, *give it to hi* "*and his heirs in perpetuity, exempting hi* "*from payment of revenue for a certai* "*term*, and at the expiration of it subjectin "him to a specific assul jumma, with a "increases, abwabs, and mhatoots impose "on the pergunnah generally," &c.

From this and other passages which ma be cited, it is clear that the word revenu is not invariably used in the sense of *publ revenue* collected directly by the Govern ment.

It should also be observed that the word are "grants *for holding* land exempt fro the payment of the revenue." There ma be a grant for holding land so exempt, al though the grant has not the effect of ex empting the land from liability to sal should the grantor fail to pay the revenue- if the grant is one, under which, as betwee grantor and grantee, the grantee is to hol free from the payment of revenue.

The object of the enactment of Sectio 10, as stated in the preamble of the Regula tion XIX., is not to prohibit grants, releasin the revenue, or absolutely exempting lan from the payment of public revenue. Suc of course, are grants, which none but the Gc vernment could make or affect to make. Th expressed object was to prevent alienation similar to those which had been previousl spoken of, to the prejudice of the *security o the public revenue.*

b

It has been suggested that the Section must be read as if it were confined to alienations of land made by zemindars after 1790, and before the completion of the Permanent Settlement. But the preamble shows that the enactment was to protect "*the public revenue which has been assessed in perpetuity upon the estates of individuals,*" not to secure the Government from loss in an assessment to be afterwards made. Again, it includes *all* grants that have been made since the 1st of December 1790, *or that may be hereafter made.* This language appears wholly inconsistent with the notion that the Legislature was dealing merely with grants to be made while the settlement was in progress.

It appears to me clear that grants made for holding land free from the payment of rent, and not subject to the performance of any duty to the zemindar, and free from the payment of revenue to the Government or zemindar, are, under Section 10, Regulation XIX. of 1793, null and void; and that what are ordinarily called rent free grants are of this description.

There was nothing new in the prohibition. Zemindars and farmers, as early as 1772, were bound, by an express clause in their leases, not to confer any grants without the knowledge and sanction of Government.

In 1782, a plan for the institution of a Bazee Zemin Duftur, proposed by the Calcutta Committee of Revenue, was approved by the Governor-General in Council. This document refers to the loss sustained by Government in its revenues, in consequence of the alienation of lands without its authority. It states that zemindars had continued to violate the stipulation not to confer grants without the authority of Government: that the practice affects the revenues of Government, *first*, by the alienation of the lands included in the general rental, and, *secondly*, by lessening the value of the revenue-lands; that this was effected by withdrawing the ryots from the revenue-lands, and inducing them to settle in the Bazee Zemin, which the proprietors could afford to rent to them on easier terms than a farmer or zemindar who pays an assessment for lands held by him. It was proposed that Bazee Zemin lands should be registered, after the titles under which they existed should have been ascertained.

Certain principles were laid down as to lands alienated after the 12th of August 1765, and, amongst other things, it was declared "that, as the Governor and Council of "Bengal only have the authority to alienate "lands from the jumma, all grants made by "any other persons whatever, without their "authority, and which have not been subsequently confirmed by their sanction, would "be deemed invalid;" and a rule was sanctioned that "all grants of land subsequent "to the grant of the Dewanny to the Company under the general denomination of "'Lakheraj,' 'Gair Jummai,' &c., should be "declared invalid, excepting such as have "been confirmed," &c. *See* 3 Colebrooke's Digest, Vol. 3, pp. 224-231.

In the Regulation respecting "lakheraj-lands," passed by the Governor-General in Council, 1st December 1790, it is enacted by Section 2 that "all *grants of rent-free land* "made or confirmed" since the 12th of August 1765 "by any other authority than "that of Government, and which have not "been confirmed by them, shall be held "invalid and liable to resumption," &c. By Section 8, "any person who may *purchase a village* or villages either by private "or at public sale, subsequent to the date of "these Regulations, shall be entitled to the "property in the soil, and the Government's "share of the produce, whether it be more or "less than one hundred sicca rupees per "annum, of all portions of such village or "villages that may have been *alienated* "*since the date of this Regulation*, and "prior to the date of his purchase," &c. Section 11 directs that suits for the resumption of such lands shall be brought in the Court of the Collector of the District. *See* 3 Colebrooke's Digest, Vol. 3, p. 292.

We have seen that Regulation I. of 1793, Section 8, empowers proprietors to transfer their proprietary rights in the whole or any portion of their estates by sale, gift, or otherwise, without applying to Government for its sanction to the transfer, and that, on the transfer, the fixed jumma is to be apportioned in the manner therein directed. In the prohibitory clause of the Regulation of 1790, the term used is "rent-free." The change to "free of revenue" in the Regulation of 1793 is rendered necessary by the power given to zemindars by Regulation I. of 1793 to alienate any portion of their estates if a provision is made for the payment of the revenue in respect of such portion.

Except this necessary modification, there is nothing that leads to the inference that by *grants exempt from the payment of revenue, made since the 1st of December 1793, or that may hereafter be made*, the

Legislature meant anything different from the *rent-free* grant spoken of in the earlier Regulation. It appears to me difficult, if not impossible, to give any meaning to the words, "grants for holding land exempt from the payment of revenue that may hereafter be made," except by supposing it to refer to grants free of all payment whatever in respect of rent or revenue, either to the Government or the zemindar. It was no new or hasty enactment, but was consistent with the whole course of legislation on the subject from the time of the Company's accession to the Dewanny, throughout which the principle is constantly asserted, that the revenue-paying estates should be preserved entire in the hands of the parties by whom the revenue was to be paid.

If the meaning of the law is clear, and the language positive, no further enquiry is necessary. Whatever may be thought of the policy of any particular enactment, whether in particular cases it may appear to be likely to operate harshly or not, it is the duty of Courts of Justice to administer the law as they find it. To use the words of their Lordships in delivering the judgment of the Privy Council in the case of Moonshee Buzloor Ruheem *versus* Shumsoonissa Begum: "If the words of a law are clear "and positive, they cannot be controlled by "any consideration of the motives of the "party to whom it is to be applied, nor "limited by what the Judges who apply it "may suppose to have been the reasons for "enacting it." VIII. Weekly Reporter, Privy Council Cases, 12.

But, if it is suggested that the construction I put upon the language of Section 10 involves such hardship and injustice that such construction cannot be the true one, and that it must be supposed that the Legislature meant something different from that which seems to be the natural meaning of the words used, I am prepared at once to join issue on that point.

The enactment is really no more than this, that from thenceforth no man shall hold lands in full proprietary right, without contributing to the land tax, either by a direct payment to the estate, or, if he holds as a dependent talookdar, by payment to or through the zemindar of such *revenue* as shall be fixed by the zemindar.

Short of this, and subject to the limitation as to leases, to which I shall come presently, there is no sort of estate or interest which a person desiring to possess land could not under the Regulations of 1793 acquire by grant from a zemindar. I do not understand what hardship there is in limiting the zemindar's powers of alienation, as I believe Section 10 limits them. A zemindar has full powers to alienate the lands held by him, or any part thereof, absolutely, so that the purchaser or grantee may hold the portion of land granted to him, as a distinct estate, free from all obligation towards, or dependence upon, the zemindar or his successor. But in the case of grants of independent estates, where the grantee is to hold in full proprietary right free from all obligation to the zemindar, he must hold subject to the same conditions as those under which the zemindar had held it—the conditions under which all lands in the country is held, unless specially exempted by grant made or confirmed by the sovereign authority, *viz.*, subject to the payment of the proportion of the Government revenue properly chargeable on the land.

There is nothing unreasonable in such a rule. It does not in any degree interfere with the absolute power of disposition on the part of a zemindar, or of acquisition on the part of an intending purchaser; and it can in no way affect the marketable value of the land in the hands of the zemindar.

For myself, I am wholly unable to understand the view of the Chief Justice and those learned Judges who appear to think it necessary, convenient, or reasonable, that a zemindar who holds land, every beegah of which is charged with the payment of Government revenue, should be allowed to alienate land to be held by the alienee under conditions more favorable than those on which the zemindar held it. I will quote the words of Lord Brougham in the case of Keppell *versus* Bayley, 2 Mylne and Keen 517. "There are certain known incidents of "property recognized by the law. But it "must not be supposed that incidents of a "novel kind can be devised and attached to "property at the fancy or caprice of any "owner. It is clearly inconvenient, both to "the science of the law and to the public "weal, that such a latitude should be given. "There can be no harm in allowing men the "fullest latitude in binding themselves and "their representatives, that is, their assets "real and personal, to answer in damages for "breach of their obligations; this tends "to no detriment, and is a reasonable liberty "to bestow; but great detriment would

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"arise, and much confusion of rights, if "parties were allowed to invent new modes "of holding real property, and to impress on "their lands and tenements a peculiar "character, which should follow them into "all hands, however remote." On these principles, one would expect to find that a zemindar might bind himself and his heirs by a personal covenant to pay the revenue of an alienated portion of the estate, but could not grant lands to be held free of the payment of revenue or annex to his estate, so as to bind an assignee, an obligation to pay revenue in respect of lands alienated by him.

But the Regulation goes further. The preamble shows that the object of the enactment was to prevent such alienations to the prejudice *of the security of the public revenue.*

Now, it must be remembered that, at the date of these Regulations, the Government revenue was equal to ten-elevenths of the total rental. The estimated surplus of the total collections from the land, over and above the Government revenue, or, in other words, the beneficial interest of the zemindar, was no more than ten per cent. on the revenue. *See* the preamble of Regulation II. of 1793, and Bengal Special Orders; Regulation VIII. of 1793, Sections 75-77.

If zemindars had been left at liberty to make absolute grants of portions of their lands free of revenue or rent, it is certain that great difficulty might have been thrown in the way of the Government in realizing the public revenue from the land. We shall see presently that, by Regulation XLIV. of 1793, the power of zemindars to grant leases was restrained, with the express object, *viz.*, of preventing them from impoverishing themselves and their heirs. It would have been preposterous to limit thus the power of zemindars to grant leases, if they were left free to grant their lands to hold free of rent in fee simple.

Again, at the time of the Permanent Settlement, no survey had taken place. If, immediately after the settlement, the zemindaries could have been split up and sub-divided, and large portions of them disannexed from the parent estates by rent-free grants without notice to the Government, the security of the Government revenue would have been enormously imperilled. There would have been great risk that the boundaries of zemindaries would have become confounded. It may be said that, if the zemindar made default, the whole estate might be sold, and the grantees of the zemindar would have no title as against the auction-purchaser. But the officers of Government would probably have had great difficulties in identifying the lands to be sold, and it is by no means clear that the zemindaries, when sold, would have realized prices sufficient to cover the arrears. I believe that, as a matter of fact, in almost every case, a purchaser at a sale for arrears of revenue would have bought little more than a crop of law-suits.

In view of these dangers to the security of the public revenue, the stringency of the enactments of Section 10 is perfectly intelligible. The case has been compared by some of those learned Judges who differ from me with the well-known instances of leases by ecclesiastical persons; *See* Bacon's Abridgment, *tit.* Leases (H.), and the case of Ranee Surnomoyee *versus* Maharajah Suttis Chunder Roy, decided by the Privy Council, and reported in II. Weekly Reporter, page 13, has been referred to. But the construction put upon the Statutes in question depends upon the fact that the leases are good at common law, and the Statutes were made for the benefit of the successors of the party creating the void lease, and not to enable him to avoid his own act. Here the enactment is for the security of the public revenue; the language is clear and imperative, and makes it not only the right, *but the duty* of every person possessing the proprietary right in any estate, to dispossess the grantee in possession under a grant for holding land exempt from the payment of revenue, and to re-annex it to the estate in which it may be situated. So far, therefore, as the assignee or heir of the original grantor is concerned, there appears to me no doubt that the grant is void as against them.

Whether or not the grantee paid a valuable consideration to the original grantor does not, in my opinion, affect the position of a person who has deliberately chosen to endeavour to acquire property under conditions prohibited by law. Grants of land free of revenue, created with a view to the personal advantage of the grantee, or even with a view to the clandestine appropriation of the produce to the use of the grantor, or *sold to supply his private exigencies*, are amongst others specially aimed at in the preamble of Regulation XIX.

I am not bound to consider what would be the position of the parties if the question arose between the original grantor and

grantee, or how far the heirs of the grantor may be *compellable* to make restitution out of his estate, if, in obedience to the provisions of Section 10, they dispossess the grantee. These questions are not raised in the case before us. I believe there would be no insuperable difficulty in doing justice between the parties. But, as regards a person taking the zemindaree by private purchase from the original grantor, on the principle stated by Lord Brougham in the case I have already referred to, I believe that, by taking the estate, he would be in no way bound by the act of the former owner. And, as regards the heirs of the former owner, the maker of the void grant, whatever may be the liability of the ancestor's estate in their hands, to answer for their act in entering on lands contrary to his grant, I must give the same answer, *viz.*, that the grant is void as against them.

The Regulations of 1793 constitute an entire Code, and were passed on the same day. In order to show how and in what manner the Legislature meant to provide for the security of the public revenue, I proposed to read the preamble of Regulation XLIV.

"The public demand upon the estates of "the proprietors of lands, with whom a settle-"ment has been or may be concluded under "the original Regulations for the Decennial "Settlement, having been declared fixed for "ever, it is to be apprehended that many pro-"prietors, either from improvidence, igno-"rance, or with a view to raise money, or "from other causes or motives, may be in-"duced to dispose of dependent talooks to be "held at a reduced jumma, or fix the jumma "of the dependent talooks now existing in "their respective estates, at an under-rate, or "let lands in farm or grant pottahs for the "cultivation of land at a reduced rent for a "long term, or in perpetuity: *such engage-"ments, if held valid, would leave it in the "power of weak, improvident, or ill-disposed "proprietors to render their property of "little or no value to their heirs:* promote "vice and injustice; *occasion a permanent "diminution* of the resources of Government "*arising from the lands, in the event of the "rent or revenue reserved* by such proprie-"tors being insufficient for the discharge of "the amount of the public demands upon "their estates; be an abuse of the great and "lasting benefit which has been conferred "upon the landholders, by the possession of "their lands being secured to them in perpe-"tuity at a fixed assessment; and moreover be "*repugnant to the ancient and established "usages of the country, according to which "the dues of Government from the lands* "(which consist of a certain proportion of "the annual produce of every beegah of land "demandable according to the local custom, "in money or kind, unless Government "has transferred its rights to such proportion "to individuals, for a term or in perpetuity, "or fixed the public demand upon the whole "estate of a proprietor of land, leaving him "to appropriate to his own use the difference "between the value of such proportion of the "produce, and the sum payable to the public, "so long as he continues to discharge the "latter) *are inalienable, without its express "sanction.* It is at the same time essential "that proprietors of land should have a discre-"tionary power to fix the revenue payable by "their dependent talookdars, and to grant "leases, or fix the rents of their lands, for a "term sufficient to induce their dependent "talookdars, under-farmers, and ryots, to "extend and improve the cultivation of their "lands, and that such engagements should be "held inviolable in all cases, except where they "may interfere with or affect in any shape the "*primary and indefeasible rights of Govern-"ment.* Upon the above grounds, and as the "proprietors of lands, previous to the De-"cennial Settlement being declared perpetual, "were not entitled to enter into any engage-"ment with their dependent talookdars, "under-farmers, or ryots, for a period extend-"ing beyond the term of their own engage-"ments with the public, the Governor-General "in Council has enacted," &c.

Section 2 provides that the jumma of dependent talooks is not to be fixed, nor farms or pottahs granted for a term exceeding ten years.

By the 8th Section, nothing contained in this Regulation shall be construed to prohibit actual proprietors of land granting without the sanction of Government or its officers, to any person not being a British subject, or a European, a lease or pottah for ground for any term of years, or in perpetuity for the erection of dwelling-houses, or buildings for carrying on manufactures, or for gardens, or other purposes, and for offices for such houses or buildings.

It has been supposed that the 8th Section enabled zemindars to grant leases for the purposes named in perpetuity at *any rate of rent.* But I think this construction appears open to some doubt.

The language of Section 2 is, that no zemindar shall dispose of a dependent talook *to be held at the same or any jumma or fix at any amount, the jumma of an existing dependent talook for a term exceeding ten years;* nor let any lands in farm nor grant pottahs to ryots or other persons for the cultivation of lands for a term exceeding ten years. The change of the language in the second branch of this clause should be noticed. It may be that the true construction of Section VIII., read in connection with Section 2, and the definitions of dependent talooks to be found in Regulation VIII., is that a lease for the purposes named is in effect a dependent talook, and as such may be granted for any term of years, or in perpetuity, but not subject to a fixed rent. If so, the supposed inconsistency of the provisions of Section 10 of Regulation XIX. with Section 8 of Regulation XLIV. of 1793 has no existence whatever. However that may be, a lease under Section VIII. is only grantable for limited purposes, and does not disannex the land granted from the revenue-paying estate.

I will observe by the way that the cases in the 6 Select Reports, page 281, and the Sudder Dewanny Reports of 1852, page 967, referred to by Mr. Justice Jackson, if carefully examined, will be found to amount to no more than this, that the lands held under the grant alleged to be invalid were not within the limits of the portion of the zemindary held by the party claiming to assess and re-annex them to his estate. There is really no decision in either case as to whether the rent-free grant was valid or not.

Special Appeal No. 1116 of 1862.

In Special Appeal 1116 of 1862, the facts, as stated at the bar, are that the grant is one made in the year 1815 A. D., or 1222 Fuslee, by Murijla Koer and Kousila Koer, the two widows of Moorlychand, in favor of Peary Sen Gywal, for the performance of the Gya Shrad of Moorlychand. The plaintiff was the purchaser of a four-anna share in the Mouzah within which the land held rent-free was situate.

The judgment of both the Lower Courts was that the rent-free grant, being made subsequent to 1790, is liable to resumption.

And for the reason already given, I am of opinion that it is null and void as against the plaintiff.

Special Appeal No. 253 of 1863.

The question proposed by the Division Bench does not really arise at all in the Special Appeal 253 of 1863.

The suit is one to resume and assess lands within the plaintiff's mouroosee ijara.

As to plots 2 and 3, which were granted for the purpose of making a tank at which the village-cattle might drink, I believe we all agree. Indeed, the case is governed by that of Peezeerooddeen *versus* Mudhoosoodun Pal Chowdhry, reported in 2 Sutherland's Weekly Reporter, page 15, by which I suppose this bench is bound.

As to plots 1, 5, 6, 7, 8, 9, 10, and 11, they were granted by the plaintiff's predecessors in title rent-free, or, as it is expressed in the grants or some of them, "lakheraj," at various times between 1815 and 1842, in consideration of the payment of sums of money which perhaps represent, and may be taken to be, a fair price for the land.

The peculiarity of the case is, that the grants are made by a mouroosee ijaradar who, for all that appears, may be a mere subordinate tenant of the zemindar, in no way connected with the payment of Government revenue.

The mouroosee ijara-pottah, under which the plaintiff and his ancestors held, is not in evidence, but I will assume for the purposes of the argument that it places the ijaradar in the same position as a putneedar. Of course, I cannot assume that the ijara-pottah contains any special clause enabling the ijaradar to bind the zemindar of the nature referred to in Section 11 of Regulation VIII. of 1819, as being one which may or may not exist in a putnee-pottah.

The Legislature, in Regulation XIX. of 1793, was dealing with zemindars and their grants. That appears clearly from the preamble. There is nothing in the Regulation which applies to grants by persons other than zemindars, or grants other than those out of the revenue-paying estate.

The rent-free grants, now under consideration, are carved out of a subordinate estate.

Except so far as they may be prohibited by positive law, rent-free grants are good.

If a tenant renting a few villages from a zemindar makes a rent-free grant out of his subordinate estate, there seems no reason why such grant should not be good as against him and his heirs. It makes

no difference whether the quantity of land comprised in the subordinate estate is large or small; whether it is a small part of or even the whole zemindary.

A grant by a subordinate tenant would not disannex the land from the revenue-paying estate. The tenant would pay rent for all the land comprised in the sub-grant, and the zemindar would pay revenue for it. If the subordinate tenure were sold by the zemindar or putneedar for *arrears of rent*, the rent-free tenure granted out of it would fall as of course, for though by express legislation, some under-tenures created by subordinate tenants are protected in case of the sale of the tenure for arrears of rent (as by Regulation VIII. of 1819, Section XI.), such provisions do not exonerate rent-free holders from the liability to be called on for the payment of a fair rent to the purchaser at such a sale. Reading Section XII., and referring to Section XI. of Regulation VIII. of 1819, it appears to be taken as of course by the Legislature that, if a putnee-talook is sold under any decree other than for arrears of rent, the purchaser succeeds to no more than the reserved rights of the former tenant, such as they may be, and is subject to any restriction put upon the tenure by his act.

The Legislature treats it as clear that *sales, gifts, and limited assignments by a putneedar* would be valid as against his heir, or any person who, whether by purchase or otherwise, succeeds to no larger interest than the putneedar himself possessed.

I think that the grants in question in Special Appeal 253 are not affected by Regulation XIX. of 1793, Section 10, and are binding on the grantors and their heirs. I would decree the appeal in this case with costs, reverse the decision of the Court below, and dismiss the suit, except as to the land in Dags Nos. 4 and 5, with costs.

I may observe that Mr. Trevor and Mr. Loch, on the 28th November 1865, in the case of Luckhun Acharj *versus* Tarrachand Dutt (not reported), held that a lakherajdar cannot resume lakheraj within his lakheraj estate.

Bayley, J.—On the question of whether the papers sent to the Registrar as judgments of Mr. Justice Trevor and Mr. Justice G. Campbell (retired), and Mr. Justice Shumbhoo Nath Pundit (deceased), shall have the full effect of judgments, I am of opinion that, under the ruling in the Exchequer Chamber, Law Reports (Common Law Series), Volum II., part 4, page 223, these judgments cann have effect as judgments, properly so calle but are still entitled to be recorded an considered as opinions, as laid down in th case above cited.

But, at the same time, I think that th previous fully-recognized practice had le the above Judges of our Court to recor their judgments as they did, when the found they were not called upon by the Chi Justice to deliver them before the retiremer of the two, and the death of the third, and s had no opportunity to do otherwise tha they did.

I deposited my own in this case as a pro posed judgment in February or March, an considered that it might, or it might not, be come a final judgment, when I might b called upon to use it in that light, eithe with or without further discussion.

In the other case of 16th March 186 (which will be referred to by the Chief Jus tice), I am free to admit that, although called it "a note of a judgment," still I consi dered it would have the effect of a judg ment; but I have at the same time to notic that the decree was signed by the othe Judges only, and not by me.

I believe, however, that Trevor and Loch Justices, did, in fact, look at it as a judgmen wrongly, I now, of course, fully admit wit reference to the law and precedent of th English Court above cited by me.

After the judgments which we have al ready heard, and with reference to a stil more elaborate one proposed to be delivered by the Honorable the Chief Justice, which we have had the advantage of seeing, I will not state again, in detail, all the facts o these cases, and all the provisions of the laws bearing on the subject before us. But I shall limit myself to the question which we have to answer, to the answer I consider the proper one to give, and to my reasons for my opinion.

The question we have to answer is "how "far a grant for valuable consideration by a "zemindar of a specific portion of land to "be held without payment of rent is valid "against the heir of the grantor or purchaser "by private sale of the estate."

I would answer the question by saying that, in my opinion, such a grant is *not* valid against the heir or private purchaser, when made either by the zemindar or (as in one case here) *mouroosee ijaradar*.

My reasons for that opinion are these. I apprehend there is no question now that such grants *before* the Permanent Settlement were invalid.

Article 1 of the Proclamation in Regulation I. of 1793 says that, "in the original "regulations for the Decennial Settlement, "it was notified to the proprietors of land "with, or on behalf of, whom a settlement "might be concluded, that the jumma assessed "upon their lands under those regulations "would be *continued* after the expiration of "the ten years, and remain unalterable for "ever."

In my view, these words show, not so much an entirely new contract with a class of proprietors never before existing, as the *continuance of the jumma assessed when the zemindar was a collecting agent* with a *new* class of zemindars, let in, I admit, as proprietors, but still let in *only under the provisions and stipulations and restrictions* laid down, in all the regulations passed on the 1st May 1793, which form, in fact, one Code of revenue-settlement and administration.

Looking next to Section 10, Regulation XIX. of 1793 (one of those laws passed on the 1st of May 1793), I can only read the declaration there, to be in terms that grants made after 1st December 1790 of land exempt from the payment of revenue are null and void; and, further, I hold that a grant which transfers a portion of an estate *without any rents* to be paid, which rents are recognized means from which the zemindar is to pay Government revenue, and thus form the basis of revenue, is such a grant as is contemplated by this Section X. to be null and void.

I can, moreover, only read Section X., Regulation I. of 1793, which is to the effect that, in *cases* of *transfer* by public or private sale or *otherwise* of land in the estate in which the permanent assessment is fixed, a proportionate assessment of revenue is *required* to be assessed, as meaning that no land shall, in fact, be rendered exempt by any act of the landowner from *revenue;* that is from bearing its proper quota of assessment. Its not bearing that quota would be the practical result when a grant is made without any rent, which rent forms the basis of that quota.

The Permanent Settlement rested in my opinion on that basis, *viz.*, that the rents the zemindar might collect should afford him the means of paying the Government revenue. The settlement of 1793 certainly regarded the apportionment of the zemindar's share and the share of Government in those rents as the mode by which it was *originally* determined what should be paid to Government as public revenue, and what remains as profit to the zemindar. I do not see that the basis of the contract in the permanent settlement on *this point* was altered; or *how* it was so; for, although the Government by the Permanent Settlement transferred its proprietary rights to the new class of zemindars, still the rents to be collected by the zemindar were rents on the existence and assessment and distribution and realization of which the Permanent Settlement rested; that is, if these rents were to cease to exist or to be realized by the zemindar by transfers of lands of his estate *rent-free*, then the accident of the landholder having private funds, and his willingness to use them to pay Government revenue, or else a *sale*, was the *only security* for the Government revenue of the estate.

I take it that it is not denied that the security of the Government revenue was an essential part of the contract between Government and the new zemindars in 1793, and I hold that a stipulation restoring wasteful grants by zemindars to third parties (as the grantees are in this case) was one of those stipulations. In my opinion, this was the particular object of Section X., Regulation XIX. of 1793.

That Government had ever in mind that the private funds of zemindars were no security for the Government revenue, and that the zemindars' improvidence had to be restricted and watched, and that there was risk to Government in raising them from collecting agents to a new class, as they were liable to be influenced by Brahmins and by other motives to make wasteful grants, is, I think, clear from the Regulation passed on the 1st May 1793, especially from the preamble of Regulation 44 of 1793.

But it is said that the public sale for default provides ample security for the Government revenue. It is true that now, in most cases, the balance due is recovered by the sale. But this was not always so; and at one time, some thirty years ago, sales were but too numerous and much deprecated. Further, Government in many instances did not then realize the balance of revenue by sale.

Though, however, I look upon the sale for arrears of Government revenue as undoubtedly the great security, still it was the *extreme measure* to be resorted to for the realization of the balance of public revenue, and I cannot read the enactment passed on the 1st May 1793 as a whole and as one Code (as we are required to read them), without coming to the conclusion that, while the law provided the sale as such *ultimate* measure, it *primarily* looked to avoid such sales and keep the zemindars safe in their estates, by restricting the power of the zemindar to waste the assets by improvident grants of lands without rent, and that because such acts left the zemindar without the assets available from his full rents to pay the Government demand of his estate.

It is not denied that Government did not only look to the next generation as being liable to suffer by grants of land exempt from revenue. The Regulations of 1793, indeed, expressly refer to the risk of estates being deteriorated by the improvidence of the *first* generations of zemindars. It is not denied, too, that the limitation of leases to periods of ten years was *continued* from the decennial to, and through, the Permanent Settlement and did *not* cease with that up to 1812.

It is said that the Permanent Settlement, made the zemindar an absolute proprietor. But can he be properly so called, if he could not under the Permanent Settlement make leases for as long periods as he pleased? Yet it is said he could grant away land exempt from rent in perpetuity, because he was an absolute proprietor.

It is argued that a lease for a nominal rent for ten years contained as much means of deterioration of assets as if the zemindar could absolutely transfer, *i. e.*, if he could let for ten years at a nominal rent, he could thus as completely divest himself of assets to which Government looked as enabling him to pay the Government revenue, and could default as injuriously for Government as if he *made grants* in perpetuity *exempt from the payment of rent.* But it may be fairly answered that restriction and limitation to ten years' leases in the Permanent Settlement was, in fact, a very strong restriction and limitation of proprietary rights; and further that there would have been no restriction to ten years in the matter of leases had it not been thought that the revenue would be jeopardized by such leases on nominal rents if made in perpetuity. If, then, by the smaller matter of leases this jeopardy was contemplated, would not the still large power of perpetual grants exempt from ren much more jeopardize that revenue by direc failure of assets, from failure of rents which before the grant, would have been paid to th grantor, and have been a sure fund to enabl him to pay the Government revenue? may also add that the short period of te years left the Government free to remed any injury before it had gone to any grea extent. This would not be so with referenc to grants in perpetuity.

It is then argued that by these grants ther is no exemption of the zemindar from liabi lity for the public *revenue*, and that the pro prietor, as absolute proprietor and master o his own property by the Permanent Settle ment, would have still just as much publi revenue to pay as if he had made no grant o land free of rent.

It is also strongly pressed on us that th sale-laws provide full security and remedy But I have always understood that it wa the object of the Legislature from the perio of passing the Regulations of 1793 to tha of passing Act XI. of 1859 to kee zemindars in *possession of their properties* and therefore to avert, and not to resort o look to, public sales of estates as the *firs* or best means of obtaining the payment o Government revenue.

Now, if the zemindar may make an grants in perpetuity, saying to the grantee: "You shall pay me no rent for *this* land, "although I, of course, must pay the propor- "tion of Government revenue assessed o "*it*, and I must pay it by any means I can, "and I know not what, instead of from th "rents I should ordinarily have as a sur "resource from the land now granted rent- "free to you"—will public sales be averted or precipitated?

Let us take a practical illustration: say a zemindar in 1793 had an estate of 1,000 beegahs charged with a payment of public revenue of 1,000 rupees. He has *no priva* means at all, or, having them, he chooses to spend them in other ways than paying Government revenue from them. Fou Brahmins ask him for grants of 4 parcels o lands of 100 beegahs rent-free, or 400 beegahs rent-free, but from which the grantor hitherto collected rent of 100 rupees from each, or 400 rupees. The grants are made. The zemindar no longer realizes the 400 rupees from the 4 parcels of lands. He runs short by 100 rupees of the means he had

to pay the public revenue. He defaults in consequence; and then the estate is sold, and thus only is the balance due to Government realized. Multiply this one case by the number of zemindars so influenced by Brahmins in 1793, and by the same consequences of sale in each case, would then all those numerous sales be the result contemplated *for the welfare of the zemindars*, then first created proprietors by that Government which made the laws of the settlement of 1793? I certainly think not; and, therefore, I contend that the words of the Legislature represent their intention when they prohibited grants exempt from revenue, and looked to other very distinctly laid down restrictions and stipulations in their Code of 1793 (and not to sales alone) for retaining the assets, *i. e.*, the rents, that safely and surely were available to zemindars to pay the public revenue, and also to leave a profit for themselves.

It is then said that there can be no insecurity from deterioration of assets by grants rent-free, because not only will the *sale* realize all balances, but by it the estate start afresh free of all incumbrances, and with all its former assets available to the purchaser. But, if the revenue-sale be the great security of Government in order to give a purchaser such an estate, can it not be fairly said that the prohibition of the law of such grants being made rent-free, and declaring their invalidity if so made, is *the* security the Government *primarily* looked to, in order to avoid the extreme measure of sale, and the consequent ouster of the zemindar whom it was the great object of Government to retain in his lands?

Now, it is clearly admitted that *quoad* Government no rent-free grant is valid, and all under-tenures fall by a sale for arrears of Government revenue. The reason is, that Government must give the purchaser the estate as it was at the date of the Permanent Settlement.

But, as to third parties, *grantees*, Section 10, Regulation XIX. of 1793, refers in terms to the security of the public revenue being effected by grants of lands to such grantees exempt from payment of public revenue, and prohibits them. If then a sale were the only thing to which it was desired to have recourse in order to obtain this security, why has this further provision been enacted *at all* in the stringent terms it has been? and why are the evils and risks arising from the character of the then zemindars, so fully set forth in the preamble of Regulation 44 of 1793?

Again, I would observe that this same legislation of 1st May 1793 provides large means for the zemindar to be assisted in collecting his rents, in order that he might pay from them the Government revenue. If a grant be made rent-free in such a way that no Government revenue is supplied from rents, because the grant, rent-free, removes all those rents of that portion of the estate so granted which would otherwise go to pay the Government revenue, what is the use of so much care and provision for the collection of the rents of the remaining portion, which is said to be the profit left to the zemindar, and *with which* Government declared they had no concern?

It is also said that, not *each* beegah but every beegah of an estate is liable to bear its quota of the burden of the Government revenue. But, if a portion of an estate be granted free of rent, surely *each* beegah of that grant is included in the estate of which *every* beegah has to bear its portion of burden for rent, and for which it is hypothecated for its quota of the Government revenue; and thus, whether it be the assets of *each* beegah or of *every* beegah which enables the zemindar to pay the Government revenue of the estate, it is the fact that by such grants rent-free (and they may be for *any* portion of the whole estate, *however large*) that portion is, in fact, unhypothecated, and the revenue unsecured except by sale.

On all these reasons I cannot but think that all the Regulations of 1st May 1793 show that the legislation of that day was so extremely doubtful of the strength and stability of this newly-created class of proprietors, if left to take care of themselves and without the legislative prohibitions as to wasteful grants which deprived them of those rents from which the demand for the public revenue was to be met, that, for that reason, they clearly and stringently imposed these restrictions.

Reference has been made to the power given to zemindars absolutely to resume invalid lakheraj grants under 100 beegahs. Previous to the Permanent Settlement, Government treated these, when resumed, as khas Government properties. When the contract of 1793 was made, and the power was given to the zemindars to resume and manage these lands under 100 beegahs, it was done (just as in the case of the 50 beegahs of the more recent resumption-days), because it was not worth

while for the Government to resume and collect from such small scattered properties, and make them khas estates. The lands were topographically in one estate, and they were thrown in by Government to add to the zemindar's resources, and to enable him to have more rents wherewith to meet the demands of Government revenue.

As to the point that a grantor cannot repudiate his own grant, I, of course, fully admit the maxim as a legal one, but I still am forced to say that Section 10, Regulation XIX. of 1793, read with the other laws of the 1st May 1793, does not provide for the contingency, and, however much one may regret a *hard* case, our duty is not to consider the hardness of the case, nor to supply the omission of the regard of the legal maxim cited, but to interpret and apply the laws according to the terms used, taken in their ordinary sense.

Referring, lastly, to the precedents, I think that the late Sudder Dewanny Adawlut case, *viz.*, 1855, page 395, and Shejantoollah's case, 1848, page 462, bear out the view taken by me by the terms used in those decisions; and, if we were to admit that a dissentient Judge's judgment is to outweigh that of two others, the whole recognized system in regard to what is a precedent would be subverted.

Regarding, then, the preamble of Regulation 44 of 1793 and its text, together with Section 10, Regulation XIX. of 1793, and looking to the facts of the status of zemindars in 1793, and to the reasons I have given, I can only come to the conclusion that no landowner, nor his representatives, as a perpetual holder (such as a mouroosee ijardar here), could make valid grants of lands in perpetuity, out of his perpetually-settled estate, exempt from rent, and that the heirs and purchasers may resume them, because invalid by law.

I, therefore, generally concur in the present *judgment* of Mr. Justice Norman and Mr. Justice Seton-Karr, and in the recorded *opinions* of Mr. Justice Trevor, Mr. Justice Campbell, and Mr. Justice Shumbhoonath Pundit.

I would answer the Division Bench accordingly.

Peacock, C. J.—This case is a very in portant one, not on account of the value the property at stake, for that is small, b on account of the principle involved in it.

The question which is asked by the Div sion Bench is: "How far the grant for val able consideration by a zemindar of a specif portion of land, to be held without payme of rent, is valid as against the heirs of t grantor or purchasers by private sale of t estate?" It is contended on the part of t plaintiff that such grants are grants to ho land exempt from the payment of revent within the meaning of Section 10, Regul tion XIX. of 1793, and are consequent void; and that the heirs of the grantor, or purchaser from him by private sale, a entitled to resume the lands, and to treat t grantee as a trespasser. Such a constructio of Section 10 would be, in my opinion, co trary to the intention of the Legislature, an at variance with every principle of justice.

The case was originally referred to a Fu Bench consisting of the Chief Justic Mr. Justice Louis Jackson, Mr. Justic Shumbhoonath Pundit, Mr. Justice Leving and Mr. Justice Elphinstone Jackson. was argued at full length, and, the poi being a very important one, the Court too time to consider its judgment.

The Judges at that time were not agree in opinion as to the decision to be pr nounced. Before judgment could be delive ed, two of the Judges, *viz.*, the Chief Justic and Mr. Justice Louis Jackson, were oblige to leave India on account of their healt under medical certificate. During their ab sence, another case of a similar nature wa referred to a Full Bench, consisting of th Officiating Chief Justice, Mr. Norman, an Justices Trevor, Loch, Shumbhoonat Pundit, and Levinge. The case was de cided on the 9th of January 1865 ju before my return to India. The actual de cision of that Full Bench ultimately turne upon another point, *viz.*, that the rent-fre grant was for the purpose of digging a tan from which some of the villagers in th estate were to have a right to take wate Two of the Judges considered that that fac did not make any difference, and that th grant was void. Two of them thought tha the grant, being for the purpose of diggin a tank from which the villagers were to hav a right to take water, was not void.

The majority of the Judges, howeve with the exception of Mr. Justice Levinge expressed an opinion, not necessary for th

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decision of the case then before them, that rent-free grants made by a zemindar after a Permanent Settlement are void. Mr. Justice Levinge, who, after the hearing of the case before the first Full Bench, agreed with me in the view which I then took of it, held that such grants were not void. I regret to say that that learned Judge was prevented by illness of a serious nature from ever taking his seat upon the Bench after my return from England, and death soon afterwards deprived us of his valuable assistance as a colleague.

Under these circumstances, I did not consider it just to act upon the opinion of the majority of the Judges of the 2nd Full Bench in a case in which the present appellant had not been heard, and which was not referred until after his case had been argued before the 1st Full Bench.

I, therefore, thought that the present case ought to be re-argued before a Full Bench consisting of nine Judges; and, the other Judges concurring in that view, I appointed a Full Bench of nine Judges to hear it. Of that Full Bench, two, *viz.*, the Chief Justice and Mr. Justice Louis Jackson, were on the first Full Bench; two, *viz.*, Mr. Justice Trevor and Mr. Justice Norman, were on the 2nd Full Bench; one, Mr. Justice Shumbhoonath Pundit, sat on both of the Full Benches; and the other four Judges were not members of either of them.

The case was fully and ably argued before the nine Judges, but they could not agree in opinion, and consequently the Court took time to consider. The Judges afterwards met, but they could not then agree as to the answer which ought to be given to the question. The point was not finally discussed at that meeting; but, as there did not appear to be any reasonable ground for supposing that the Judges would ever come to a unanimous opinion, it was then arranged, as I understood, that such of the Judges as might wish it should put their opinion into writing: and, although I cannot say that it was so expressly stated, I fully understood that anything that was to be written was to be circulated for the consideration of the other Judges of whom the Full Bench was composed in order that, after considering the reasons which might be adduced on either side, the question might be fully and thoroughly discussed at another meeting; and that the Judges, if they could not then agree, should deliver their judgments *seriatim*.

Soon after the departure of Mr. Justice Trevor for England, I discovered that some of the Judges had expressed their opinions in writing, and had sent them into the office of the Registrar without informing me, and I believe, I may say, without informing any of the other Judges of their intention to do so. They probably considered that their written opinions were their final judgments in the case, but I cannot treat them otherwise than as arguments and minutes of the judgments which they proposed to deliver. Amongst the number of the Judges, who sent in their opinion, were the late Mr. Justice Shumbhoonath Pundit, whose death we all lament, and Mr. Justice Trevor and Mr. Justice Campbell, both of whom have since retired from the Bench. The opinion of Mr. Justice Trevor is dated the 9th April last, only 14 days before he retired.

I am informed that, according to the practice of the late Sudder Court, the views so expressed in writing and sent in to the Registrar's Office would have been considered judgments. All the opinions thus expressed are in favor of the heir's right to resume, and differ from that which I entertain; and this circumstance renders it an unpleasant duty for me to declare that, in my opinion, they cannot be considered as judgments, but merely as memoranda of arguments to be adduced. This is not a mere technical objection, but it is founded upon a fundamental principle essential to the due administration of justice, that every judicial act which is done by several Judges ought to be completed in the presence of the whole of them.

This is not the first occasion upon which I have been called upon to express my opinion upon that subject. I have done so several times, and in one case in particular which has been reported (*see* Regular Appeal No. 164) in 6 Weekly Reporter, Civil Rulings, p. 269.

I then stated that, in my opinion, a final judgment ought not to be pronounced by a Court consisting of several Judges in a case in which they differ, until by conference and discussion they have endeavoured to arrive at an unanimous judgment; and I then cited authorities for the opinion which I expressed.

If, after discussion and after deliberately weighing the arguments of each other, the Judges cannot agree, their several judgments ought to be delivered in open Court in the presence of the others.

It would not have been lawful, nor would it have been even seemly, for each of the Judges who sent his written opinion in to the Registrar's office, to have gone separately into open Court without communication, or even after communication, of his intention to the other Judges, and to have read out as his final judgment the contents of the memorandum which he sent in to the Registrar's office.

If each of the Judges, who composed the Full Bench, could not have gone separately into Court, and, in the absence of the others, have read out his own judgment, without hearing the arguments which each of the other Judges, who were associated with him as members of the Full Bench, might adduce to alter his opinion, he could not lawfully deliver a separate judgment at a separate time, by handing in to the Registrar as his judgment a separate paper signed by him containing his written opinion. The mere arguments and expressions of opinion of individual Judges who compose a Court are not judgments. A judgment, in the eye of the law, is the final decision of the whole Court. It is not because there are nine Judges that there are nine judgments. When each of the several Judges of whom a simple Court is composed separately expresses his opinion when they are all assembled, there is still but one judgment, which is the foundation for one decree. If it were otherwise, and if each of the memoranda sent in on the present occasion were a judgment, there would be nine judgments in one case, some deciding one thing and some another, and each Judge would have to review his own judgment separately, if a review should be applied for.

In a case which was heard before Mr. Justice Bayley and two other Judges in 1864, my honorable colleague made the following remark: "As I shall probably have "gone on leave before the judgment of my "colleagues will have been given in this case, "I leave my note of my view after hearing "Counsel." In that case, which is reported in the Special Number of Sutherland's Weekly Reporter, page 148, the Judge very properly recorded the note which he left merely as an expression of his opinion, and not as a judgment.

This was my impression from the wording of the memorandum; but, from what my honorable colleague has stated to-day in Court, I find that he did intend it to be a judgment, and that I was under a wrong impression.

In a very recent case in the Exchequer Chamber in England (Brand *versus* the Hammersmith and City Railway Company, Law Reports, Common Law Series, Vol. 2, part 4, pp. 223 and 235), the Court, after argument, took time to consider. The Chief Justice of the Common Pleas prepared a written judgment to be delivered, but other members of the Court were not then prepared to give judgment. Before judgment was delivered the Chief Justice resigned. The other Judges differing in opinion, the judgment which the Chief Justice had prepared was treated merely as an expression of his views, and not as a judgment.

I cannot say that the Judges, who have expressed their views of this case, might not have changed them upon discussion with the other Judges who were associated with them as members of the Full Bench. I cannot suppose that, when they sent in their opinions in writing to the Registrar's office, they considered that they had so far recorded their final judgment that they had not the power to change their opinions, however they might be influenced by the arguments of their colleagues; nor can I believe that they were so wedded to their opinions that they would not have been ready to change them, if they had been convinced that they were wrong.

The minutes sent in may be valuable as memoranda containing the opinions and arguments of the Judges who expressed them, and I have read and considered them very carefully. It appears to me that they ought to be filed, so that the parties, if they should obtain leave to appeal, may have them transmitted to Her Majesty in Council, in order that the Lords of the Council may have the benefit of the arguments and opinions expressed, and may treat them as judgments if they should hold that they legally had that effect.

Unfortunately, a succession of circumstances over which we have had no control have caused considerable delay in this case; but as execution has not yet been issued, and the defendant is still in the possession of the lands of which he and those under whom he claims have been in the peaceable and undisturbed possession for nearly 50 years, it is some consolation to know that the delay which has occurred has not been productive of injury, but has merely stood in the way of a plaintiff who was endeavoring to enforce an unjust and an unrighteous demand.

The question referred in appeal No. 253 of 1863 involves a most important point,

viz., whether a zemindar, who for valuable consideration sells land either absolutely or for a term of years without reserving any rent, or the heirs of such zemindar or purchaser by private sale from him, can treat the grant as void, and resume the lands.

As a similar question has been raised in special appeal No. 1116 of 1862, the pleaders in that appeal have also been heard before the Full Bench.

The question relates to grants made since the 1st December 1790 and to lands included in and forming part of the mâl lands of a permanently-settled estate, for the revenue of which the zemindar has engaged, and is liable to Government, and for the arrears of which the whole estate is liable to be sold.

The question raised is not whether the grant would be void as against a purchaser at a sale for arrears of Government revenue, but whether the grantor himself, or his heirs, or any person claiming under him, can treat the grant as void, and turn the purchaser out of possession, or assess the lands at a full rent, notwithstanding they have been sold rent-free. The two questions are very different.

There can be no doubt that grants rent-free are void as against a purchaser for arrears of revenue unless they fall within any of the exceptions in the Sale Laws.

When a landlord re-enters and avoids a lease under a clause of forfeiture for non-payment of rent or for breach of covenant, the title of the lessee is at an end, and all leases or other incumbrances created by him fall together with the lease out of which they were created. So, also, in the case of a sale for arrears of revenue under the power of sale expressly reserved to Government by the Sale Laws, all leases and incumbrances with certain exceptions are void as against a purchaser. If this were not so, the power of re-entry in the case of a landlord, and the power of sale for arrears of revenue, might in all cases be rendered valueless by means of rent-free grants or leases or other incumbrances for the whole or greater portion of the estate created by the lessee or zemindar during the continuance of his lease or of his proprietary right in the estate.

The cases are very different from that of a vendor's treating his own grant as void, and taking away from the purchaser that which he has sold to him.

A purchaser for arrears of revenue does not claim through the zemindar whose estate is sold, but through the Government under a power of sale adverse to the zemindar. *See* Section 5, Regulation XLIV. of 1793, amended and altered by subsequent Regulations and Acts, of which the last is Act XI. of 1859.

Persons who purchase or take leases from a zemindar are cognizant of the Sale Laws, and are fully aware of the risk which they run, and that a zemindar cannot convey a title which will stand good against a purchaser for arrears in default of payment of revenue.

In dealing with this case, I refer to Regulation XLIV. of 1793, because it formed part of the same Code as Regulation XIX. of 1793, and was the Sale Law which existed under that Code. In construing one of the Regulations of that Code, we cannot consistently take into consideration any Regulation which was passed subsequently.

The question turns upon the construction of the words in Section 10, Regulation XIX. of 1793, "all grants for holding land exempt "from the payment of revenue."

Some of the Judges hold that those words include grants or leases by a zemindar to hold exempt from the payment of rent. In my opinion, the word revenue is used in its ordinary and proper sense, and refers only to grants for holding free from the payment of revenue to Government.

The Officiating Chief Justice, Mr. Justice Norman, in the 2nd Full Bench, considered that, as a right was, by the grant then under consideration, reserved to some of the villagers of the estate to take water from the tank, for the construction of which the grant was made, the water might be considered as the produce of the land, and that the right to take it was in the nature of a reservation of rent in kind. But the other Judges did not concur with him in that view; and, with all deference, I am clearly of opinion that, if it was necessary to reserve rent in order to prevent the grant from being void as a grant for holding land exempt from the payment of *revenue*, the right reserved to the villagers to take water from the tank was not a reservation of rent, and it was still less a reservation of revenue. If the right of the villagers to take water from the tank was Government revenue, it was a kind of revenue which was wholly useless to Government, and could not assist

them in meeting the necessities of the State; and, if it was rent, it could not assist the zemindar in providing for the payment of the revenue.

In the case now under consideration, one of the grants was an absolute grant to the grantee and his heirs for digging a tank; one was an absolute sale of land to the grantee and his heirs for the purpose of building a house; and others were sales of land generally to the grantee and his heirs. It is clear that, if a reservation of rent was necessary, the erection of a dwelling-house on the land granted for that purpose could not amount to a payment of rent or revenue, whatever opinion may be entertained as to the water of a tank. As to the grant, therefore, for building a house, if the Judges, who consider that a grant to hold free from the payment of rent to the zemindar or his heirs is a grant to hold exempt from the payment of revenue, and is therefore void, and that the grantors or his heirs may treat the grantee as a trespasser, are correct in their view of the law, the plaintiff is entitled to recover the lands which were sold by his ancestor, and upon which the purchaser has expended his money in building a house. Such a grant would be binding even upon a purchaser under a sale for arrears of revenue—Regulation XLIV. of 1793, Sections 5 and 8; and, with all respect for the opinion of my honorable colleagues, I have no doubt that it is also binding upon the grantor and his heirs. It would be a great anomaly if such a grant were binding upon a purchaser at a sale for arrears of revenue, and not binding upon the grantor himself or his heirs.

I must admit that, before a revenue-settlement, the Government's share of the produce of every beegah of land in cultivation, or the rents paid in lieu of it, were treated as revenue.

In the report of Messrs. Anderson, Crofts, and Bogle, the Commissioners appointed by Government in 1776 to collect materials for the settlement, and of which an extract is set out in Harington's Analysis of the Regulations, Vol. 2, page 58, it is said: "Amongst all these various sources of "*revenue* and profit, those which issue out of "land form so capital and important a "branch that, comparatively speaking, *the* "*revenue of Bengal may be said to consist* "*of land-rents.*"

It is true that Mr. Harington objects to the indefinite use of the word "rent," and that in another part of the report it is said "Almost all the lands of Bengal are held "under some person who *collects the* "*rents, pays the revenue*, and stands between the Government and the immediate "tenant of the soil."

However indefinitely and inaccurately the word rent may have been used before the Permanent Settlement, and whatever may be the correct theory as to the proprietorship of the lands previously thereto, it is clear from the recitals in Regulation XIX. of 1793, and in several others of the Regulations of the Code of which that Regulation formed a part, that the Government claimed to be entitled to a proportion of the produce of every beegah of land in cultivation, demandable in money or kind (according to local custom), *unless it transferred its rights thereto for a term or in perpetuity, or limited the public demand upon the whole of the lands belonging to an individual.* This was the basis upon which the Permanent Settlement was founded.

If Government made a lakheraj grant for a term or in perpetuity, it transferred to the grantee its rights to a share in the produce of the lands during the existence of the grant. If it made a temporary settlement with a zemindar, it limited the public demand upon the whole of the lands included in the settlement to the amount of revenue which the zemindar engaged to pay for such lands during the continuance of the settlement.

In cases in which there was no valid lakheraj and no temporary revenue-settlement, the rents or share of the produce payable by the occupiers of the land were treated as revenue belonging to Government.

When a temporary settlement was made with a zemindar, he could not enter into any engagement with dependent talookdars, under-farmers, or ryots beyond the period of his own engagement with Government. *See* Regulation XLIV. of 1793, Section 1.

So long as that state of the law continued, any grant to hold lands free from the payment of rent, which included the Government's share of the produce, beyond the period of the zemindar's engagement, was, no doubt, treated as an invalid lakheraj grant, whether such grant was, according to its language, to hold free from the payment of "revenue" or free from the payment of "rent."

In the Regulation of the 1st December 1790, grants to hold land "*rent-free*" are treated as lakheraj grants or grants to hold land "*exempt from the payment of revenue to Government.*"

If such grants had been binding upon Government after the expiration of the zemindar's temporary engagement for revenue, the aggregate of the rents upon the estimate of which the amount of revenue would have had to be fixed at the next revenue-settlement would have been from time to time reduced, and doubtless would soon have dwindled to nothing.

It is not necessary for the present question to determine whether, before the Permanent Settlement, the zemindars were proprietors of the soil or not. It is clear that they could not make grants for holding lands free from the payment of that proportion of the produce which was payable in money or kind to Government, and that the Government or their duly-authorized officers were alone capable of making such grants. The Government always assumed and exercised the power of making lakheraj grants at their pleasure; and after such grants the lands were exempt from payment of rent to the zemindars.

A great change, however, was effected by the Permanent Settlement.

The two fundamental measures which were declared to be essential to the objects which the Government had in view in settling the lands permanently were that the soil should be vested in the landholders, and that the *revenue* should be fixed for ever (*see* Regulation II. of 1793, Section 1).

Regulation VIII. of 1793, Sections 4 and 5, laid down rules as to who should be considered the actual proprietors of the soil and entitled to engage with Government for the revenue. If that had not been done, there would have been great difficulty in determining who had the proprietary rights. Those who paid revenue immediately to Government at the time of the Decennial Settlement were ordinarily considered to have the proprietary rights, and were allowed to engage with Government for the revenue to be paid in perpetuity for their lands; and the lands for which such engagement was entered into were called an estate.

I shall henceforward use the word estate in the sense in which it is defined in Section 2, Regulation XLVIII. of 1793, *viz.*, "land subject to the payment of public revenue for the discharge of which a separate engagement has been entered into with Government."

As soon as an engagement for a permanent settlement was entered into, the amount payable to Government, and that alone, was the Government revenue, and the unpaid kists or instalments of that amount were alone treated as arrears of revenue (*see* Regulation XIV. of 1793, Section 2).

The rents payable for the lands by the occupiers or cultivators were vested in the zemindars as proprietors of the soil, and they were expressly authorized by Regulation XVII. of 1793 to distrain for any arrears thereof, and such arrears were termed in the Regulation "the arrears of *rent* due from *their* under-farmers, ryots, and dependent talookdars." As soon as an estate was permanently settled, the revenue and rent became perfectly distinct, and were described throughout the Code of 1793 as two separate and distinct things. The revenue was not payable for each beegah of land. No particular portion of the sum which the zemindar engaged to pay as revenue for the whole estate was the separate revenue of any particular beegah or portion of the estate. The whole revenue was assessed upon, and paid for, the whole estate, and every beegah of land in the estate, whether cultivated or not, was liable to be sold for any arrear of revenue. No distinct beegah was liable to be sold separately for any separate or distinct portion of the revenue. The Government had no more power to alienate the zemindar's rents than the zemindars had to alienate the Government revenue.

By Regulation I. of 1793, Section 10, the landholders were expressly authorized to transfer by sale, gift, or otherwise, *the proprietary rights* in the whole or any portion of *their* estates, and the grantee of the whole of the proprietary rights in portions of the estate was entitled to have the revenue apportioned, and a separate portion of it charged upon the land in which he had acquired the proprietary right, and to hold such land as a separate estate liable only for that portion of the revenue which was assessed upon it.

By Section 52, Regulation VIII. of 1793, the zemindars were also empowered to let their lands in whatever way they might think proper, or to grant dependent talooks subject to certain exceptions and to the restrictions

contained in that Regulation, which are not material in this case.

Now, we find that in other parts of the Code of 1793 the words "rent" and "revenue" were used to designate two distinct and separate things; and that in Section 10, Regulation XIX. of 1793, the word "revenue" was substituted for the word "rent," which had been used in the Regulation of the 1st December 1790 with reference to the same subject. This of itself is a very strong ground, independently of the sense ordinarily attached to the words "revenue" and "rent," for concluding that the word "revenue" was not intended to be used as synonymous with the word "rent."

The object of the Regulation of the 1st December 1790 and of Regulation XIX. of 1793 was the same. Each of those Regulations related to *lakheraj lands or lands exempted from the payment of revenue to Government.*

The Regulation of 1st December 1790 was entitled "Regulations respecting lakheraj lands *or lands paying no revenue to Government.*" Regulation XIX. of 1793 was entitled "a Regulation *for re-enacting with modifications the rules passed on the 1st December 1790 for trying the validity of the titles of persons holding or claiming a right to hold lands exempt from the payment of revenue to Government,* not being of the description of those termed Badshaie or Royal," &c.

Regulation XIX. of 1793 contained the following recital, which shows that the object of it was to prevent unauthorized alienations of revenue payable to Government, and that it had nothing to do with the rents payable to the zemindars:—

"By the ancient law of the country the "ruling power is entitled to a certain por- "tion of the produce of every beegah of "land (demandable in money or kind ac- "cording to local custom) unless it transfers "its right thereto for a term, or in perpe- "tuity, or limits the public demand upon "the whole of the lands belonging to an "individual, leaving him to appropriate to "his own use the difference between the value "of such proportion of the produce and the "sum payable to the public whilst he conti- "nues to discharge the latter. *As a necessary* "*consequence of this law,* if a zemindar "made a grant of any part of his lands to "be held exempt from the payment of "revenue, it was considered void *from bei* "*an alienation of the dues of Governm* "*without its sanction.* Had the validity "such grants been admitted, it is obvic "that the revenue of Government wo "have been liable to gradual diminution."

The recital then proceeded to show t numerous grants of the description ab referred to had been made. It stated t the Governor-General in Council deemec incumbent to recover the *public dues t alienated,* and pointed out the grounds legislating in the manner provided by Regulation with reference to grants alre made, and then it proceeded as follo "Upon the above grounds, and with a v "to facilitate the recovery of the *pu* "*dues* from lands held exempted un "invalid grants, as well as *to prevent* "*similar alienations being hereafter m* "*to the prejudice of the public reven* &c., "the following rules have b "enacted," &c.

The Regulation divided the grants tended to be dealt with into three classes

1st.—Those which had been made p to the grant of the Dewanny (12th Aug 1765).

2ndly.—Those which had been m between that date and the 1st of Decem 1790; and

3rdly.—Those which had been or sho be made after the *1st* December 1790.

It must be remarked that the same wo are used in regard to all the three classes grants, *viz.*, "grants for holding land exe from the payment of revenue," from whi according to every sound principle of c struction, independently of the rule expre laid down in Regulation XLI. of 1793 ought to be concluded that only grants the same nature were intended, and that word "revenue" was used in Section 10 the same sense as that in which it was u in the title and in the other Sections of same Regulation.

Grants made prior to the 12th of Au 1765 were declared to be valid, subject certain conditions (Section 2). Grants m between the 12th August 1765 and the December 1790, with certain exceptions material to this case, as well as grants wh had been or should be made subsequent the 1st December 1780, were declared to invalid.

There was, however, a great distinction made between lands included in invalid lakheraj grants made prior to the 1st December 1790, and those which had been or could be included in grants *made subsequent to that date*. The former were provided for by Section 3 and subsequent Sections; the latter by Section 10.

It is very important to attend to this distinction and to the reason for it, as it clearly explains the meaning of Section 10, and shows why the provisions, in respect to grants made after 1st December 1790, were different from those which had reference to grants made prior to that date.

The reason for the distinction was this. By the rules for the Decennial Settlement, it was directed that the assessment upon the settlement of an estate was to be fixed exclusive and independent of all then existing lakheraj lands, whether *exempted from the kheraj or public revenue with or without authority*.

The rule was re-enacted by Section 36, Regulation XVIII. of 1793. That rule, like the rules made for the Decennial Settlement, did not extend to grants made after the 1st December 1790. Lands included in any lakheraj grant made prior to that date, whether such grant were made with or without due authority, were deemed to be separated from the estate in which they were situate, and rents thereof were excluded from the estimate on the basis of which the amount to be paid as revenue under the Permanent Settlement was fixed (*see* Regulation XIX. of 1793, Section 4).

If the grants were registered, the lands included in them could not be assessed to the public revenue at all until the grants had been declared by a final judicial decree to be invalid. When such a decree was obtained, and the lands were resumed, they were assessed to the revenue as independent talooks.

If the lands exceeded 100 beegahs, they were held as separate estates under Government to whom the revenue was declared to belong (*see* Regulation XIX. of 1793, Sections 4, 7, and 8). If the lands did not exceed 100 beegahs, the revenue, when assessed upon them, was to belong to the zemindar within whose estate they were situate (*see* Regulation XIX. of 1793, Section 6).

Regulation XIX. of 1793, Section 4.

Further, although it was declared that the Regulation respected only the question, "Whether the lands included in such grants were liable to the payment of revenue, or otherwise," still the grant was considered to have such a *primâ-facie* effect as regarded the proprietary rights in the soil, that it was expressly enacted that every dispute between the grantee and the grantor respecting the proprietary right in the lands was to be determined by the Civil Court; and that the grantees or possessors of the lands, *until dispossessed by a decree of the Civil Court, were to be considered the proprietors of the lands*.

The case was, however, different with respect to grants made after 1st December 1790 and before a Decennial or Permanent Settlement of the lands included in them. Such grants, having been declared null and void by the Regulation of the 1st December 1790, and by Section 10, Regulation XIX. of 1793, were not lakheraj grants within the meaning of Section 36, Regulation VIII. of 1793, or the rule for the Decennial Settlement of which that Section was a re-enactment. The lands included in such grants were deemed part of the estate to which they belonged, and the rents of them were included in the assets of the estate upon the basis of which the Government revenue was fixed; and the lands, notwithstanding the grants, were assessed to the public revenue as part of the estate. The zemindar's engagements for the revenue included such lands, and they, as well as all the other lands of the estate, were liable to be sold for any arrear of revenue.

The lands, therefore, were not, like the lands included in grants made prior to the 1st December 1790, held free from the payment of revenue, until the grants should be declared invalid by a final judicial decree, and the lands should be resumed.

It was only reasonable and just when the grants were treated by Government as void as against Government, and no effect was given to them, on fixing the amount of revenue to be paid for the estate, that the zemindars who were assessed, and paid revenue for them, should be allowed to treat the grants as void as against themselves, and should be authorized to collect the rents of the lands included in such grants in the same manner as they would have done if such grants had not been made.

The grants could not with any justice be held void as against Government as regards the assessment of revenue, and valid as against the zemindars as regards the collection of the rents upon the faith of which they engaged to pay the revenue.

It was not only considered right that the zemindars who had then assessed, and had engaged with the Government for the revenue upon the faith that the grants were void, should, in lieu of the revenue for which they engaged, be entitled to collect the rents of the lands; but it was also considered right that they should have the same summary remedies for collecting these rents as if the grants had not existed, and that they should not be compelled to resort to a Court of law to have the grants declared invalid before they could collect the rents.

No one would have engaged by a permanent settlement to pay revenue to Government for lands included in lakheraj grants subsequent to the 1st December 1790, if he had not been authorized to collect the rents before the grants should have been declared void by a decree of the Civil Court. No such decree was necessary before the Government could assess the lands; and it was not considered necessary or expedient to require such a decree as in the case of grants prior to the 1st December of 1790, before the zemindar could collect the rents.

It was, therefore, enacted by Section 10, Regulation XIX. of 1793, that all grants for holding lands exempt from the payment of revenue, which had been made after the 1st December 1790, or which should thereafter be made *by any other authority than that of the Governor-General in Council*, should be null and void, and that no length of possession should thereafter be considered to give validity to such grant, either with regard to the property in the soil or the rents of it. The Section then proceeded thus: "And every person who now pos-"sesses or may succeed to the proprietary "rights in any estate or dependent talook, or "who now holds or may hereafter hold any "estate or dependent talook in farm of Go-"vernment, or of the proprietor, or any other "person, and every officer of Government "appointed to make the collections from "any estate or talook held khas, is author-"ized and required to collect the rents "from such lands at the rates of the per-"gunnah, and to dispossess the grantee of "the proprietary right in the land, and to "re-annex it to the estate or talook in which "it may be situated, without making pre-"vious application to a Court of Judicature, "or sending previous or subsequent notice "of the dispossession or annexation to any "officer of Government; nor shall any "such proprietor, farmer, or dependent "talookdar, be liable to an increase of asse "ment on account of such grants which "may resume and annul, during the time "the engagements that he may be under "the payment of the revenue of such est "or talook when the grants may be so "sumed and annulled. The managers "the estates of disqualified proprietors "of joint undivided estates are authoriz "and required to exercise, on behalf of "proprietors, the powers vested in propr "tors by this Section.

It has been shown that, after a perman settlement, the Governor-General in Coun could not alienate the rents which belong to the zemindars as the proprietors of soil. The words "by any other autho than that of the Governor-General Council" in Section 10 were applicable grants to hold exempt from the payment Government revenue, but were wholly out place if the words "exempt from the p ment of revenue" are to be read as synony ous with the words "exempt from the p ment of rent to the zemindar or his heir inasmuch as such a grant would not h been binding if made by the Govern General in Council.

Grants made after the 1st December 17 to hold lands exempt from the payment revenue being void, and the zemindars be assessed by the Permanent Settlement the revenue, whether the lands included the grants exceeded 100 beegahs or n no such distinction was necessary, w reference to grants made after the 1st Dece ber 1790, between cases in which the la should exceed, and those in which t should not exceed 100 beegahs, as was m by Sections 4, 5, 6, and 7 of Regulat XIX. of 1793 in the case of grants m prior to the 1st December 1790.

The words "whether exceeding or un 100 beegahs" in Section 10 are clear intelligible if the word "revenue" is to read as revenue, but wholly useless and intelligible if the word revenue is to be r as synonymous with "rent."

Further, it was considered right to a zemindar who should engage for revenue the same benefit of *nullum tem* as the Government itself should have as regards grants exempt from the paym of revenue: hence the use of the words " no length of possession shall be herea considered to give validity to such gran &c. These are intelligible if the Sectio read as applicable to grants to hold

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empt from the payment of revenue, but not if the word "revenue" is to be read as synonymous with "rent."

Again, it was fair and equitable that the zemindars, who were assessed, and paid revenue for the lands included in their estates, should not only be entitled to the soil and to collect the rents, but that they should have the same power to collect the rents, as they would have had if the grants had not been made, and that they should not be driven to a Court of law to declare the invalidity of the grants, either for the purpose of entitling themselves to the rents, or of establishing their rights in the soil.

Consequently, Section 10 went on to declare that every person who should possess the proprietary right in the estate should be at liberty to collect the rents from the lands at the rate of the pergunnah, and to dispossess the grantee *of the proprietary right in the land, and to re-annex it to the estate or talook in which it was situate without making any previous application to a Court of Justice.*

Again, it might have so happened that a zemindar would refuse to enter into a Decennial or Permanent Settlement for his estate; or the lands might be let in farm or held khas; or a zemindar might become disqualified. To provide against these or other contingencies under which the estate might be let in farm or held khas, Section 10 enacted that any person who might hold the estate in farm of Government, and every officer of Government appointed to make the collections from any estate or talook held khas, and every manager of an estate of a disqualified proprietor, *was authorized and required* to exercise the powers vested in the proprietor.

These words would not be applicable to a lease granted by a zemindar after a permanent settlement to hold lands free from rent, though they were peculiarly applicable to grants made before a permanent settlement.

Mr. Justice Campbell says: "It seems to "me that, in regard to permanently-settled "estates, if the word revenue be taken to "mean the revenue payable to Government, "the law treats of an impossible thing, "and deals with it in a way which means "nothing at all. It was quite impossible "that a zemindar or any one else could "grant away the Government revenue, "that revenue having been already definitely "fixed in a lump sum payable by the zemin-"dar. To declare such grants invalid would "be a most uncalled-for and meaningless "provision."

But it must be borne in mind that all the lands in the districts intended to be permanently settled had not been decennially or permanently settled when the Code of 1793 was passed; and, consequently, it was just as necessary to provide against lakheraj grants which might be made between the 1st December 1790 and the Permanent Settlement, as it was to provide for the resumption of similar grants which had been made between the 12th of August 1765 and the 1st of December 1790.

It does not follow that because it would be difficult to evade the new law by making such grants after the 1st December 1790 that such law was not directed against such grants; otherwise it might be argued that the most effectual law was not directed against the acts which it was intended to prevent, and must be construed to apply to something else, because it had effectually prevented the mischief against which it was directed.

If Section 10 did not extend to grants to hold lands exempt from the payment of revenue made by a zemindar after the 1st December 1790 and before a permanent settlement of the estate to which the lands belonged, the Regulation contained no provision against such grants. The real question is not whether in regard to grants made after the 1st December 1790 and *after* a permanent settlement the words "exempt from the payment of revenue" mean exempt from the payment of revenue to Government, but whether they also mean exempt from the payment of rent to the zemindar.

It appears to me that the word revenue as used in the Section means revenue, and nothing else, but that it includes whatever was Government revenue at the time of making the grant to be affected by the Regulation.

If a law should enact that whoever should clip the current coin of the realm should suffer a particular punishment, it would include the clipping of whatever was current coin at the time of the clipping; but it would not include the clipping of anything which was current coin at the time of passing the Act, and which should cease to be current coin before the time of the clipping. So, a grant to hold free from the

payment of rent would be a grant to hold free from the payment of revenue if made at a time when the rent was public revenue, but not if made after rent had ceased to be public revenue, and had been vested by law in the zemindars as proprietors.

If the construction which I put upon the words of Section 10 is correct, the word "revenue" will be read in its ordinary and natural sense; the provisions of the Section will be natural and consistent with justice; and force and effect will be given to every word in the Section. But, if the construction contended for by the plaintiff is the right one, the word "revenue" must be read in two different senses—one, its natural, proper, and ordinary sense; and the other, a sense in which it is never used: the greatest injustice will be done; and no force or effect can be properly given to a great portion of the words which are used in the Section.

It has been urged that the recital and provisions of Regulation XLIV. of 1793 show that it was the intention of Government to restrict the powers of the zemindars, and to prevent them from making rent-free grants in order to protect the heirs of the zemindars and also the Government revenue.

It appears to me that the argument to be drawn from Regulation XLIV. of 1793, so far from being in favor of the construction contended for, is a very strong argument in support of the view which I take of the case.

The recital is as follows:—

"The public demand upon the estates "of the proprietors of land, with whom a "settlement has been or may be concluded "under the original Regulations for the "Decennial Settlement, having been fixed "for ever, it is to be apprehended that many "proprietors, either from improvidence, "ignorance, or with a view to raise money, "or from other causes or motives, may be "induced to dispose of dependent talooks "to be held at a reduced jumma, or fix the "jumma of such dependent talooks as now "exist in their respective estates at an un-"der-rate, or let lands in farm, or grant "pottahs for the cultivation of land, at a "reduced rent for a long term or in perpetu-"ity. Such engagements, if held valid, would "leave it in the power of weak, improvident, "or ill-disposed proprietors to render their "property of little or no value to their heirs; "promote vice and injustice; *occasion a "permanent diminution of the resources of "the Government arising from the lands, in "the event of the rent or the revenue re-"served by such proprietors being insuffici-"ent for the discharge of the amount of "the public demand upon their estates;* be "an abuse of the great and lasting benefit "which has been conferred upon the land-"holders by the possession of their lands "being secured to them in perpetuity at a "fixed assessment; and, moreover, be repug-"nant to the ancient and established usages "of the country, according to which the "dues of Government from the lands "(which consist of a certain proportion of "the annual produce of every beegah of "land demandable according to the local "custom in money or kind, *unless Govern-"ment has transferred its right to such pro-"portion to individuals for a term or "in perpetuity, or fixed the public de-"mand upon the whole estate of a pro-"prietor of land, leaving him to appropriate "to his own use the difference between the "value of such proportion of the produce, "and the sum payable to the public so long "as he continues to discharge the latter)* "are inalienable without its express sanction. "It is at the same time essential that pro-"prietors of land should have a discretion-"ary power *to fix the revenue* payable to "their dependent talookdars, and to grant "leases, *or* fix the rents of their lands for a "term sufficient to induce their dependent "talookdars, under-farmers, and ryots to ex-"tend and improve the cultivation of their "lands, and that such engagements should be "held inviolable in all cases where they may "not interfere with or affect in any shape the "primary and indefeasible rights of Govern-"ment. Upon the above grounds, and "as the proprietors of land previous to the "Decennial Settlement being declared per-"petual were not entitled to enter into any "engagements with their dependent talook-"dars, under-farmers, or ryots, for a period "extending beyond the term of their own "engagements with the public, the Governor-"General in Council has enacted as fol-"lows," &c.

This recital shows—

1st.—That the Legislature drew a clear distinction between the Government demand or revenue, and the rent payable to the zemindars;

2nd.—That they foresaw that the zemindars, having been declared proprietors of the lands, would probably grant dependent ta-

looks or leases at an under-rate; and that, by doing so, they would render their property of little or no value to their heirs, and occasion a permanent diminution of the resources of Government arising from the lands, in the event of the rent or the revenue reserved by such proprietors being insufficient for the discharge of the public demand upon their estates.

3rd.—That they did not consider that Section 10 of Regulation XIX. of 1793 was sufficient to restrain the mischief so contemplated.

No one has ventured to suggest that a grant to hold land free from the payment of all revenue except a nominal revenue would not be a grant to hold exempt from the payment of revenue within the meaning of Section 3 of Regulation XIX. of 1793.

If the word "revenue" in Section 10 is synonymous with rent, and if a reservation of a nominal rent after a permanent settlement is sufficient to prevent the grant from being rent-free, it seems to follow that the reservation of a nominal revenue in a grant made after the 1st December 1790 and before a permanent settlement would be sufficient to prevent the grant from being a grant to hold exempt from revenue. Yet no one, I presume, would contend that a grant by a zemindar or an unauthorized officer of Government made before the 1st December 1790, or after the 1st December 1790, and before a permanent settlement, to hold lands of large annual value to a man and his heirs for ever at a nominal revenue, would not fall within the words "exempt from the payment of revenue," as much as a grant to hold wholly exempt from the payment of revenue would.

It would be idle to contend that grants in perpetuity made without the authority of Government at a mere nominal revenue or rent before the 1st of December 1790 were not invalid lakheraj grants, because they reserved some revenue, and were not, therefore, grants to hold wholly exempt from the payment of revenue.

As I understand the words "exempt from the payment of revenue" in Sections 3 and 10, Regulation XIX. of 1793, they mean exempt from the payment of the whole *or any part of that which the grantee would have been bound to pay as revenue* in the absence of the grant.

If, then, Section 10, Regulation XIX. of 1793, included grants to hold exempt from the payment of revenue, it operated to prevent grants to hold at nominal or inadequate rents, and Regulation XLIV. of 1793 was unnecessary.

If, however, Section 10 did not extend to rent-free grants after a Permanent Settlement, there was nothing to prohibit such grants.

Now, there were two modes by which the Legislature might have provided against the mischief contemplated by them as recited in Regulation XLIV. of 1793.

They might have prevented grants at inadequate rents for long terms or in perpetuity, either by compelling the zemindars to reserve adequate rents on all grants, or by restricting their right to make grants for any term exceeding a fixed period.

The Legislature thought it right to adopt the latter course, and they fixed the term at 10 years, and introduced Regulation XLIV. of 1793 into the Code for that purpose.

By the 2nd Section they enacted—

That no zemindar, independent talookdar, or other actual proprietor of land, nor any person on their behalf, shall dispose of a dependent talook to be held at the same or at any jumma, or fix at any amount the jumma of an existing dependent talook, for a term exceeding 10 years, *nor let any land in farm, nor grant pottahs to ryots or other persons for the cultivation of the lands for a term exceeding 10 years.*

The Section then prohibited the renewal of leases or pottahs at any period before the expiration of them except in the last year; and it concluded by declaring "that all evasions of the prohibitions, by entering into "two separate engagements, leases, or pottahs "at the same time; dating an engagement, "lease, or pottah subsequent to the period "at which it may have been actually executed; or by any other device, shall be "considered as an infringement of them "and every engagement fixing the jumma "of a dependent talookdar, and every lease "or pottah which has been or may be concluded or granted in opposition to such "prohibition, is declared null and void."

I have set out the words of so much of the above Section as bears upon the point under consideration, as it is not printed in the ordinary collections of the Regulations.

The Section avoided all leases and pottahs for the cultivation of lands for a term exceeding 10 years, whether they reserved a full rent or a nominal rent or no rent at all. It did not require leases or grants for periods not exceeding 10 years to reserve an adequate rent or a nominal rent, or any rent at all.

By Section 6 it was expressly enacted that "nothing in the Regulation should be construed to prohibit a zemindar, independent "talookdar, or other actual proprietor of land, "from *selling, giving, or otherwise disposing* "of any part of his lands as a dependent "talook."

This provision was, however, subject to Section 2, which declared that the grant should not be for a term exceeding 10 years.

I have read the precise words of Section 6, inasmuch as the two Judges, who formed the majority of the Court, and whose judgment prevailed in Rajah Modhnarain's case, to which I shall presently refer, declared that the power of creating dependent talooks or granting leases at *any* rent was fully accorded; and they referred to Section 6, Regulation XLIV. of 1793, in support of that doctrine.

Regulation XLIV. then proceeded to declare that all grants to dependent talookdars, and all leases and pottahs to ryots, with certain exceptions, should stand cancelled by a sale for arrears of revenue.

Section 8 provided that nothing in the Regulation contained should be deemed to prohibit actual proprietors of land from granting leases or pottahs of ground for any term of years or in perpetuity for the erection of dwelling-houses or buildings for carrying on manufactures or for gardens or for other purposes, or for offices for such houses or buildings.

Grants for the purposes mentioned in Section 8 were amongst those excepted from the provisions of Section 5, and consequently were binding upon a purchaser at a sale for arrears of revenue.

The only distinction made by Regulation XLIV. between grants and leases for the purposes mentioned in Section 8 and those for other purposes was, that the former might be granted for any term or in perpetuity, and were not invalidated by a sale for arrears of revenue, whilst the others could not be granted for a period exceeding ten years, and were, according to Section 5, to stand cancelled in the event of a sale for arrears of revenue.

So careful was the Legislature to protect leases whether for a term of years or in perpetuity for the erection of dwelling-houses or buildings for carrying out manufactures or for gardens or other similar purposes, that such leases were expressly made binding upon a purchaser at a sale for arrears of revenue.

Is it probable, then, that the Legislature would have authorized the grantors themselves or their heirs to treat such leases as invalid if some rent, however nominal, should not be reserved?

It may be convenient if I allude in this place to an argument put forward with reference to the following words in Section 1, Regulation XLIV. of 1793: "Such engagements" (referring to engagements at underrates or reduced rates), "if held valid, would "occasion a permanent diminution of the re-"sources of Government arising from the "lands, in the event of the rent or revenue "reserved by such proprietors being in-"sufficient for the discharge of the amount "of the public demand upon their estates."

It was contended that it was the intention of Government to compel the zemindars, after the Permanent Settlement, to continue to collect the Government's portion of the produce of each beegah of land in order that they and their heirs might be in a condition to discharge the revenue, and that the aristocracy which the Government had created might be maintained, or, to use the words of Mr. Justice Trevor: "That prevention was considered better than cure;" that the Government might not wish to sell for arrears, or that the arrears might not be realized by the sale.

I find no such intention declared or even implied in the preamble of Regulation XLIV. or in any other part of the Code. It appears to me to rest merely in imagination. The security and resources of Government would doubtless have been diminished, if grants for long terms or in perpetuity made after a permanent settlement at nominal or inadequate rents had been allowed to stand good as against a purchaser in the event of a sale for arrears of revenue.

The mischief contemplated, as regards the injury likely to be done to heirs by improvident grants made by their ancestors, was provided against by Section 2, which rendered void all grants of leases or pottahs for a term exceeding 10 years. The mischief as regarded the diminution of the security and

the resources of Government was provided against by Section 5, which declared that all grants, except those included in Sections 7 and 8, should stand cancelled in the event of a sale for arrears of revenue.

In considering the question whether the words "exempt from the payment of revenue" in Section 10, Regulation XIX of 1793, were intended to apply to leases or grants made by zemindars or other proprietors after a permanent settlement to hold free from the payment of rent to them or their heirs, it is important to remark that by Section 14, Regulation XLI. of 1793, it was enacted that, in framing the Regulations, the same descriptions and terms were to be applied to the same descriptions of things, in order that rights, property, and all persons and things might be uniformly described throughout the whole of the Code; that in Regulation XIX. of 1793 "revenue" and "rent" are used as designating two distinct things; and that in that Regulation the words "grants to hold land exempt from the payment of revenue" were substituted for the words "rent-free," which were used in the Regulation of the 1st December 1790.

The following propositions are, I think, clear as regards permanently-settled estates:—

1st.—That the only revenue payable to Government for an estate is that which the zemindar has engaged to pay to Government.

2nd.—That the zemindars are proprietors of the soil. (Regulation II. of 1793, Section 1)

3rd.—That, as such, they are entitled to the rents of the lands included in their estates and to distrain for such rents. (Regulation XIX. of 1793, and XVII. of 1793, Sections 1 and 2.)

4th.—That such rents, being the property of the zemindars, and not the property of Government, are not Government revenue, and cannot be alienated by Government, and that the zemindars are not bound to account for or pay over to Government any portion of their rents.

It seems to follow—

1st.—That, after a permanent settlement, a grant by a zemindar to hold lands "rent-free" is not a grant to hold free from the payment of revenue.

2nd.—That such a grant is void as against a purchaser at a sale for arrears of revenue; but that, as long as the revenue is paid, it cannot be treated by Government as a nullity as affecting their interests injuriously.

3rd.—That a rent-free grant cannot be treated as a nullity by the grantor or his heirs or by any person claiming through him.

I will now proceed to consider the authorities bearing on the question before us.

It was said by Mr. Justice Campbell that "there are very few cases on the subject, because no one ever thought of any other construction than that Section 10 applies to rent-free grants made by a zemindar after a permanent settlement." I find no tradition to that effect in any reported case, or in any history of the Permanent Settlement. The assertion is not borne out by any treatise or by the declarations or arguments of any of the Judges or pleaders who were concerned in any of the cases in which the question arose.

The earliest case which I have been able to find upon the subject was directly opposed to that construction, and I see no reason to think that the Judges who decided it were wanting in experience. The case to which I refer is that of Paramanick *versus* Odeynaran Mundel, reported in 6 Sudder Dewanny Reports, Select Cases, p. 281.

That case, which was cited in argument before us, was decided in the year 1840, more than a quarter of a century nearer than the present time to the date of the enactment upon which we are now called upon to put a construction, and when the Judges must have had means, at least as good as we have at this day, of knowing what was the general opinion, if there was any upon the subject.

In that case, the plaintiff purchased the rights and interests of one Doorga Dass in a putnee-talook, and sued to recover a tank within that talook. The land in which the tank was made was granted in 1217 B. S., before the putnee was created, to the defendant's father by the zemindar to be *held rent-free.* The Judge gave a decree for the plaintiff upon the ground that no such grant made after the Decennial Settlement could stand, but upon appeal to the Sudder Court the decree was reversed.

Mr. Dick said: "The argument of the Judge as to rent-free grants *after* the Decen-

nial Settlement does not apply. That will be applicable should the rights of the zemindar be sold for arrears of revenue, but can never apply to the case of a purchaser of the mere rights and interests of the putneedar." The other Judge, Mr. Tucker, said: "*The tank has been improperly called lakheraj. It is not lakheraj, for it has not been exempted as such from the general estate for which the zemindar pays revenue to Government.* The zemindar himself gave a rent-free grant of it to the appellant-defendant's father, and subsequently sold the talook in which it is situated in putnee. The respondent has succeeded to the rights of the putnee, but cannot touch the previous grant to the appellant's father."

Here, then, was an express decision not based upon the ground that the land granted was for a tank, nor upon the ground that the water of the tank was rent or revenue. It was decided upon general principles applicable to all rent-free grants made after 1st December 1790 and *after* a permanent settlement.

The rule laid down in that case was followed by that of Hurree Mohun Doss *versus* Pran Kissen Rae, decided in 1847, and reported in the Sudder Decisions for that year, p. 447. In that case it was held that a grant rent-free of land upon which a tank had been dug was good even as against a purchaser for arrears of revenue. If Section 8, Regulation XLIV. of 1793, had required the reservation of a rent, the grant would have been invalid. The decision is an authority that a reservation of rent was not necessary.

The case was decided upon general principles, and, no doubt, was correctly decided. Section 8, Regulation XLIV. of 1793, allows grants to be made for long terms or in perpetuity for "other purposes" of a nature similar to those particularly described therein; and a grant for the digging of a tank was, no doubt, a grant for the purpose within the meaning of Section 8. There was clearly nothing in that Section which rendered a reservation of rent necessary. The only question was whether Section 10, Regulation XIX. of 1793, had the effect of requiring some rent. Leases under Section 8 of Regulation XLIV. of 1793 were expressly exempted from Section 5, and were, therefore, good as against a purchaser for arrears of revenue, unless they were rendered void by Section 10. The Court held that it was not lakheraj under that Section.

In the case of Baboo Modhnarain Singh *versus* Ameeroonnissa Begum, Sudder Decisions for 1852, page 967, the plaintiff claimed to recover certain land which had been granted rent-free by his ancestor. It was contended that the grant was void under Section 10, Regulation XIX. of 1793. But the Court held that *the plaintiff could not repudiate his own act and that of his ancestors.* That was decided upon a well-known general principle that an heir claiming through his ancestors cannot invalidate the grant of his ancestors of property which he claims by descent from them.

In the case No. 1157 of 1854, the plaintiff sued for the resumption and assessment of certain lands granted rent-free for the purpose of digging tanks. The Principal Sudder Ameen dismissed the suit upon the ground that the grants were good under Section 8, Regulation XLIV. of 1793. The Judge reversed the decision, on the ground that the sunnud on which the lakheraj depended was invalid. He held that the grant was void under Section 10, Regulation XIX. of 1793. The Sudder Court held that the decision of the Judge was incorrect; that the case was one between landlord and tenant under Section 8, Regulation XLIV. of 1793, and not under the Resumption Laws; and they remanded the case.

That case was followed by the case No. 336 of 1857, Sudder Decisions, 1858, page 968.

In the face of all these cases, I know not how it can be asserted that no one ever thought of any other construction than that which is contended for. The only case in which I find that such a construction was ever put upon the Section is that of Rajah Modhnarain Singh *versus* Ahmed Ali Khan.

Sudder Decisions, 1855, page 395.

In that case Ahmed Ali Khan was plaintiff. He sued to recover possession of certain lands given to him by Rajah Mitterjeet Singh, the defendant's ancestor, in 1211 Hijree, in exchange for a copy of the Koran, and from which the defendant, Rajah Modhnarain Singh, the heir of Rajah Mitterjeet Singh, had ousted him, claiming a right to do so under the provisions of Section 10. The Principal Súdder Ameen held that the grant of the defendant's ancestor was valid, and that it could not be ignored under Section 10, Regulation XIX. of 1793, and he gave the plaintiff a decree for possession of the land to be held rent-free.

The Additional Judge, on appeal, held that the plaintiff was entitled to possession upon condition of his paying rent for the land, upon the ground that Section 10, Regulation XIX. of 1793, did not sanction the grant of any land made after 1st December 1790 exempt from the payment of revenue.

On appeal, two of the Judges of the Sudder Court, Sir Robert Barlow and Mr. Binny Colvin, held that the grant was void under Section 10, Regulation XIX. of 1793; that the decisions of both the Lower Courts were wrong; *and that defendant was entitled to take possession of the estate*, notwithstanding the plaintiff had been in undisturbed possession under the grant for upwards of 50 years; and they held that the plaintiff was not entitled to either a proprietary right in the land or to a right to possession upon paying rent for it.

Mr. Dick, however, with his usual good strong common sense and earnest desire to do justice, said: "I concur with the Principal Sadder Ameen that the grant is not resumable by the *heirs* of the grantor, and that Section 10, Regulation XIX. of 1793, *does not apply to the case*. The law could not intend to declare that the party who had made the grant could at pleasure resume it, whether given for a valuable consideration or not, or intend to entitle the heirs of such grantor to resume. This would be authorizing such persons to repudiate their own acts and the acts of their ancestors. *Grants of the nature in question, quoad the grantors and their heirs, affect not the public revenue. They affect merely their own rental. The grantor continues himself to pay the revenue, and, if he do not, the estate is sold*; and then the grant becomes null and void. The law, Section 10, Regulation XIX. of 1793, was enacted to prevent alienations prejudicial to the security of the public revenue not to enable the heirs of proprietors (whose ancestors' acts are theirs) to profit by their own wrong. The proprietors and their successors, who were authorized to resume at pleasure, are not those who made the grants or their hereditary successors. An auction-purchaser can annul all grants and alienations. This the law declares. *All bonâ-fide alienations are binding on those who made them and their heirs. This justice requires, and our precedents have decided.*"

By that decision the plaintiff was deprived of lands which he had obtained for a valuable consideration from the defendant's father, and of which he had held possession for 34 years in the lifetime of the father, and 17 in the time of the defendant himself after his father's death.

The plaintiff's pleader, Moonshee Ameer Ali, cited on behalf of his client the case of Paramanick *vs.* Odeynaran Mundel to which I have referred; yet the Judges did not in their judgment refer to that case or give a single reason for holding that Section 10, Regulation XIX. of 1793, was opposed to such alienations, notwithstanding it had been expressly decided 15 years previously in the case to which I have just referred, and which was brought to their notice, that Section 10 did not apply to *rent-free grants made by a zemindar after a decennial or permanent settlement*.

They added "but the power of creating dependent talooks or granting leases *at any rent* is fully accorded," and they referred, in support of that proposition, to Section 6, Regulation XLIV. of 1793, and to Regulations V. and XVIII. of 1812, which do not even use the word "rent."

This case seems to have been the origin of the impression that grants not reserving any rent are void, but that grants which reserve a mere nominal rent are valid and binding. I cannot hold myself bound by such a decision.

The two Judges, in their judgment, referred, in support of their construction of Section 10, to the language of the Sudder Court in the case of Sheikh Shufaetoollah *vs.* Joy Kissen Mookerjee, Sudder Decisions for 1848, page 462; but they appear to have entirely misunderstood the passage.

It is as follows:—

"In the absence, however, of any such "provision as that of Section 10, Regulation "XIX. of 1793, it appears to us that the "Courts of Justice must have held that "grants" (that is grants to hold exempt from the payment of revenue) "made at a period "subsequent to the date of the Permanent "Settlement are null and void. It is a nar-"row and contracted view to suppose that "the Permanent Settlement consists of "nothing more than the obligation on the "part of the zemindar to pay a certain "amount of revenue to the Government. "The Permanent Settlement is a compact by "which the zemindar engages on his part to "pay a fixed amount of revenue to the State, "*and the State, on its part, guarantees to the*

"*zemindar, by means of its judicial and "fiscal administration, the integrity of the "assets from which that revenue is derived, "and which, in fact, constitutes the Govern-"ment's own security for the realization of "its revenue.* The declaration to the ze-"mindars and other proprietors of land that "the jumma assessed upon their lands is fixed "for ever (Section 3, Regulation I, 1793) "carries with it, by necessary implication, a "rule of the nature laid down in Section 10, "Regulation XIX., 1793."

It is clear that the fixing of the revenue for ever could not have been held to have carried with it, by implication, a rule that all grants by a zemindar not reserving rent to himself should be void as against the grantor himself and his heirs; and that he might consequently sell, and then take away from the purchaser, that which he had sold.

The suit in that case was to resume and assess invalid lakheraj lands, not to recover lands which the zemindar or his ancestor had sold. The Court entered fully into the whole case, pointed out the distinction between grants prior and those subsequent to 1st December 1790; and they held that the *nullum tempus* Clause in Section 10 applied to such grants, and that the general provision as to 12 years in Section 14 of the Regulation for the limitation of suits (III. of 1793) did not apply to a suit for resumption of lands held under invalid lakheraj grants.

The meaning of the passage referred to is very clear. It entirely corroborates my view of the case. It is this, that, even without any express declaration, such as that contained in Section 10, grants by unauthorized persons alienating the revenue of an estate would have been void as against Government and all persons who derived title through Government, and that Government guaranteed to the zemindar the integrity of the assets upon the basis of which the Permanent Settlement of their estate was made, and that the zemindars should be entitled to the rents of all lands in respect of which they engaged to pay revenue. It did not mean that the Government guaranteed to the zemindars that they might repudiate their own grants or those of their ancestors.

The dictum in the 2nd Full Bench case upheld the ruling in Rajah Modhnarain's case. Mr. Justice Norman, then Officiating Chief Justice, after referring to the preambles of Regulations XIX. of 1793 and XLIV. of 1793, says: "*Reading those Regulations to-"gether*, it seems to have "been the intention of the "Legislature to treat the "*zemindars as agents or trustees for the "Government, and, as such, bound to collect "the Government share of the produce from "each and every beegah of land within their "zemindaree.*"

See 2 Weekly Reporter, p. 16.

With all deference, this appears to me to be in direct opposition to one of the fundamental principles of the Permanent Settlement, by which the zemindars were for the first time declared to be the proprietors of the lands. If the zemindars were agents or trustees for the Government for collecting its share of the produce, they would have been bound to pay over to Government the collections when made, and they would not have fulfilled their agency or trust by collecting a mere nominal rent for lands of large value.

If they were trustees or agents for Government, and not bound to account for or pay over the collections when made, we have the anomaly of an agent or trustee bound to collect that which he is not liable to pay over, and for which he is not bound to account.

The fact is, as soon as an estate was permanently settled, the Government became entitled to receive the amount which the zemindar agreed to pay as revenue for the estate, and so long as that amount was duly paid the Government had no further interest in the lands or the rents of them. If the revenue fell into arrear, the Government had power to sell the estate free from all leases or incumbrances created by the zemindar.

Mr. Justice Norman proceeds: "They "(that is, the zemindars) are incapacitated "from depriving themselves of the right "and obligation of collecting revenue which "by Regulation XLIV. is declared inalien-"able, *i. e.*, by the zemindar, without the "express sanction of Government; and it "is in accordance with that principle that all "grants by zemindars which exempt the "grantees from liability to pay revenue to "the zemindar are declared null and void "by Section 10, Regulation XIX. of 1793. If, "therefore, the grant now before the Court "is considered simply as a rent-free grant "created by a zemindar since 1790, I should "feel bound to agree with the Court below, "and say that it is null and void."

Here, again, there appears to be a mistake. Regulation XLIV. of 1793 did not declare

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that the Government revenue was inalienable by the zemindars without the express sanction of Government. It merely declared that, according to the ancient and established usages of the country, the dues of Government from the lands were inalienable without the express sanction of Government, unless Government has transferred its right thereto to an individual for a term or in perpetuity, *or fixed the public demand upon the whole estate, &c.* The ancient law, as I shall presently show, was subject to the exception expressed by the words "unless," &c., above referred to

The rule laid down in the 2nd Full Bench case is not even confined to leases and grants of dependent talooks: it extends to grants in fee simple or to what may more properly be called grants of the whole proprietary right in any part of an estate.

Mr. Justice Trevor says:—

"This instrument is a grant in fee simple "of *22 beegahs of the grantor's revenue-* "*paying estate, to the grantee to be held* "*by him free of revenue for ever, and the* "*case can in no way be construed as a* "*lease, for there is no annual return or* "*rent made by the grantee as tenant either* "*in money, labor, or kind.* The condition "in the grant, if condition it can be called, "is only a condition subsequent, and there "is no contention on the part of the grantor "that the grant is liable to be defeated in "consequence of a breach of this condition. "*It is simply contended that the grant is of a* "*nature contrary to the public policy, and* "*one that by Statute has been declared null* "*and void. Had it been a lease, however* "*small the rent reserved, it would have been* "*legal under the terms of Section 8, Regula-* "*tion XLIV. of 1793, but as it is a grant* "*involving that which the zemindar had no* "*power to grant, viz., the Government por-* "*tion of the produce of the land, granted in* "*perpetuity, it is altogether, it seems to me,* "*illegal and contrary to the policy of the law* "*as laid down in the Regulations.*"

He then refers to the recital in Regulation XIX. of 1793 as declaratory of what the common law of the country was, and says: "Section 10 of that Regulation, in *further-* "*ance of this view of the common law of the* "*country, declares that all grants for hold-* "*ing lands exempt from the payment of* "*revenue made by a zemindar since the 1st* "*December 1790 are null and void;* and "that no length of possession shall be "considered to give validity to any such "grant, either with regard to the property in "the soil, or the rents of it."

Although Mr. Justice Trevor speaks of the grant as a grant to hold *revenue*-free, it was in its terms, and as I consider in substance and reality, merely a grant to hold free from the payment of rent to the zemindar or his heirs.

There is a slight difference in the terms of the grant as stated by the Officiating Chief Justice, and as stated by Mr. Justice Trevor. That possibly arose from the translation.

It was in substance a grant of *land to the grantee and his heirs for ever* for digging a tank for the benefit of the villagers. The concluding words of the grant, as stated by the Officiating Chief Justice, are: "*You will dig a tank in this land, and make a reservoir of water;* we shall have no right in the land. Being vested with the right therein, and bringing it under your possession and seisin, you will continue to distribute water. You will stock the tank with fish, plant on the raised and low banks thereof mangoe-trees, &c., *and enjoy the same down to your son's son, and so on in succession; no rent shall have to be paid for the land. Should we or any of our heirs ever prefer any claim to this, the claim will be void.*"

In Mr. Justice Trevor's statement of the sunnud, it appears that the land granted was a piece of marshy ground for which no rent was paid at the time of the grant. The grantor declared that, after the grant, *he would have no right to the land, and that the grantee and his heirs should hold possession in his own right from generation to generation, and then it is said no rent for the land will be charged, &c.*

The grant, therefore, appears to have been a grant, as Mr. Justice Trevor calls it, *in fee simple*, or, more properly, to use the words of the Regulations when speaking of lands in the mofussil, to which the English law does not apply, a grant of the whole of the zemindar's proprietary rights in that part of his estate, without reserving any reversion or any rent or condition. In short, the grantor parted absolutely with all his interest in the land which was the subject of the grant.

I should have thought it clear that Section 10 had nothing to do with such a grant; that the grant was not within the spirit of the law; and, most certainly, that it was not within the letter of it.

Mr. Justice Trevor, however, treats the grant as within the letter as well as the spirit. He says: "It may be said that the "grant in this case, *though against the "letter, is not against the spirit of Section "10,* which prohibits only improvident "grants," &c. It was certainly to my mind not within either the letter or spirit of the law.

He then quotes the words of Mr. Dick in Rajah Modhnarain's case: "Grants of the "nature in question *quoad* the grantors and "their heirs affect not the public revenue. "They affect merely their own rental. The "grantor continues himself to pay the re-"venue, and, if he do not, the estate is sold, "and then the grant becomes null and "void;" and he proceeds thus: "*This is, "no doubt, in the main true;* and at the De-"cennial Settlement the Legislature might, "had it chosen, have relied on the *sale-law "to remedy any improvident act done by "the zemindars, and restore estates to their "original estate. But it considered preven-"tion better than cure, and, with the former "object, keeping in view the common law of "the country and the probable improvidence "and weakness of the zemindars it had "then created,* it enacted Regulation XIX. "of 1793, and thereby declared that all "grants of the nature of that before us are "null and void, and that no lapse of time "shall cure them. It follows that, as they "are null and void in their inception, they "can be resumed even by the grantor or his "heirs at pleasure."

If this view of the law were correct, there would have been no necessity to pass Regulation XLIV. of 1793. But Regulation XIX. of 1793 had nothing to do with the improvidence of the zemindars.

It was passed, as shown by its title and preamble, with reference to alienations of the revenue payable to Government. On the other hand, Regulation XLIV. of 1793 had nothing to do with alienations of the public revenue, but had reference only to grants of leases or dependent talooks by the zemindars.

It is beyond doubt that Regulation XLIV. of 1793 had no reference to grants in fee simple, as they are called by Mr. Justice Trevor, or grants which passed the whole proprietary rights of a zemindar in the whole or in any particular portion of his estate. Such grants were expressly provided for by Regulation I. of 1793, Sections 9 and 10.

The whole Code of 1793 was passed on the same day, the 1st May 1793. All the Regulations must be studied together and read as a whole. It is not safe or proper to take one enactment here and another enactment there, and to interpret them without reference to the whole Code. But it is not because the Code must be taken and studied as one entire system that the preamble of one Regulation of the Code is to be read as explanatory of the meaning and intention of a Section in another Regulation. This is what was done in substance by one or more of the Judges in the 2nd Full Bench decision. They construed Section 10 of Regulation XIX. of 1793 with reference to the preamble of Regulation XLIV. of 1793, and not with reference to its own preamble. Such a mode of construing Regulation XIX. is not only at variance with every sound principle of construction, but is in direct opposition to the rule laid down in Regulation XLI. of 1793, which enacted, amongst other things, that every Regulation should have a title expressing the subject of it, and also a preamble stating the reasons for enacting it, in order that individuals might be able to make themselves acquainted with the laws, and that Courts of Justice might be able to apply the Regulations according to their true intent and import (*see* the preamble and Sections 4 and 5, Regulation XLI. of 1793).

Regulation XIX. of 1793 and Regulation XLIV. of 1793, and every one of the 48 Regulations which were passed on the same day, had its own separate title and preamble.

When Regulation XIX. of 1793 and Regulation XLIV. of 1793 each had its own title expressing the subject of it, and a preamble stating the reasons for enacting it, as required by Regulation XLI. of 1793, Sections 4 and 5, it is only reasonable to suppose that those Regulations respectively contained all the provisions which the Legislature deemed necessary with reference to the particular subjects treated of in their respective titles and preambles. Yet the preamble of Regulation XLIV., which alone speaks of the contemplated improvidence of the zemindars and of the necessity of protecting their heirs against it, is taken to explain the meaning of Section 10, Regulation XIX., which was passed to *facilitate the recovery of the public dues from lands held exempted from the payment of revenue to Government under invalid grants, as*

well as to prevent similar alienations from being thereafter made to the prejudice of the security of the public revenue.

If the Legislature intended to prevent zemindars from granting dependent talooks or leases at inadequate rents, and to allow them to treat their own grants as nullities, if they did not reserve at least a nominal rent, I should have imagined that, independently of the rules laid down in Regulation XLI. of 1793, common fairness with regard to those who were to be bound by the law, and who had to regulate their dealings according to its provisions, would have induced the Legislature to express that intention in clear and unambiguous language, especially when any violation of the law was to be attended with such serious consequences to unsuspecting purchasers, and I should have expected to find that language in Regulation XLIV., and not in Regulation XIX. of 1793, which related to an entirely different subject.

The zemindars, and those who purchased from them, had clear and express notice by Regulation XLIV. that, with certain exceptions, no grants by zemindars of dependent talooks or leases for periods exceeding 10 years would be valid; and no grant by a zemindar of any part of his estate, whether on a term exceeding 10 years or not, would be binding on a purchaser at a sale for arrears of revenue. Having that notice, it was for them to regulate their dealings accordingly.

But who, without the light of modern construction, could, on reading Regulation XLIV. of 1793, have imagined that there was a Section in another Regulation, XIX. of 1793, passed with an entirely different object, which rendered a purchaser of a rent-free lease or dependent talook, or even of an estate in fee simple, liable to be treated as a trespasser by the vendor or his heirs, and turned out of possession after any length of possession under his purchase?

Mr. Justice Trevor, in the 2nd Full Bench, after showing that the grant was an alienation of part of a revenue-paying estate, goes on to say: "Alienations after "the 1st December were *ipso facto* null and "void; they were unauthorized alienations by "the zemindar *of the Government portion of* "*the produce, as well as alienations of his* "*own share, and were opposed to the com-* "*mon law of the country, by which a portion* "*of the produce of every beegah of land* "*belonged to Government. As, moreover,* "*the Government demand on estates had* "*become fixed in perpetuity, it became of* "*the greatest moment to prevent, as far as* "*possible, the decrease of the security of* "*the revenue—and hence the power which* "*was given to the zemindars, enabling them* "*at once, without recourse to the Courts,* "*to dispossess the grantee and assess the* "*rents after any lapse of time. The* "*grantee, in short, was considered as a* "*trespasser, who had and could have no* "*rights in the eye of the law.* It follows "that Regulation XIX. of 1793 placed the "possessors of grants subsequent to December 1790 in a very different position from "that which they held before the passing of "that Act."

In the same case, Mr. Justice Loch also seems to have considered that upon the Permanent Settlement the zemindars continued to collect as revenue the Government's share of the produce, and he also relied upon the ancient common law of the country. He says: "It has been asked why, if a zemindar is "able, as unquestionably he is by law, to "alienate any part of his estate by sale or "gift, he should be unable to create a rent-"free tenure. That, as he can give a per-"petual lease at a quit-rent, there can be no "good reason why he should not be able to "forego his rent altogether, for, if a rent-free "grant be said to be injurious to the estate, "a perpetual lease on a quit-rent, which the "law allows him to make, might be equally "injurious.

"The reason why such rent-free grants "cannot be made is that they are entirely "opposed to the theory of the Permanent "Settlement; and it is very remarkable how "guarded the law has been on the subject; "for, while it allows the zemindar to give a "lease in perpetuity, it never sanctions such "an alienation as a lakheraj or rent-free "grant; and the reason is obvious when the "principle of the Permanent Settlement is "considered, which is clearly laid down in "the preamble of Regulation XIX. of 1793." After reading that preamble, he says: "It is "obvious that, if a zemindar grants lands to "any one free of rent, he not only *alienates* "*that portion of the assessment on each* "*beegah of the land which the law permits* "*him to appropriate, but he also gives up* "*that portion which is the Government* "*revenue, and thereby does a serious injury* "*to the assets of the estate. He relin-* "*quishes the quota of the revenue with* "*which each beegah of a permanently-set-* "*tled estate was charged at the time of the*

"*settlement*, and it is no answer to say that "the whole estate is liable for the revenue, "for it is not only that the integral estate "is liable for the whole revenue assessed "upon it, *but each beegah of land is respon-* "*sible for its own quota of that revenue.*" In another part of his judgment, he says: "The reason why such rent-free grants can- "not be made is that they are entirely "opposed to the theory of the Permanent "Settlement."

The argument that after a Permanent Settlement the zemindars, when they collected the rents of their estate, were collecting the Government's share of the produce of each beegah, as well as their own, appears to me to be founded upon a fiction and based upon an erroneous view of the object and intent of the Permanent Settlement. In my opinion, it is a mistake to suppose that, after a Permanent Settlement, the Government continued to be entitled to a share of the produce of every beegah of land in the settled estate in addition to the amount which the zemindar engaged to pay as revenue. It is an error to suppose that the Government was, according to the ancient law, entitled under all circumstances, and without any exception, to a certain proportion of the produce of every beegah of land in cultivation.

In stating what the ancient law was, the Legislature very clearly pointed out that it was subject to an exception.

The law is defined as follows: "By the "ancient law of the country, the ruling "power is entitled to a certain proportion of "the produce of every beegah of land de- "mandable in money or kind according to "local custom."

The exception is pointed out in the following words: "*Unless it transfers its right* "*thereto for a term or in perpetuity, or* "*limits the public demand upon the whole* "*of the lands belonging to an individual,* "*leaving him to appropriate to his own use* "*the difference between the value of such* "*proportion of the produce and the sum* "*payable to the public, so long as he conti-* "*nues to discharge the latter.*"

In construing the Regulations we must take the law as it was defined by the Legislature with reference to the enactments which they founded upon it; and when they introduced into that definition an exception in the case of a transfer in perpetuity, or of the limitation of the public demand upon the whole of the lands of an individual, we must understand them to mean that, as soon as such a transfer should be made, or the public demand upon an individual should be limited in perpetuity under the operation of the laws which they were then enacting, the Government would cease to be entitled to the proportion of the produce of every beegah to which they would have had a right under the ancient law of the country.

When a zemindar entered into a *temporary* engagement to pay a certain sum as revenue for the whole of an estate which belonged to him, and the Government limited the public demand upon the whole of the lands in that estate to the sum which the zemindar agreed to pay as revenue, the Government, according to the law as defined in the Regulation, ceased during the term of the settlement to be entitled to a proportion of the produce of every beegah of land in the estate. The public demand upon the whole of the lands in the settled estate was limited to the sum which the zemindar engaged to pay as revenue, and he was left to appropriate to his own use *the difference between the value of that proportion of the produce* to which the Government would have been entitled if the settlement had not been made, and the sum payable by the zemindar as revenue under his engagement. In short, so long as he continued to pay the sum which he engaged to pay as revenue, he was to be at liberty, during the period for which the settlement was made, to appropriate to his own use the whole of the assets or rents of the estate, and, in so doing, to appropriate to his own use the difference between the *value* of the Government's proportion of the produce, that is, the rents payable to the occupiers, and the amount which, at the time of the settlement, he engaged to pay as revenue.

It seems to be a forced construction to hold that the Government continued entitled to its own proportion of the produce, or any part of it, when the zemindars were expressly authorized to appropriate to their own use the whole difference between the value of such proportion and the revenue which they agreed to pay permanently in lieu of it.

The revenue-settlement seems to have been treated, so long as it continued, as a composition entered into by the zemindars for the revenue of the estate; and when the term for which the settlement, if temporary, was made expired, the Government again became entitled to its proportion of the produce of each beegah of land in cultivation, of which an estimate was made before a fresh settlement was entered into.

That was the case under the old law, and then the zemindars were not entitled to enter into any engagements with their dependent talookdars, under-farmers, or ryots for any period beyond the term of their own engagement with the Government (Regulation XLIV. of 1793, Section 1).

When, however, a permanent settlement was entered into, the Government ceased to be entitled to anything beyond the amount which the zemindars contracted to pay as revenue, and the zemindars, according to a solemn declaration, became the proprietors of the lands. The property in the soil was vested in them, and they were at liberty "to transfer by sale, gift, or otherwise their proprietary rights in the whole or any portion of their respective estates" (Regulation I. of 1793, Section 9), and to let their lands in whatever manner they might think proper subject to the restrictions in Regulation VIII. of 1793 (*see* Section 52 of that Regulation). They were also authorized to grant dependent talooks (*see* Section 6 of Regulation XLIV. of 1793), and to distrain for the rents due from their tenants (Regulation XVII. of 1793, Section 2). They were, however, expressly restrained at the time from granting leases or talooks for any period exceeding 10 years, except for the purposes mentioned in Section 8, Regulation XLIV. of 1793, for which they were allowed to make grants in perpetuity; and all leases and grants with a few exceptions, such as those made for the purposes mentioned in Section 8, Regulation XLIV. of 1793, were, in the event of a sale for arrears of revenue, to stand cancelled from the day of sale.

Section 6 of Regulation VIII. of 1793 and Section 2 of Regulation XVII. of 1793 show very clearly that the Legislature did not consider that the zemindars, after a permanent settlement, when collecting the rents of their estates, would be collecting public revenue from their dependent talookdars, farmers, and ryots, or that such talookdars, farmers, and ryots, would be paying to Government through the zemindars the share of the produce to which, under the ancient law, the Government would have been entitled if a settlement had not been made; for what was the use of declaring that the talookdars specified in Section 6, Regulation VIII. of 1793, *viz.*, those who, by virtue of an express stipulation in their sunnuds or title-deeds, then paid their revenue through the zemindar *should continue to pay their revenue through him*, if it was contemplated or intended at that time that every dependent talookdar or ryot or occupier of land who should pay rent to the zemindar should be deemed to be paying to Government through the zemindar the Government's share of the produce of the land.

Moreover, the kists or instalments of revenue payable by the zemindar to Government were not necessarily due at the same time, as the instalments of rent payable to them. By Section 64, Regulation VIII. of 1793, which was passed for the benefit of the under-farmers and ryots, the zemindars were required to adjust the instalments *of the rents receivable by them from their under-renters and ryots according to the time of their reaping and selling the produce.*

In the present case, the grantor in some of the grants was not a zemindar, but a mokurrureedar; and the question is whether his heir can resume lands granted by him rent-free, though he pays rent to the zemindar, and the zemindar pays revenue to Government.

It follows from what I have already stated that, in my opinion, the heir cannot resume the lands.

If a grant rent-free by a zemindar who pays revenue to Government is not a grant to hold exempt from the payment of revenue, it follows that a grant made by a tenant of the zemindar to an under-tenant rent-free would not be a grant to hold exempt from the payment of revenue. But some of my late honorable colleagues have expressed an opinion that rent-free grants by mokurrureedars, as well as rent-free grants by zemindars, are grants to hold exempt from the payment of revenue.

Upon this subject Mr. Justice Trevor says: "The plaintiff in this case is a mourosee ijar-"dar, or a person who holds the estate in "farm of the proprietor. He is, therefore, "under Section 10 of Regulation XIX. of "1793, authorized and required to collect the "rent for the lands at the rate of the Per-"gunnah, and to dispossess the grantee" (that is the grantee who purchased from his ancestor) "of the proprietary right in the "land," &c.

Mr. Justice Campbell also says: "The "word revenue being in my view used in "the sense of the *kheraj payable by the* "*ryot or cultivator*, it seems to me to be "quite immaterial whether the plaintiff is

"the zemindar or the assignee of the ze-
"mindar of the 1st, 2nd, 3rd, or 10th degree
"of sub-infeudation. The suit may, I con-
"sider, be maintained by any person en-
"titled to receive the khiraj."

But, if there are sub-infeudations, as they are called, or rather 10 dependent talooks or leases intervening between the zemindar and the cultivator, each of the talookdars collects rent from the holder of the tenure next below him, and it is only the last who receives rent or a share of the produce of the soil from the actual cultivator.

The mere argument that the rents payable by each of the various under-tenants to the landholders under whom they respectively hold is revenue seems to me to be a strong argument against the correctness of the doctrine that, after a permanent settlement, all rent is revenue within the meaning of Section 10, Regulation XIX. of 1793.

In Rajah Modhnarain's case it was held that the grantor could treat the grantee as a trespasser, and turn him out of possession, and the Sudder Court went to the extent of reversing the decision of the Zillah Judge, because he held that the grantee to whom the rent-free grant was made was entitled to retain possession of the lands upon condition of his paying rent for them at the pergunnah rate.

In the Full Bench case of Sonatun Ghose *versus* Abdool Furrar, 2 Weekly Reporter, Civil Rulings, 92, Mr. Justice Trevor says: "The grantee, in short, was considered a "trespasser, who could have no rights in "the eye of the law."

Mr. Justice Norman, then officiating as Chief Justice, says: "Section 10 of Regula-
"tion XIX. of 1793 authorized the zemin-
"dars to resume, or in other words to retake,
"possession without a suit."

Mr. Justice Shumbhoonath Pundit says: "The law could not provide rules for any-
"thing less than the power it had given,
"*viz.*, that of ousting the lakherajdar, and
"so no provision was made for any other
"limited mode of exercising that power,
"which the landlord may find it expedient
"to adopt."

It was, however, held by the Judicial Committee that a purchaser at a sale for arrears of revenue could not, under Section 5, Regulation XLIV. of 1793, treat a talookdar as a trespasser, and turn him out of possession, but that he could only recover the same rents from him as the former proprietor could have done, if the grant had not been made.

If the decision of the Sudder Court in Rajah Modhnarain's case and the principles laid down in the 2nd Full Bench case and in the case of Sonatun Ghose and others *versus* Abdool Furrar are correct, that the grantor of a rent-free tenure and his heirs can, under Section 10 of Regulation XIX. of 1793, treat the grantee as a trespasser, and turn him out of possession, the grantor and his heirs will have a greater power as against a purchaser of lands for which no rent is reserved, than a purchaser for arrears of revenue would have under Section 5, Regulation XLIV. of 1793.

It appears to me to be a great anomaly that a grantor should have a greater power against the grantee to whom he has sold lands rent-free than a purchaser at a sale for arrears of revenue, who claims through the Government adversely to the grantor.

It is a general principle of law that a man shall not avoid his own grant, and another that an heir is bound by the acts of his ancestor in respect of lands which he inherits from him.

Those principles are founded upon justice and common sense, for law is intended to suppress fraud, not to encourage it.

In the case to which I have just referred, Ranee Shurnomoye *versus* Rajah Suttis Chunder in the Privy Council, reported in 10 Moore's Indian Appeals 123, and also in 2 Weekly Reporter, Privy Council cases, 13, the rule by which a Bishop was not allowed to invalidate his own grant under the disabling Statute, 1 Eliza., Cap. 19, was referred to for the purpose of illustrating a general principle of construction. The rule did not directly govern the case before the Privy Council, for the question there was whether a purchaser for arrears of revenue, having a right to treat a zemindar's engagement with a dependent talookdar as cancelled under the provisions of Section 5, Regulation VIII. of 1793, could treat the talookdar as a trespasser, and turn him out of possession, or merely enhance his rent to a fair rate. There was no doubt as to whether the auction-purchaser could treat the engagement under which the talookdar held as cancelled.

But the principle referred to in the case in the Privy Council is peculiarly applicable to the present case, in which the question is,

whether a zemindar can treat his own grant void, or whether an heir can avoid a grant made by his ancestor.

The following remarks of Lord Justice Turner, in delivering the opinion of the Judicial Committee, are so pertinent to the present case that I need not offer any apology for quoting them: "English lawyers "are familiar with the principle of construc-"tion applied as early as the time of Lord "Coke (see 1st Inst. 45) to the disabling "Statute of 1st Eliza., Cap. 19, Section 5, and "in several modern reported cases between "landlord and tenant on clauses of forfei-"ture in leases. Words which make a "Bishop's grant 'utterly void and of none "effect to all intents, constructions, and "purposes,' have been held not to prevent "the grant from being good and binding on "the grantor, and in some cases confirmable "by the successor; and so a proviso in a "lease that it *should be void altogether* in "case the tenant should neglect to do a "certain act has been held only to make it "voidable at the option of the landlord. "Their Lordships do not cite these as author-"ities governing this case, but mention "them only as illustrating a general prin-"ciple of construction which for its justice, "reasonableness, and convenience, must be "considered of universal application. In the "present case, the object of the Government "was that the jumma should be duly paid, "and that the means of paying it should not "be withdrawn by the improvident grants "of the zemindars who had made default, "but cases of default might often arise "where no improvident grant had been "made, where the talookdars and the ryots "held at proper rents, and the default was "owing to extravagance, mismanagement, "or other causes—in such cases the Go-"vernment cannot be supposed to have in-"tended a wanton and unjust disturbance of "vested interests."

It is to be observed that the principles laid down in the 2nd Full Bench case apply, not only to rent-free grants of dependent talooks and leases, but also to grants by a zemindar of his whole proprietary rights in a portion of an estate. This, if possible, carries the doctrine to a more dangerous extent than if it were confined to leases and independent talooks.

Mr. Justice Trevor says: "This instru-"ment is a grant *in fee simple of 22 beegahs* "*of the grantor's revenue-paying estate* to "the grantee to be held by him free of "revenue for ever; and it can in no way "be construed as a lease, for *there is no* "*annual return of rent made by the grantee* "*as tenant, either in labor, money, or kind,*" &c. "Had it been a lease, however small "the rent reserved, it would have been legal "under the terms of Section 8 of Regulation "XLIV. of 1793; but, as it is a grant in-"volving that which the zemindar had not "the power to grant, *viz.*, the Government "portion of the produce of the land granted "in perpetuity, it is altogether, as it seems "to me, illegal and contrary to the policy "of the law as laid down in Regulation "XIX. of 1793."

The grant, no doubt, conveyed all the grantor's interest in the estate to the grantee and his heirs for ever, and is, what we should call in English Law, a grant in fee simple, and what I should call in the words of Section 9 of Regulation I. of 1793, a grant of the zemindar's proprietary rights in a portion of his estate. It matters not whether the grant was for a large or a small portion of the estate, for half the zemindaree, or for the whole or part of a village or mehal. The zemindar retained no right or interest, reversionary or otherwise, in the land granted, and he reserved no rent for it. Mr. Justice Trevor treats it as a grant in fee simple without any reservation of rent. Such a grant conveys all the proprietor's rights in the land.

If the grant of the 22 beegahs of land for a tank rent-free was a grant of the Government's portion of the produce of the land granted, and, therefore, void, and the grantee was a trespasser because the grant *did not reserve a rent*, a similar grant by a zemindar of the greater part of his zemindaree or of a whole village or mehal to a man and his heirs for ever, without reserving a rent, would be void, and the grantee might be treated as a trespasser, and turned out of possession even though he might have paid a large sum as purchase-money for the grant.

A grant in fee simple or a grant of a zemindar's proprietary rights in a particular part of his zemindaree or in a particular village or mehal to a purchaser and his heirs for ever does not usually reserve a rent or condition.

A mortgage by a zemindar of his whole proprietary rights in a portion of his estate by conditional sale would not reserve a rent. When foreclosed, the conditional sale becomes absolute, but still it has only the effect of an absolute grant or transfer by

the zemindar of his proprietary rights in a portion of his estate without any reservation of rent.

Sections 9 and 10, Regulation I. of 1793, provide that the grantee in such a case is entitled to have the revenue apportioned, and to hold the lands included in his grant as a separate estate subject to only that portion of the revenue which may be assessed upon it under the provisions of Section 10. But if the grant is void under Section 10, Regulation XIX. of 1793, because no rent is reserved, the zemindar or his heirs may intercept the grantee, and, before he can obtain a butwarra, or get the portion of the estate which has been conveyed to him converted into a separate estate, may treat him as a trespasser, and turn him out of possession, and resume the lands which he or his ancestor had sold.

Besides, if the grant, as held by Mr. Justice Trevor, is null and void under Section 10, Regulation XIX. of 1793, the Government officers could not legally give effect to it by carrying out the provisions of Section 10, Regulation I. of 1793, in respect of the lands included in it. It is clear that the Legislature never contemplated that such grants would be void if made rent-free. There could be no reason why a man, who purchases the whole interest or proprietary right in a particular mehal or other portion of an estate, or obtains a grant, as Mr. Justice Trevor calls it, in fee simple, should pay rept to the zemindar as well as his portion of the Government revenue to be assessed upon the lands conveyed to him.

If that part of the zemindaree which is sold to him is liable to have its own portion of the revenue assessed, what necessity can there be for any reservation of rent to the zemindar, who parts with all his interest in it? There cannot be any greater necessity for the reservation of rent to a zemindar who sells all his proprietary rights in one-half of his zemindaree, than there is for a reservation of rent by a zemindar who sells his whole interest.

Regulation XLIV. of 1793 does not apply to grants of proprietary rights, but only to dependent talooks and leases. It has no reference to grants in "fee simple," or, as they may be more properly designated in the Mofussil, grants of the whole of a zemindar's rights and interests in a part of his estate.

No one will, I think, after reflection and a careful consideration of Regulation I. of 1793, Sections 9 and 10, hold that suc grants are void under Section 10, Regulatio XIX. of 1793, if no rent is reserved to th grantor.

It is clear that Clause 3, Section 10, Regu lation I. of 1793, which has been referred t by Mr. Justice Norman, does not require rent to be reserved to the zemindar upo the grant of his proprietary rights in th whole or in a portion of his estate. It merel contains directions as to the apportionmen of the Government revenue, when an estat is divided into two or more distinct portions The Section has nothing to do with the re servation of rent upon the grant of a depend ent talook or lease which, by the expres terms of Clause 10, Regulation I. of 1793 Art. IX., is excluded from the provisions o that Clause.

Another theory, as regards the effect o Section 10, Regulation XIX. of 1793, ha been propounded.

Mr. Justice Norman says: "If the ze-"mindarees could have been immediately spli "up and subdivided, and large portions o "them disannexed from the parent estates by "rent-free grants without notice to the "Government, the security of the Govern-"ment revenue would have been enormously "imperilled. It may be said that, if the "zemindar made default, the whole estate "might be sold, and the grantees of the "zemindar would have no title as against "the auction-purchaser. If such grants "had been permitted, it is by no means clear "that zemindarees, if sold, would have real-"ized prices sufficient to cover arrears. "There would have been great risk th "the boundaries of zemindarees would ha "become confounded, and that, in almo "every case, a purchaser at a sale for arrea "of revenue would buy little more than a cro "of law-suits."

But a grant of a dependent talook or leas whether a rent is reserved or not, does n disannex the lands included in it from th parent estate. The lands still remain a pa of the estate liable for the revenue reserve for the estate, and to be sold with the r mainder of the estate for any arrears of suc revenue, and, when sold, the lease or taloo stood cancelled by virtue of Section 5 o Regulation XLIV. of 1793. I cannot se what interest the Government could have i compelling the zemindar to reserve a rent or how, if they had such an interest, it coul be protected by compelling the reservatio of a mere nominal rent.

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As to the risk of confounding the boundaries of the zemindarees, I am at a loss to understand how the reservation of a nominal, or even of a substantial, rent would prevent such risk. Even if it would have done so, surely some better contrivance than that of encouraging fraud, and allowing the grantor or his heirs to commit the injustice of repudiating his own grant, might have been devised for that purpose.

It has been said by one of my honorable colleagues that "we are bound to administer "the policy of the law if we can discover "it," and he arrives at the conclusion that the whole policy of our revenue-legislation is against the creation of rent-free grants.

With all respect for that opinion, the doctrine of administering the policy of a law appears to me one of the most dangerous that I ever heard propounded as a rule of construction.

We are bound to administer the law as we find it laid down, and not what we may imagine to have been the policy of the law-makers. We ought not to deprive a man of lands which he has purchased, and of which he and his ancestors have been in undisturbed possession for nearly half a century by administering the policy of a law, or of a system of legislation which is not expressed by the law-makers.

The policy of our revenue-legislation is to secure the revenue. I trust that it is not to be carried out without regard to justice.

Who is to be the judge of what grants are, and what are not, against the policy of our revenue-legislation?

Is it to depend upon the opinion of each individual judge, or only upon the declared intentions of the Legislature?

2 Weekly Reporter, Civil Rulings, page 22.

It was admitted by one of the learned Judges, who delivered judgment in the 2nd Full Bench case in 1865, that it might appear unjust and inequitable that any person should have a right to take advantage of his own wrong, and that grants made for consideration should be resumable by the party making them. But he added: "*Perhaps the policy "which dictated the law preferred to protect the rights of the Government without any regard to the hardship or injustice "noticed above.*"

What man's property will be safe if such rules of construction be adopted?

Who is to decide whether it is against the policy of the Revenue Laws to allow a man for a valuable consideration to grant a lease at a nominal rent, and to repudiate all leases or grants which he himself has made if they are rent-free. Upon this point, various opinions are entertained by different Judges. For my own part, I hold that it was not against the policy of the Revenue Laws or of the Permanent Settlement to allow a zemindar to avoid his own or his ancestors' rent-free grants. If the Legislature has declared that all rent-free grants are void, we must administer the law as we find it, however much we may reject it, and disapprove of the policy.

But the real question is whether, when the Legislature used the word "revenue," they meant "rent," or meant only that which they expressed.

Mr. Loch in his judgment in the 2nd Full Bench case says:—

"The preamble (of Regulation XIX. of "1793) clearly lays down the principle "upon which the revenue was assessed— "what part of that *revenue* was to be "considered *as rent (viz., the difference "between the assets of an estate, and such "portion of them as Government might "think fit to appropriate)*; and it distinctly "repudiates the zemindars' rights to make "a grant exempt from the payment of re-"venue, such revenue necessarily comprising rent." (2 Weekly Reporter, Civil Rulings, page 20.)

The argument fails to prove to my mind that that portion of the assets of an estate which Government does not appropriate, and for which the zemindar was not bound to account, is revenue.

The argument is that the Regulation shows what part of the revenue was to be considered rent. The conclusion is that the part which was to be considered rent was intended to be included by the Legislature when they used the word revenue.

If the Regulation shows what part of the assets is to be considered as rent, and what part as revenue, why are we to hold that the Legislature intended to include in the word revenue that which they intended to be considered as rent? Is it not more reasonable to suppose that the Legislature intended by the word revenue that part which was not rent, especially when in the same

Code they use the word rent as something distinct from revenue? Mr. Justice Loch admits that the zemindar may remit his share of the rent, but he says he has "no "authority to *remit any portion of the re-* "*venue;* and, therefore, that a perpetual "lease or a quit-rent which does not provide "for the full quota of revenue from each "beegah of land is as invalid as a rent-free "grant."

If, as stated by Mr. Justice Loch, the difference between the whole assets of an estate and such portion of them as Government thought fit to appropriate was rent, rent was the part not appropriated by Government. How, then, could revenue, which was the part appropriated by Government, comprise rent, which was the part not appropriated by Government?

The argument assumes that, when a zemindar has engaged for, and pays a certain sum fixed permanently as the revenue of an estate, the Government still retain a share in the rent or that part of the assets of an estate which they have not appropriated.

If this is so, what becomes of the declaration made at the time of the Permanent Settlement by Section 1, Regulation II. of 1793, that the revenue payable to Government had not been fixed for ever.

If the assets or the sums paid by the ryots are part of the revenue, they surely have not been fixed for ever. It was the very object of the Permanent Settlement to induce the zemindars to improve their estates, and thus from time to time increase the assets; and, for this purpose, the Government appropriated, as revenue, a fixed sum, and left the remainder of the assets to the zemindars. Before the Permanent Settlement, the Government's share of the assets was liable to frequent variation. It may be asked, if Mr. Justice Loch's argument is correct, what part of the assets must be reserved as rent, in order to prevent the grant from being exempt from the payment of revenue. If a question arises whether the share which belongs to Government of the assets has or has not been reserved under lease by a zemindar, how is that question to be determined? If it belongs to Government, one would imagine that, when collected, it must be paid over to Government. Yet no one will, I think, contend that a zemindar is bound to pay to Government any portion of the rents reserved under leases or grants of dependent talooks. I concur with Mr. Justice Loch that, if it is necessary to reserve a rent at all, it is not sufficient to reserve a mere nominal rent; but, if it is compulsory upon zemindars to reserve a rent equal to that portion of the assets to which the Government would have been entitled, if the lands had not been permanently settled, how is it to be ascertained whether such a rent has been reserved or not, when it is clear that, before the Permanent Settlement, the amount payable for revenue was fluctuating, and depended upon the will of the Government? If a lease or grant after a Permanent Settlement is to be avoided by the grantor because it does not reserve that which would have been the Government's share of the assets, if the settlement had not been made, it will be impossible to ascertain whether such rent has been reserved or not. Even if it should be held sufficient if the rent reserved is equal to the full quota of revenue fixed by the Permanent Settlement for each beegah, inextricable confusion will arise, and it will be necessary in every case in which a grant or lease is disputed to raise an issue, whether the amount reserved bears the same proportion to the actual produce of the land included in the grant, as the assessment upon the whole of the estate bears to the whole of its actual produce, and the trial of such an issue will involve the same inquiry as would be necessary if the grantee had had the proprietary right in the lands conveyed to him, and was applying for a butwarra; and this will be the case even if the grant comprised only a few beegahs or cottahs of land. Indeed, as it has been already shown, after a permanent settlement, no particular portion of the whole revenue is payable for any particular beegah, and, even if it were so, it would be almost impossible, after extensive improvements in an estate, to say what proportion the revenue of any particular beegah of land bears to the whole assets of the estate. In the 2nd Full Bench case the land in question was at the time of the Permanent Settlement a piece of low marshy land, which yielded no assets. In such a case, it would be impossible to say what proportion of the revenue was payable for it.

Mr. Justice Shumbhoonath Pundit, with his great acuteness and experience, foresaw the difficulty, I may say the impossibility, of compelling a zemindar to reserve on every grant a rent equal to the full quota of revenue for each beegah of the lands granted, especially when no rent for such lands was paid at the time of the settlement.

He said: "During the progress of the Decennial Settlement, and "in 1793, when the "laws of that year were "enacted, *it was thought to be a* sufficient "check against acts supposed to be injuri-"ous to the public rights, to declare that "no grant or alienation should be made "rent-free; and it was not considered at "all expedient to rule that the rent re-"served in a lease should be equal to the "proportionate revenue due to the Govern-"ment from the lands leased out. It was "not an easy matter to fix this proportion, "and it was not thought proper to impose "such a troublesome condition, because it "had already been ruled that the zemin-"dars generally could not *settle for more "than 10 years*, and that fraudulent or "wrongful settlements made by them were "not binding upon auction-purchasers."

2 Weekly Reporter, p. 21.

I cannot discover what Mr. Justice Shumbhoonath Pundit relied upon when he stated that, when the laws of 1793 were enacted, it was thought to be a sufficient check to declare that no grant or alienation should be made *rent-free*. He must, I presume, have relied upon the authority of the Sudder Court in Rajah Modhnarain's case, to which I have already adverted.

Mr. Justice Trevor, holding that a mere nominal rent was sufficient, had not to contend with the difficulty of deciding what amount of rent it would be necessary to reserve in order to prevent a grant from being void under Section 10 as a grant exempt from the payment of revenue. He says: "The mere fact of "the land granted being "unculturable at the "time the grant was made does not render "that legal which, under other circum-"stances, would not be so. The fact of its "unculturableness was an accident of the "moment, and as the land was a portion of "the decennially-settled estate, the whole "area of which forms the security for the "Government revenue, it could not be alien-"ated revenue-free without the consent "of Government. Neither can the fact of "the grant being for the alleged benefit of "the villagers render that legal which is "illegal in consequence of its being to the "detriment of the interests of the State."

2 Weekly Reporter, page 18.

The decision that a nominal rent is sufficient gets rid of the difficulty of deciding what amount of rent would be sufficient to prevent a grant from being a grant to hold exempt from the payment of revenue, if such grants are at all within the meaning of Section 10, Regulation XIX. of 1793. But the decision is open to this palpable objection, that, if a rent-free grant of lands of large value is void in consequence of its being detrimental to the State or to the interests of the zemindar's heirs, such interests would not be protected by the reservation of a merely nominal rent.

A question also seems naturally to arise: Were Lord Cornwallis and his Council so short-sighted as not to see that there could be very little difference as regards the interests of the State or those of the heirs of a zemindar whether a grant was rent-free or subject to only a nominal rent?

Moreover, a zemindar has full power to assign by way of gift, sale, mortgage, or otherwise the rents of any of the dependent talooks or leases on his estate or any portion of them. There is nothing in Section 10 which by any interpretation can be held to prohibit this, although the grants would, as against a purchaser at a sale for arrears of revenue, convey no interest in the rents of the estate to the grantee. What good reason could there have been to compel a zemindar to reserve some rent from the tenant on the grant of a talook or lease, when he could assign over to a third person the rent which he had reserved as soon as he had received it. How much better would the State or the heirs of a zemindar be, if the zemindar should grant a lease reserving a full rent, say of 10,000 rupees a year, for the lands, and should assign over the rent the next day to a stranger and his heirs for ever, than they would be if he were to grant a lease without reserving any rent at all?

Further, if in consideration of a large premium a zemindar should grant a lease at a nominal rent of lands worth 10,000 rupees a year, he would be guilty of extortion if he should collect more than the nominal rent so reserved (*see* Regulation VIII. of 1793, Section 52). But, if a lease rent-free of such lands is void under Section 10, Regulation XIX. of 1793, he might, and indeed would, be required by that Section to resume the lands, and could then let it for a full rent.

It was contended on behalf of the plaintiff, and it was held by some of the Judges in the 2nd Full Bench case, and it is the opinion of some of the Judges on the pre-

sent Full Bench, that the word "revenue" was used in Section 10, Regulation XIX. of 1793, as well as in the laws before the Decennial Settlement, to express either revenue belonging to Government or rent belonging to the zemindars, or, to use the words of Mr. Justice Campbell, "in a shifting and in-"terchangeable sense, and sometimes synony-"mously to mean the same thing."

In the Regulations prior to the Decennial Settlement, no doubt, the word revenue included rent, not because the same word was intended to refer to two different things, but because at that time the rents of lands were Government revenue. The Regulation of 1st December 1790, in using the words "rent-free grants," included lakheraj grants or grants exempt from the payment of revenue to Government, because at that time, if the rent was alienated, the revenue which belonged to Government was *ipso facto* alienated.

I cannot find any inconsistent use of the word revenue in Regulation XIX. of 1793 or in any of the other Regulations of that Code or any synonymous use of the words "revenue" and "rent."

The instances which have been specified, in which it has been asserted that the word revenue was used in the sense of the zemindar's rent, do not, in my opinion, support the assertion.

The use of the word in Section 1 of Regulation XLIV. of 1793 and in Section 11 of Regulation XIX. of 1793 were the only specific instances given as regards the Code of 1793, in which it was said that the word revenue was used in a double sense.

Regulation III. of 1828 was also referred to for the purpose of showing that the words "revenue" and "rent" were used synonymously; though that fact, if it had been so, could have but little bearing upon the question as to the sense in which the word revenue was used in Regulation XIX. of 1793.

Mr. Justice Loch, in his judgment in the 2nd Full Bench case, has very clearly shown that the word revenue, as used in Section 11, Regulation XIX. of 1793, refers to revenue in the ordinary sense of the word, and that it was used in that Section to denote the revenue on resumed lakheraj lands under 100 beegahs which was given up to the zemindars by Section 6 of that Regulation, and was assessed under Section 9. It was revenue, and not rent, as a reference to Sections 6, 9, and 11 will show.

The words which are referred to in Regulation XLIV. of 1793 are those in which it is said: "It is essential at the same time "that the proprietors of land should have a "discretionary power to fix the *revenue* "*payable by their dependent talookdars*, "and to grant leases *or* fix the rents of their "lands for a term sufficient to induce their "talookdars, &c., to improve the cultivation "of their lands," &c. The word revenue is used in the passage above quoted in the same sense as that in which it is used in Section 2, Regulation XVII. of 1793, by which zemindars are authorized to distrain upon their under-tenants and ryots and upon the talookdars paying revenue through them for arrears of "rent" or "revenue." The word revenue in both these Regulations refers to the dependent talookdars mentioned in Regulation VIII. of 1793, Section 6, who were to continue to pay their revenue through the zemindars. The word revenue both in Regulation XVII. and in Regulation XLIV. was, therefore, used in its ordinary and strict sense.

Regulation III. of 1828 referred to grants of lands which the Government were entitled to resume, and necessarily referred to grants made prior to the 1st December 1790, when, as I have already endeavoured to show, a grant rent-free was really and actually an alienation of the Government revenue.

Mr. Justice Loch, in his judgment in the 2nd Full Bench, refers to the indiscriminate use of the word revenue; but he does not concur in that use of it. He says: "*Another element of confusion must be* "*got rid of, viz.*, the interpretation put upon "the word revenue in Regulation XIX. of "1793. It has been said that the word "is used indiscriminately to mean either "revenue or rent according to the context. "This appears to be a mistake. The word "'revenue' is used in its proper meaning "throughout the Regulation; and is not con-"vertible with rent, though it comprises "rent. A consideration of the purport of "the law will at once show that the Legisla-"ture was dealing with a question of re-"venue only."

The word "revenue" and the word "rent" were used in the Code of 1793 in many places, as I have already shown, in order to describe two very different things: the former meaning Government revenue; the latter meaning the rents payable to the zemindars by their talookdars, farmers, and ryots.

It would, therefore, have been quite contrary to the rules contained in Regulation XLI. of 1793 to use the word revenue as applicable to the zemindar's rents, or the word rent to express the Government revenue.

By Regulation XLI. of 1793 it was enacted that in the Regulations the same designations and terms should be applied to the same descriptions of things, in order that rights, property, tenures, and generally all persons and things, should be uniformly described by the same designations and terms throughout the Judicial Code, and so careful was the Legislature with respect to this important subject that it was directed by Section 16 that, in translating the Regulations, the translator was to be particularly careful to preserve the same uniformity.

The Legislature knew full well what they were about, and, therefore, in re-enacting with modifications the Regulation of 1st December 1790, they substituted the word "revenue" in Section 10 for the word "rent," which was used in the corresponding Section of the Regulation of the 1st December 1790.

Notwithstanding this substitution of the word "revenue" for the word "rent," for which the Legislature must be supposed to have had some good reason, and notwithstanding the preamble and enactments of Regulation XLI. of 1793, some of my honorable colleagues held that the word revenue was used in Section 10 of Regulation XIX. of 1793, to express two different things. One of them in particular says :—

"I am compelled to conclude that the "word revenue at that time was not al-"ways employed to mean only the revenue "demandable by Government, but that it was "also *loosely* used to comprise the rent re-"coverable by the zemindar who was "accountable for the revenue."

To arrive at such a conclusion, we must hold that the Legislature were themselves violating in Section 10, Regulation XIX. of 1793, a rule which, by another Regulation of the *same* Code, XLI. of 1793, passed on the same day, they declared to be essential to enable Courts of Justice to apply the Regulations according to their true intent and import (*see* the preamble to Regulation XLI. of 1793).

But the use of the words "revenue" and "rent" in the same Code for the purpose of designating sometimes the same thing, and sometimes two distinct things, would have been, not only a violation of the express rule laid down in Regulation XLI. of 1793, but in contravention as well of the principles by which the scientific use of language is regulated as of the rules of legal construction.

It was wisely remarked by Locke in his Essay on the Human Understanding, speaking of the abuse of words, that "words "fail to lay open one man's ideas to an-"other's view—*1st*, when men have names "in their mouths without any determinate "ideas in their minds, whereof they are the "signs ; *2ndly*, when they apply the common "received names of any language to ideas to "which the common use of that language does "not apply them; and, *3rdly*, when they "apply them very unsteadily, making them "stand now for one, and by and by for "another idea."

He points out how great is the concernment of every man as to the meaning of the laws which he is to obey, and which draw inconveniences upon him when he mistakes or transgresses them. "It is hard," he says, "to find a discourse written on any subject "wherein one shall not observe, if he read "with attention, the same words (and those "commonly the most material in the discourse "and upon which the argument turns) used "sometimes for one collection of simple ideas "and sometimes for another, which is a "perfect abuse of language. Words being "intended for signs of my ideas to make "them known to others, not by any natural "signification, but by a voluntary imposition, "it is a plain cheat and abuse when I make "them stand sometimes for one thing, and "sometimes for another."

I do not believe that either the Legislature of 1793, or the drafter of the Code of Regulations which was passed in that year, is open to the imputation of having used the word revenue in Regulation XIX. of 1793, unsteadily in a double or shifting sense. It was the very object and intention of Regulation XLI. of 1793 to prevent any such abuse of words, and the Legislature appear to have had the remarks of Locke in their minds when they framed that Regulation.

If any hardship and injustice has been caused from the use of the word "revenue" in Section 10, it is not, in my opinion, owing to the abuse of the word revenue by the Legislature, or by the framer of the Regulation, but by the misuse of the word in the interpretation of the law.

I have already quoted a passage from Locke on the abuse of words. I will now

refer to another passage from the same author on the subject of interpretation of words. He says (still speaking of the abuse of words): "Nor hath this mischief "stopped in logical niceties or curious empty "speculations. It hath invaded the great "concernments of human life and society, "*obscured and perplexed the material* "*truths of law* and divinity, brought confu-"sion, disorder, and uncertainty into the "affairs of mankind, and, if not destroyed, "yet, in a great measure, rendered useless "these two great rules, religion *and justice.* "*What have the greatest part of the com-* "*ments and disputes upon the laws of God* "*and man served for but to make the* "*meaning more doubtful and to perplex the* "*sense?* What have been the effects of those "multiplied curious distinctions and acute "niceties, but obscurity and uncertainty, "leaving the word more unintelligible, and "the reader more at a loss. How else comes "it to pass that princes speaking or writing "to their servants, in their ordinary com-"mands, are easily understood; speaking to "their people in their laws, are not so? And, "as I remarked before, *doth it not often* "*happen that a man of an ordinary* "*capacity very well understands a text* "*or a law that he reads, until he con-* "*sults an expositor, or goes to counsel,* "who, by the time he hath done ex-"plaining them, makes the words signify "either nothing at all, or just whatever he "pleases." Again, he says: "There remains "yet another more general though perhaps "less observed abuse of words, and that is "that men having, by a long and familiar "use, annexed to them certain ideas, they "are apt to imagine so near and necessary "a connection between the names and the "signification in which they use them in, "that they forwardly suppose one cannot "but understand what their meaning is, and, "therefore, are apt to acquiesce in the "words delivered, as if it were past doubt "that, in the use of those common received "sounds, the speaker and hearer had neces-"sarily the same precise ideas. Whence, "presuming that, when they have in dis-"course used any term, they have thereby, "as it were, set before others the very thing "they talk of, and *so likewise taking the* "*words of others as naturally standing* "*for what they themselves have been accus-* "*tomed to apply them to, they never* "*trouble themselves to explain their own,* "*or to understand clearly the meaning of* "*the others.*"

So it seems to have been in Rajah Modhnarain's case. The Judges, having been in the habit in resumption-suits of treating *rent*-free grants made between the 12th August 1765 and the 1st December 1790 before the Decennial Settlement as illegal alienations of the Government revenue, appear to have assumed, as a matter of course, that the word "revenue" in Section 10, Regulation XIX. of 1793, must necessarily have been used by the Legislature in the sense in which they had been accustomed to apply it, and, consequently, that all rent-free grants were grants to hold exempt from the payment of revenue.

In construing a law, a Judge is bound to give effect to what he believes to be the intention of the Legislature. That intention, however, must be collected from the words which the Legislature has used, and not from importing into the law any of the Judge's own notions of policy or any ideas of his own as to what may or may not have been the general policy or intention of the Legislature. He ought not, as was stated by the Privy Council in the case to which I have referred, "to suppose that the Government intended to sanction a wanton and unjust disturbance of vested interests."

It was stated by the Legislature in 1793 that in consequence of the laws which were then enacted "land must become the most desirable of all property." We ought not, without the clearest expression of the intention of the Legislature, to put a construction upon any part of that law which, to use the words of the Judicial Committee in the case cited, "will render the title to landed "property unnecessarily uncertain;" and thus to render it the least desirable investment for capital.

In Skerry *versus* Lord Muskerry in the House of Lords, Lord Cottenham says: "Courts "of Law and Equity can "discover the intention of the Legislature "only from the terms used, and are not at "liberty *to speculate upon the existence* "*of any intention not consistent with the* "*plain and obvious meaning of such* "*terms.*"

House of Lords Cases, page 593.

To use the words of Lord Brougham, "we must construe a "Statute by what appears "to have been the inten-"tion of the Legislature, "but we must ascertain that intention from "the words used, *and not from any general*

Fordyce *versus* Brydges, 1 House of Lords Cases 4.

"*inferences to be drawn from the nature of* "*the objects dealt with by the Statute.*"

Mr. Justice Campbell says: "Hard cases make bad law;" but it must not be supposed that every decision which causes a hardship is necessarily good law. I wish I could say that no bad law had ever been made except that which had its origin in an earnest desire to avoid a hardship.

We should bear in mind the words of Lord Bacon: "Let Judges beware of hard "constructions and strained inferences, for "there is no worse torture than the torture of "laws." And again: "Let no man weakly "conceive that just laws and true policy "have any antipathy," and that "the prin-"cipal part of a Judge's office is a wise use "and application of laws."

I have not alluded to Regulations V. and XVIII. of 1812, which repealed Section 2 of Regulation XLIV. of 1793, and by which zemindars were declared competent to grant leases for any period which they might deem most convenient to themselves and their tenants, and most conducive to the improvement of their estates. Those Regulations having been passed long after the Code of 1793 could have no material bearing upon the question as to what was the real intention of the Legislature in 1793.

The question, however, under consideration, is most important as regards leases granted under the provisions of Regulations V. and XVIII. of 1812, for if leases not exceeding 10 years were rendered void by Section 10 of Regulation XIX. of 1793 if no rent was reserved, leases or other grants made under the subsequent Regulations for periods exceeding 10 years, or in perpetuity, are also void if no rent is reserved. If it was necessary to reserve some rent in those grants or leases which by virtue of Section 2 of Regulation XLIV. of 1793 could be made only for a term not exceeding 10 years, it was equally necessary to reserve some rent in those leases which, on account of the purposes for which they were made, were allowed by Section 8 of that Regulation to be granted for any term or in perpetuity; so with regard to all leases which have been or may be granted under Regulations V. and XVIII. of 1812. If the decision of Mr. Justice Trevor is correct, every grant, in fee simple, by a zemindar or putneedar in which a nominal rent at least has not been reserved, is null and void.

The purchase-money for the lands in the present case was not large, the sums paid for the several grants varying from 200 rupees to 100 rupees and less; but that does not affect the principle. The small property involved in this decision is probably as important to the defendant as his vast possessions are to the richest and proudest nobleman in the country. They are probably his birthright and inheritance, upon which he and his family are dependent and of which the resumption may reduce them from comparative comfort to want and penury.

It is my duty to give this case as calm and deliberate and careful a consideration as if the property were worth lacs of rupees. The case will form a precedent for the future upon a most important subject, and much injustice may be caused by an erroneous decision. I have never entertained the slightest doubt upon the question; but, considering that so many of my honorable colleagues entertain a different opinion, I have gone more fully into the case, and expressed the reasons for my judgment at greater length than I otherwise should have done.

Since the 2nd Full Bench case was decided, I find another case in which land granted rent-free for a tank was held liable to resumption. (*See* Gopeenath *versus* Banee Madhub Banerjee, 2 Weekly Reporter, Civil Cases, p. 296.)

In that case, a Division Bench of this Court held that a tank granted rent-free subsequently to the Permanent Settlement was liable to resumption, there being nothing to show that it was the intention of the grantor that the tank should be a public benefit; and the Judges in that case expressed an opinion *that it was not desirable that the doctrine upon which the grant in the 2nd Full Bench case was upheld should be strained or carried too far.*

It is said by Mr. Justice Trevor that "the "*grantee may have a remedy against the* "*grantor in some form or other.*"

What that remedy is, is not pointed out; and from the use of the word "may" it seems very doubtful whether my late honorable colleague who made the suggestion was very certain in his own mind that any remedy actually existed. It is evident that he had no very clear conception of the mode in which the remedy was to be obtained.

For my own part, I cannot see what remedy the grantee or his heirs could have if the heirs of the grantor be held entitled to resume the lands, and to evict them after an undisturbed possession of nearly 50 years.

At any rate, I should feel for a man who should be deprived of his estate under such circumstances, and be driven to seek for a legal remedy in the Courts of Judicature, commencing with the Court of original jurisdiction in the Mofussil, and probably, after long litigation and harassment, ending with a special appeal to this Court, in which various opinions would probably be entertained.

A zemindar may have sold lands to be held rent-free for a term of years in order to raise money to improve other parts of his estate, and may have expended for that purpose every rupee of the purchase-money which he received ; or he may have let lands rent-free for a term of years upon condition that the tenant should clear jungle or otherwise improve them ; or he may have sold them for a long term of years for the purpose of erecting houses or manufactories, or other buildings upon them, and he may have expended the purchase-money in improving his estate ; or he may have granted lands rent-free for a term of years or for the life of a particular individual or absolutely, in order to make provision for a wife or daughters or other dependants, or for the purpose of erecting and maintaining a school or a soholarship or an hospital, or for some other charitable purposes. The zemindar himself may be too honest and too honorable to invafldate his own grant and to resume the lands ; but if the construction put upon Regulation XIX. of 1793 by some of my honorable colleagues in this case is correct, it will be compulsory upon the manager of his estate, if he should become disqualified by insanity or for any other cause, to resume the lands, to treat the occupiers as trespassers, and turn them out of possession. The zemindar may die leaving his heir a minor, and the Court of Wards may be compelled to resume the lands ; or he may die leaving a son less scrupulous and honest than himself, and such heir will be enabled to frustrate the intentions of his father and to resume the lands although he may, in some of the cases supposed, have received the whole benefit of the purchase-money expended by his father in improving the other parts of the estate which has descended to him.

If Mr. Justice Trevor is correct in holding that the Section extends to grants in fee simple and to grants of proprietary rights in a portion of an estate, the above remarks will apply to all cases of the transfer of such proprietary rights for purposes such as those above mentioned, and even to all absolute or conditional sales in fee simple of parts of an estate upon which no rent is reserved.

The grantee may, in addition to the purchase-money which he paid, have expended large sums in improvements ; he may have counted upon the property which he purchased as a provision for himself and his family, and yet, according to the construction contended for, he is liable to be treated as a trespasser, to be turned out of possession by the grantor or his heirs, and to be exposed to all the misery, to all the harassment, and to all the torture of finding, perhaps, in his old age, that he is destitute, or upon his deathbed that he is penniless, and that his wife and family are to be turned out of the dwelling-house which he had erected for their comfort, and to be cast adrift upon the world without any provision for their maintenance ; and all this on account of some imaginary general policy of our whole revenue-legislation, which is not expressed by the Legislature, and of some unknown and undeclared theory of the Permanent Settlement, of which he was not aware, and had no means of acquiring a knowledge.

In this very case the grants now sought to be set aside were made before the decision in Rajah Modhnarain's case, and when, according to the earlier decisions of the late Sudder Court, such grants were valid.

If it had been expressly declared that a zemindar should not be allowed to grant a lease or a dependent talook without reserving a rent, either nominal or equal to the actual value of the land, I should not attempt to set up my own views of policy against the declared intentions of the Legislature. I have to determine what the law is which the Legislature has enacted, not what it ought to be, or whether it is just or unjust. But I am to judge of the intentions of the Legislature from the language which they have used ; and without the clearest and most unambiguous expressions, I cannot attribute, nay, I may say, I cannot impute to Lord Cornwallis and to the distinguished men who formed his Council a policy so narrow-minded, so obsstructive of progress, so short-sighted so mean and paltry, so utterly at variance with all the solemn declarations of Government, so fraught with injustice, and so conducive to fraud, as that which has been contended for on the part of the plaintiff.

I hold that Section 10, Regulation XIX. of 1793, does not apply to rent-free grants made by a zemindar after a Permanent Settlement of his estate; that there is no law which prohibits a zemindar from making rent-free grants of permanently-settled lands, whether such grants are intended to pass the whole proprietary rights in the lands, or merely to create dependent talooks or leasehold interests; and that neither he nor his heir, nor any person claiming through him, can invalidate such grants, or resume the lands, or compel the occupiers to pay rent for them.

I am glad that I have been able to arrive at this conclusion, and I rejoice that, having regard to what I conscientiously believe to have been the real intention of the Legislature, I am able to pronounce a judgment consistent with justice and right.

The minutes of the three Judges which were sent in to the Registrar having been held not to be judgments, and the remaining Judges of the Full Bench being equally divided in opinion, the opinion of the Chief Justice will prevail according to the provisions of Section 36 of the Letters Patent. The cases will be sent back to the Division Bench, who will be informed that a rent-free grant made by a zemindar of a specific portion of land, after a permanent settlement of the estate to which it belongs, is valid as against the grantor and his heirs, or a purchaser by private sale of the estate.

The 3rd January 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Hindoo Law—Mitakshara—Joint property—Partition—Mother or Grandmother's right of maintenance—Necessary elements in partition—Acquired property—When acquirer gets a double share—Costs—Court's discretion how to be exercised in awarding costs.

Regular Appeals from a decision passed by Moulvie Syud Abdoolla Khan, Principal Sudder Ameen of Mymensingh, dated the 21st January 1867.

Case No. 98 of 1867.

Sheo Dyal Tewaree (one of the Defendants), *Appellant,*

versus

Judoonath Tewaree (Plaintiff) and others, (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Appellant.

The Advocate-General and *Baboos Sreenath Doss* and *Kalee Prosunno Dutt* for Respondents.

Case No. 99 of 1867.

Sheo Dyal Tewaree Chowdhry (Plaintiff), *Appellant,*

versus

Bishonath Tewaree Chowdhry (Defendant), *Respondent.*

Mr. R. V. Doyne and *Baboos Unnoda Pershad Banerjee, Kalee Mohun Doss,* and *Romesh Chunder Mitter* for Appellant.

Mr. J. W. B. Money and *Baboos Onookool Chunder Mookerjee* and *Greeja Sunkur Mojoomdar* for Respondent

Case No. 104 of 1867.

Shib Dyal Tewaree (Plaintiff), *Appellant,*

versus

Bishonath Tewaree (Defendant), *Respondent.*

Baboos Kalee Mohun Doss and *Romesh Chunder Mitter* for Appellant.

Baboos Onookool Chunder Mookerjee and *Greeja Sunkur Mojoomdar* for Respondent.

Case No. 111 of 1867.

Judoonath Tewaree (Plaintiff), *Appellant,*

versus

Bishonath Tewaree and others (Defendants), *Respondents.*

The Advocate-General and *Baboos Sreenath Doss* and *Kalee Prosunno Dutt* for Appellant.

Baboos Onookool Chunder Mookerjee, Kalee Mohun Doss, and *Greeja Sunkur Mojoomdar* for Respondents.

According to the Mitakshara, the mother, or the grandmother, is entitled to a share *when* sons, or grandsons, divide the family-estate between themselves; but she cannot be recognized as the owner of such share until the division is *actually* made; she has no pre-existing right in the estate except a right of maintenance.

Under the Hindoo Law, two things at least are necessary to constitute partition: the shares must be defined, and there must be distinct and independent enjoyment.

Whatever is acquired at the charge of the patrimony is subject to partition; but if the common stock is improved, an equal share is ordained. Where a coparcener, with comparatively small detriment to the joint estate, acquires any separate property by his own labor or capital, the property is nevertheless to be considered joint, although the acquirer gets a double share.

It is not correcti n law or justice to say that costs must be invariably awarded in proportion to the amount decreed and dismissed. The Court can exercise the largest discretion in the matter; but this discretion is to be exercised with special reference to all the circumstances of the case, including the conduct of the parties.

Mitter, J.—THESE appeals have arisen out of three original suits instituted in the Court of the Principal Sudder Ameen of Mymensingh. The facts disclosed by the pleadings in these three suits have been set forth at length in the judgments recorded by that officer, and we think it, therefore, unnecessary to recapitulate them in this place. The real contest between the parties is about the division of a joint undivided estate, and the principal questions to be determined are the extent of that estate, and the shares in which, and the persons between whom, the division is to be effected. At the request of the parties, all the cases have been heard together, both here and in the Court below, and the evidence produced in each has been fully used for the purposes of all by their consent. For the sake of convenience, however, we think it necessary to deal with these appeals separately in our judgment.

In appeal No. 111 of 1867, the following points have been raised before us on behalf of the appellant, Judoonath Tewaree:—

1st.—That the finding of the Lower Court, against the genuineness of the Furd put forward by the respondent, Shib Dyal Tewaree, in suit No. 82 of 1866, is contrary to the weight of evidence.

2nd.—That, even if the Furd be rejected as spurious, a larger amount of cash balance than that fixed by the Lower Court ought to be found in the hands of the respondent, Bishonath Tewaree, and that a joint-decree for the appellant's share of this amount ought to be passed both against him and the respondent, Shib Dyal.

3rd.—That the Lower Court is wrong in declaring that Mussamut Golaba (now deceased) was entitled to a share of the family-property, she being not entitled to any share under the Hindoo Law as administered in the Benares School.

4th.—That the above declaration has been rendered nugatory by the death of Golaba since the decree of the Lower Court, and before any partition of the family-estate has been actually effected.

5th.—That the award of the Lower Court in the matter of costs is unjust and inequitable.

* * * * * * *
* * * * * * *

With reference to the third ground, we do not think it necessary for us to decide upon it. Our reasons will be explained in our judgment upon the next ground.

As to the fourth ground, we are of opinion that the contention of the appellant is correct. Mussamut Golaba was the mother of Shib Dyal and grandmother of the appellant. Bishonath is the first cousin or paternal uncle's son of Shib Dyal. She, Mussamut Golaba, has died subsequent to the decree of the Lower Court, and Mussamut Doolaro, wife of Shib Dyal, as an alleged devisee under her, has been permitted by us to defend this appeal. Now, it is quite clear that the share which ought to have been allowed to Golaba has merged in the general estate, conceding, for the sake of argument, that she was entitled to any share under the Hindoo Law as it is administered in the Benares School. The text of the Mitakshara that has been referred to merely says, "of heirs dividing after the death of "the father, let the mother also take a "share," or, in other words, the mother or grandmother, as the case might be, is entitled to a share, *when* sons or grandsons divided the family-estate between themselves. But the mother or the grandmother can never be recognized as the owner of such a share, until the division has been *actually* made. She has no pre-existing vested right in the estate except a right of maintenance. She may acquire property by partition, for partition is one of the recognized modes of acquiring property under the Hindoo Law. But partition, in her case, is the *sole* cause of her right to the property. It follows,

therefore, that the effect cannot precede the cause.

The learned Counsel for Doolaro has contended that, in the case before us, partition must be *held to have actually taken place*, and he cited a ruling of Her Majesty in Council, to the effect that division by *metes* and *bounds* is not at all necessary to constitute partition under the Mitakshara. We do not for a moment, in fact we cannot, question the correctness of this ruling. But there can be no doubt that, under the Hindoo Law, two things at least are necessary to constitute partition. The shares must be defined, and there must be distinct and independent enjoyment of those shares. In the case before us, neither of these things has yet taken place. The definition of the shares by the Principal Sudder Ameen is no more final than our judgment at the present day, and it is the question of shares that we are still determining. As to distinct and independent enjoyment, no such thing has yet occurred. The appellant has been merely seeking for a partition. Suppose that the appellant were to withdraw this appeal at this very moment, and to agree to live jointly with his uncle Shib Dyal in estate as before, could Golaba, if she were alive, have still asked for the share allotted to her by the Principal Sudder Ameen? Or suppose that Golaba, instead of appearing as an intervenor in the Lower Court, as she did, under Section 73 of the Procedure Code, had brought an action against them both for the arrears of her maintenance which would have accrued subsequent to the decree of the Lower Court down to the present day. What answer could they have given to such a claim? Surely they could not have pleaded she was not entitled to be maintained out of the estate, because they were *going to make over to her* a share of it. Such a plea would be absurd on the very face of it. She is not to starve until the assignment is *actually* made.

It has been said that the question of maintenance is quite distinct from the question before us; but there can be no doubt that the share that is given to a Hindoo mother at the time of partition is given to her for no other purpose than as a provision for her maintenance. She has no right to ask for maintenance after she has got such a share, and if a partition *has been effected* in this case, Golaba's suit for maintenance must have been dismissed on that ground alone. It is unnecessary, therefore, to decide whether Golaba had a right to alienate the share assigned to her by the Principal Sudder Ameen as her streedhun under the Mitakshara Law. Our finding is, that she had acquired no right to that share, as she died before partition had been *actually made*. We, therefore, direct that the family-estate, real and personal, such as it may be found to be, shall be divided between the three original parties to this suit, namely, Shib Dyal, Bishonath, and the appellant Judoonath, in the following proportion:—

Shib Dyal, 5 annas.

Bishonath, 7 annas.

Judoonath, 4 annas.

As to the last ground, we are of opinion that the contention of the appellant is perfectly correct. The question of costs is the most general question to be determined in a suit. In fact, it is the only question over which the Court can exercise the largest discretion. This discretion, however, is to be exercised with special reference to all the circumstances of the case, including the conduct of parties. It is not correct in law or justice to say that costs must be invariably awarded in proportion to the amounts decreed and dismissed. If, for instance, as we find in the present case, that the appellant has mainly succeeded in his claim; that his suit was an honest and *bonâ-fide* one; that the portion dismissed has been lost more in consequence of the misconduct of his opponents than on account of any fault of his own, we shall be doing injustice to the appellant to refuse him his full costs. We accordingly direct that the costs of this litigation in full shall be paid to him by both the respondents Shib Dyal and Bishonath, and that these latter shall bear their own costs throughout. Mussamut Doolaro, of course, has to bear her own costs.

We now come to Shib Dyal's appeal No. 98 of 1867. The following points have been urged before us on his behalf.

1st.—That Shib Dyal, having been the acquirer of those properties which still stand in his name, is entitled to a *double* share under the Hindoo Law.

2nd.—That a decree has been given for the personal properties at Roy Bareily without any legal proof.

3rd.—That the Principal Sudder Ameen has awarded to the appellant, contrary to Hindoo Law, a share of such moveables

as are used as ornaments by the female members of the family.

4th.—That the Principal Sudder Ameen has not determined as to who has been in possession of the personal properties.

With reference to the first point, we are of opinion that it is not at all sound. This case is not a case in which a double share can be awarded. It has been said that Shib Dyal contributed both money and labour in acquiring these properties, though joint funds have also been used. There is no pretension to say now, whatever might have been pleaded in the Court below, that there is no joint property at all; so that the admission regarding the use of joint funds is perfectly correct. So far as the evidence is concerned, we have neither any proof of the amount of the money supplied nor the purposes for which it was used; and as to the labour, that consisted in purchasing estates out of the funds of a joint ancestral firm, which Shib Dyal was managing for the benefit of the joint-family.

But, even conceding all these facts to the appellant, we do not see how he can succeed in his contention. The very authorities relied upon by him are strongly and expressly against him. Verse 29, Chapter I., Section 4 of Mr. Colebrooke's Mitakshara, page 275, says: "It is settled that whatever is *acquired* at the charge of the patrimony is subject to partition." But Verse 30 qualifies this proposition by propounding an exception, and Verse 31 explains that exception. Verse 30 says: "The author propounds an exception "to this rule. But if the common stock be "*improved* an *equal* share is ordained," and Verse 31 says: "Among unseparated bre-"thren, if the common stock is *improved* "and *augmented* through agriculture, com-"merce, or similar means, an *equal* division "nevertheless takes place, and a double "share is not allotted to the acquirer." This is no more than a case of *augmentation* at the highest. The ancestral firm was the main nucleus of this estate, and every property acquired from such a nucleus falls within the rule of equal division. Verse 29 applies to a different state of things. Where a coparcener, with comparatively *small detriment* to the joint estate, *acquires* any *separate* property by his own labour or capital, the property is nevertheless to be considered as joint, although the acquirer *gets* a double share. Here, strictly speaking, there is no proof of Shib Dyal having supplied any portion of the money required for the purchase of the properties in question from his own funds, and as to labour his case does not stand higher than that of a manager of a joint undivided family. In our opinion, it is not even a case of *augmentation*. The mere conversion of joint funds into land is not an acquisition within the meaning of the Hindoo Law. The labour of a manager is not a means for acquiring *separate* property. It was labour voluntarily undergone for the benefit of the joint family. We hold, therefore, that the case before us neither falls within the rule laid down in Verse 29, nor within the exception in Verse 30, and must, therefore, be treated as an ordinary case of joint property.

With reference to the second ground, we are of opinion that the properties therein referred to must be excluded from the decree. All parties are agreed to reserve them for future settlement.

The third ground is not made out at all. No particular item of property has been pointed out, and there is no evidence to support the plea.

The fourth objection must be rejected. No issue was raised on this point in the Court below. We decline to entertain it at this late stage of the proceedings.

As to Appeal No. 99 of 1867, the only point raised in this appeal is the genuineness of the Furd pronounced by the appellant Shib Dyal. We have already given our opinion on this point. No further orders are necessary.

Appeal No. 104 of 1867 has not been pressed before us.

To avoid confusion, we think it necessary to pass one general decree in all these cases: It is, therefore, ordered that the properties, real and personal, mentioned in the schedules attached to the plaint filed by Judoonath, with such exceptions as will be thereafter specified, ought to be divided between Shib Dyal, Bishonath, and Judoonath in the proportion of 5 annas, 7 annas, and 4 annas, respectively; that out of those properties, those of Roy Bareily ought to be excluded from the decree, and the sum of 1,85,715 rupees ought to be reduced in the manner indicated in our judgment upon the second ground in appeal, No. 111 of 1867; that Bishonath is answerable to Shib Dyal and Judoonath for their respective shares of this reduced sum; and that Shib Dyal and Bishonath are jointly liable to Judoonath for his share of the

rest of the property decreed. The full costs of this litigation shall be paid to Judoonath, jointly and severally, by Bishonath and Shib Dyal. The remaining parties will bear their own costs throughout.

The 3rd January 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Enhancement of rent—Kubooleut as evidence of nature of tenancy—Onus probandi—Grounds of enhancement.

Regular Appeal from a decision passed by Baboo Dinobundhoo Mullick, Deputy Collector of Madareepore, in Backergunge, dated the 31st May 1867.

Golam Ali (one of the Defendants), *Appellant,*

versus

Baboo Gopal Lal Thakoor (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboos Onookool Chunder Mookerjee, Romesh Chunder Mitter,* and *Anund Chunder Ghosal* for Appellant.

The Advocate-General and *Baboo Kalee Mohun Doss* for Respondent.

In a suit to recover rent at an enhanced rate after notice had been granted, a kubooleut was put in in support of plaintiff's case, and was admitted by defendants. A pottah put in by defendants was found by the Lower Court to be a forgery.

HELD that plaintiff's contention that the kubooleut does not give the full terms of the arrangement binds him to show, beyond all reasonable doubt, what were the actual terms of the pottah. Having failed to do this, the kubooleut was treated as complete and conclusive evidence of the nature of the tenancy, which was inferred by the Court to be permanent and at a fixed rate.

HELD that it lay upon the plaintiff to make out distinctly the different grounds on which he rested his right to enhance, *viz.*, excess of area, increase of productiveness apart from the tenant's agency, and increase in the value of produce.

In respect to excess area, it was held (Phear, *J.*) that plaintiff was entitled to a fair and equitable rate; (Bayley, *J.*) that excess land should, as a part of the same lease, be liable to the same terms as the other land originally given under it.

Phear, J.—THE plaintiff, a large landed proprietor residing in Calcutta, seeks, in this suit, to recover from the defendants, as his tenants, rent at an enhanced rate after notice, alleging that, "on the strength "of a nakaemee amulnamah executed, on "the 4th Bhadro 1260, by his Naib in favor "of defendant Golam Ali, and Poonaye "Akban, the father of defendant Yakoob "Ali, in respect of 4 droons 3 kanees "4 gundahs of land within specified "boundaries" in the district of Backergunge, the two defendants hold "possession "of the lands comprised within the said "boundaries and a large quantity of land "beyond the same." The grounds of enhancement set forth in the plaint are "that "the defendants hold possession of more "lands, and that, without their agency and "expense, the value of the produce of the "said lands and the productive power thereof "have increased."

The defendants, in their written statement, entirely deny that they are liable on any ground to pay an enhanced rent for any portion of the lands in question; and they further say as follows:—

"The plaintiff has brought this suit on "the allegation that the amulnamah-pottah "was granted by the Naib; but this is "false. In fact, we own and hold the dis-"puted land under a howladaree document "signed by the plaintiff himself."

In support of the plaintiff's case, a kubooleut, dated 4th Bhadro 1260, was put in, which the defendants admit to have been the document given by their predecessors in title. The plaintiff has brought forward a considerable amount of parol evidence to prove that the corresponding pottah was signed by the Naib, and not by himself. On the other hand, the defendants have produced a document purporting to bear the actual signature of the plaintiff, and this they say was the pottah executed by the plaintiff himself and delivered in exchange for their kubooleut. In this state of the contest between the parties, naturally enough, the issue whether or not this last-mentioned document is a forgery has been more regarded and more warmly fought over, than is commensurate with its relevancy to the merits of the suit itself. The Lower Court arrived at the conclusion that the alleged pottah is a forgery, and it directed that a criminal charge should accordingly be preferred against the two defendants. We have been informed that such a charge was duly made, and that the defendants are now awaiting their trial for forgery before the Criminal Court. However, it seems to me that it is quite unnecessary for us in the trial of this civil suit to enter upon the matter of the alleged forgery at all. Whether the pottah put forward by the defendants is a fabricated document or not, in the view

which I take of this case, is a question that does not bear upon the relative rights of the parties with respect to the enhancement, or lead to evidence of what these rights are; and it is extremely satisfactory to me to feel that I shall, therefore, be able to determine the matter in suit between the plaintiffs and defendants, without saying a word which might be attempted to be used elsewhere to affect the result in the criminal proceedings.

The plaintiff brings the kubooleut from his own serishta, and admits that it was delivered to him or his agents in exchange for a pottah, at the time when the contract relative to the tenancy of land was made, namely, 4th Bhadro 1260, and there is no question raised by the defendants as to its authenticity. Nor does the plaintiff deny that, having accepted this kubooleut, and having kept it all the while in his own custody, he has allowed the defendants to retain possession of the land for 13 years under the arrangement, whatever it was, that was effected between him and their predecessors on the 4th Bhadro 1260. Clearly, then, the plaintiff cannot resist the claim of the defendants that this document should be taken as conclusive evidence of the terms of that arrangement under which they hold, unless he can show that, to the knowledge of the other party, either it is in itself an erroneous representation of that contract, or, being correct as far as it goes, is incomplete, and will not give the full terms, except it be supplemented from some other source. The plaintiff takes the latter alternative, and, as I understand him, in effect says that the real pottah delivered by him contained such a form of signature, namely, signature by the hand of an agent, and was wanting in some few words of such significance that, if it were considered side by side with the kubooleut, the contract of tenancy exhibited by the two would differ in material respects from that which is apparent on the words of the kubooleut alone.

It is, I think, *à priori*, improbable that a kubooleut should not be a counterpart of the pottah, and still more improbable that the parties to any contract should intend a different obligation to be imposed by the act of signing a written document per procuration from that which would flow from the words of the same document if signed autographically. Therefore, it seems to me that the plaintiff requires more than ordinarily strong evidence to support his position in either of its aspects. He must show, on the one hand, beyond all reasonable doubt, what were the actual terms of the pottah which, he says, was given by his agent on his behalf, and, in particular, he must point out the differences between it and the kubooleut. This might be done by the production of the draft of the pottah, or by the oral testimony of those persons who were concerned in drawing it up. On the other hand, he must make it clear that the original parties to the transaction understood and intended the vicarious execution to afford a special rule for the construction of the document. In my opinion, the plaintiff has left his burden of proof, as thus described, wholly untouched. We have had, no doubt, a great body of evidence presented to us relative to the practice of the plaintiff in regard to signing the contracts between himself and his tenants. He is accustomed, it appears from this, to draw a line between the cases of permanent tenures and those of holdings which are temporary in their nature; in the one case, he executes with his own hand; in the other, with the hand of his Naib. This may well be, but there is nothing from the beginning to the end of this evidence to show otherwise than that the distinction as to the tenancy lies in the body of the writing, and is not introduced by the form of the signature. Then, again, the plaintiff has not even made an attempt to show what the words of his pottah actually were. Under these circumstances, I am of opinion that we must treat the kubooleut produced by the plaintiff as being complete and conclusive evidence between the parties to this suit, as regards the nature and the terms of the tenancy under which the defendants hold the land of the plaintiff.

This kubooleut, immaterial parts omitted, runs thus:—

"To the high in dignity Gopal Lall Thakoor, &c."

"I, Golam Ali, and I, Pooriaze Akbar, do "execute this kubooleut-puttro to the following purpose. That we made a petition "praying to obtain a Howladaree Amulnamah "in respect of 4 droons, 3 kanees, 4 gundahs "of land, *jungle-puteet* land, which, after "deduction of four gundahs per kanee of the "tulbee land on account of howladaree rukba, "are to be assessed at Rupees 5 per kanee, "being rent-free, in the current year 1260, "at Rupee 1. per kanee in the year 1261, "Rupees 2 per kanee in 1262, Rupees 3 in "1263, and at the full customary rate in "1264, and which are situate," &c. (here

followed specified boundaries). "That, according to the said petition of ours, you "do hereby grant a howladaree amulnamah. That, out of the said amount of "4 droons, 3 kanees, 4 gundahs of land "situate within the aforesaid boundaries, "4 gundahs per kanee, or 11 kanees 4 "gundahs in all, being deducted on account "of rukba, there remains an amount of 3 "droons 8 kanees of land, which we shall "cultivate and improve and hold rent-free "in 1260, and pay rent at the rate of Rupee "1 per kanee, or Rupees 56 in 1261, at the "rate of Rupees 2, or Rupees 117 in 1262, "at the rate of Rupees 3, or Rupees 168 in "1263, and at the full customary rate of "Rupees 5, or Rupees 280 in 1264, year by "year and month by month, as per instalments "mentioned below. That we shall not "urge any plea or objection in regard to "inundation, drought, death, absconding of "ryots, sandy land, laek, or geir-laek, and "abadee or gair-abadee, and, if we do so, "it will not be admissible. That, if any "instalment falls in arrears, we shall pay "the same with interest at the rate of Rupee "1 per cent. per month, and, on our failure "to do so, the amount will be recovered, "with interest, according to the laws in "force. That, after the month of Pous "1261, a measurement will be held with "reference to the boundaries, and notice "will be served on us from your sircar to "execute a kubooleut within 15 days, with "specification of jumma and land according "to the said measurement. That, if we "do not appear before the Ameen holding the "measurement, and do not cause the land to "be measured and the rent to be ascertained, "the measurement will be effected in our "absence, and the amount of abadee and "laek-abadee land thus found will be considered as part and parcel of this howlah, "as if admitted and consented to by us, and, "deducting therefrom the amount of the "land mentioned above, the remaining excess land *minus* rukba and the hassil "land will be assessed at the aforesaid rates "from the year 1261, and the amount thus "assessed at the aforesaid rates from the "year 1261 and the amount thus assessed "will be paid by us, being added to the "jumma already fixed. The laek-abadee "lands will be held rent-free for two years, "and we shall execute a kubooleut and "receive a pottah, according to the practice "of your serishtah, for the land and jumma "of the entire lands measured, according to "the said rate and rushud. That we shall "continue to pay rent according to the "terms of the instalment-bond given in the "kubooleut, and we shall not be able to urge "any plea or objection with regard to the "same, and, if we do so, it will not be admissible. We execute this kubooleut to "the above effect after receiving the howladaree amulnamah. Finis. Dated 4th "Bhadro 1260." The document terminates with a schedule of the year's instalments and the signatures of the witnesses.

I confess that, during the hearing of the case, I have entertained considerable doubts as to the proper construction to be put upon the words of this kubooleut. On the whole, however, I am now of opinion that they must be taken to indicate a grant by the plaintiff to the defendants, or rather to their predecessors in title, of a permanent tenure at a fixed rate of rent. I am led to this in great degree by consideration of the fact that the parties to the contract have carefully provided for a variation of the rent up to a maximum of Rupees 5 per kanee, and have yet been entirely silent as to any possibility of variation beyond that amount; and also that they have minutely prescribed the mode in which the excess lands within the given boundaries are to be assessed, at rates rising up to the same amount, Rupees 5, but at the same time have made no allusion to any other ground for the enhancement of the jumma to be paid for the land leased. It seems to me too that the circumstances under which the parties were contracting are favorable to the supposition that an interest, such as might become beneficial to the lessee, was intended to be passed, rather than merely a right of occupation which might, after 1264, at the option of the landlord, be screwed down by process of law to a simple rack-rent tenure. The incoming tenant was certainly embarking upon an adventure, in which all the labour and expense would be his; while, come what would, the landlord was assured of a considerable profit as long as the contract should endure. I am also strengthened in my conclusion by knowing that Morgan and Shumbhoonath Pundit, JJ., arrived at a similar decision in a case, not reported, which appears to run very nearly parallel

with the present, namely, special appeal* No. 571 of 1865, decided on the 6th September 1865.

According to the view which I have just expressed, the defendants are not liable to be called upon to pay a rent greater than Rupees 5 per kanee with the prescribed rukba, for so much of the plaintiff's land occupied by them as lies within the boundaries specified in the kubooleut, and is, therefore, held subject to the terms alone which are therein mentioned, and no others. I also think, for the like reasons, that their jumma of Rupees 280 cannot be increased by the addition of an amount for rent of such lands as they may hold in excess of the 4 droons, 3 kanees, 4 gundahs within those boundaries, except by proceeding in the manner expressly laid down for that purpose in the kubooleut; and this suit is certainly not a step in accordance therewith. As far, therefore, as concerns the land lying within the mentioned boundaries, I am of opinion that this appeal should be decreed, and the plaintiff's suit be dismissed with costs in both Courts.

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* The 6th September 1865.

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Case No. 571 of 1865 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 7th January 1865, reversing a decision passed by the Deputy Collector of that District, dated the 20th July 1864.

Chikundee Nikaree (Plaintiff), *Appellant,*

versus

Anund Chunder Mitter and others (Defendants), *Respondents.*

Baboo Sreenath Doss for Appellant.

Baboos Dwarkanath Mitter and *Ashootosh Dhur* for Respondents.

Pundit, J.—THE allusion in the pottah, dated 7th of Joisto 1257, to the special appellant's liability to pay the rents that may, after general survey, be fixed for the lands held by him, refers to the *amount* of rent that for the quantity found in his possession, accordingly to the highest rate mentioned in the pottah, he may have to pay. To construe otherwise would be unfair to the tenant who has to pay for all works of damming, draining, clearing, &c., necessary to bring the lands into a state fit for cultivation.

It cannot easily be believed that for new-formed chur lands, not yet properly made fit for cultivation, requiring a great deal of labour and expense to make them worth holding by an agriculturist, on condition of paying lower rate only for 5 or 6 years, and that, too, progressive in each year, a pottah would be taken, that is, on terms according to which the landlord will have a legal right to demand an enhancement at any time after that short interval.

We, accordingly, decree the appeal with costs, and, reversing the decisions of both the Lower Courts with costs, decree the claim of the special appellant.

As regards the land of the plaintiff which the defendants hold outside the boundaries given in the kubooleut, I think the plaintiff is entitled to receive rent for it at a fair and equitable rate, but the evidence before the Court does not enable me to determine what rate would be fair and equitable. There is nothing to show whether that portion of land was, at the time when its culture was first commenced, equal to, in quality or condition, or better or worse than, the land for which the lessees in 1260 agreed to give a gradual rent rising to 5 rupees. And, even if this starting point had been given us, we have no means afforded to us of discriminating between that portion of the present increased annual production of the land which is due to the efforts of the lessees, and that which is attributable to the improvement by other means of the productive power of the land itself, and I think it would not be equitable to oblige the defendants to pay a rent calculated on the present annual market-value of the land, without any deduction whatever in consideration of the expenditure effected by them in bringing about the state of productiveness which the original-jungle or waste land now exhibits. It lay upon the plaintiff to make out distinctly and separately the different elements upon which he has rested his right to enhance, namely, excess of area, increase of productiveness apart from the tenant's agency, and increase in the value of produce. It is not enough for him to show that there has been a general increase in some one or all of these respects since a given period (in this case since the land was waste, and bore nothing but hoghle grass), he must with reasonable definiteness establish the amount of each of those which he relies upon. If, for instance, he does not choose to, or cannot, separate the increment of productiveness which is due to his tenant's agency, in a case where that agency is admittedly most markedly operative, and must be taken account of, from that which proceeds from other causes, it is certain that the Court cannot do so for him. It seems to me that the plaintiff has failed to support with proper evidence that part of his case upon which alone he is, as I conceive, legally entitled to seek for enhancement of rent, and therefore that, even as regards this, his suit ought to be dismissed.

Under all the before-mentioned circumstances, it results that, in my judgment, this appeal ought to be decreed in its entirety.

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and the plaintiff's suit dismissed with all costs.

Bayley, J.—This is a suit to assess at enhanced rents a tenure which is admittedly held under a howladaree amulnamah-kubooleut propounded by plaintiff as given by defendants, and not denied by defendants to have been so given.

This kubooleut states that after one year rent-free (1260) the rent is to be one rupee a kanee in 1261, two rupees a kanee in 1262, three rupees a kanee in 1263, and the *poor-dustoor* (full customary) rate of five rupees per kanee in 1264.

The land is termed jungle puteet. Excess found with reference to the boundaries after measurement is to be assessed. An extra allowance of area (as is usual in howlah tenures) to about $\frac{1}{6}$th is given in, *i. e.*, 1 kanee 4 gundahs is to be held rent-free, while 1 kanee is to bear the agreed rent.

It is impossible, I think, to read this kubooleut without coming to the conclusion that the intention of the parties was that the lessee should clear and cultivate jungle waste on the terms of partly rent-free and partly progressive jumma allowed in those cases (and not in the case of *cultivated* lands), and that the full customary rent of 5 rupees per kanee from 1264 was thereafter to be paid. I cannot think it reasonable or borne out by the deed that the lessor intended to prescribe, or the lessee intended to accept, terms such as that the lessee should bear *all* the expense and trouble of reclamation, and, having done so, was, in the first year after full rent could be paid, *viz.*, after 1264, to be liable to make over the reclaimed land to his lessor, or to have it in 1265 enhanced to the highest rate of neighbouring cultivated lands as to which no jungle waste had to be cleared.

Then as the *excess* area, I think it was clear that supposing, after reclamation, more land of the lessor's was found held by the lessee than given by the specifications of the lease *as to boundaries*, that excess should, as part of the same lease, be liable to the same terms as the other lands originally given under it.

In respect to the question whether the disputed pottah is a forgery or not, I do not think it is necessary to determine the point, while the admitted kubooleut, on which the plaintiff sues, is before us, containing the admitted agreement of the parties. I would dismiss plaintiff's case.

The 3rd January 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Hindoo Law—"Recovered Property."

Case No. 204 of 1867.

*Application for review of judgment passed by the Hon'ble Justices W. S. Seton-Karr and A. G. Macpherson, on the 5th June 1867, in Regular Appeal No. 309 of 1866.**

Bissessur Chuckerbutty and others, Defendants (Appellants), *Petitioners,*

versus

Seetul Chunder Chuckerbutty, Plaintiff (Respondent), *Opposite Party.*

Mr. Tagore and *Baboo Bungshee Dhur Sein* for Petitioners.

Baboo Sreenath Dass for Opposite Party.

The Hindoo Law on the subject of "recovered" property applies to cases in which the property has passed from the family to strangers, and has been held by them adversely to the family, and not to cases where the property has been held by one claiming (though unfoundedly) to be a member of the family.

Merely obtaining a decree for possession is not "recovering" the property.

"Recovery," if not made with the privity of the co-heir, must at least be *bonâ fide*, and not in fraud or by anticipation of the intentions of the co-heir.

Macpherson, J.—We are asked to review our judgment in this case on the ground that the defendants (the applicants for the review), at their own expense and by their own exertions, recovered the property of Shib Soonduree from the wrongful possessor Ram Chunder, by a separate suit, and that, therefore, we have erred in not, in the first instance, giving a fourth of the recovered property to the defendants, and declaring the plaintiff entitled to only a half share of the residue.

There are various grounds in addition to that relied upon by us in our judgment, on which we think that the conclusion at which we arrived was correct, and that no review ought to be granted.

In the first place, it appears to us that this is not a case of the *recovery of property which has been lost* within the meaning of those texts of the Hindoo Law which provide for a fourth share being allotted to the recoverer. The property in suit was never, in fact, lost to the family, for Ram Chunder held it, not as being a stranger, but as being

* *See* S W. R., page 13.

the adopted son of Shib Soonduree; and upon the one question of his being or not being her adopted son, his whole title admittedly turned.

The Hindoo Law, on the subject of "recovered" property, does not, in our opinion, apply to cases such as this—cases merely of disputed inheritance; it applies to cases where the property has been seized by others, or lost—cases in which it has passed from the family to strangers, and has been held by them adversely to the family, and not merely under an alleged (though unfounded) title as members of the family.

In the Dyabhaga (Chapter VI., Section 2, Clause 31), referring to the recovery by the father of lost property inherited from the grandfather, it is spoken of as property "which has *long* been lost." And in Clause 34, we find the following: "Vrihashpati "says: 'Over the grandfather's property "'which has been *seized (by strangers)* and "'is recovered by the father,'" &c. Clause 38 is as follows: "Sankha propounds a special "rule regarding land—'Land inherited "'in regular succession, but which had "'been *formerly* lost, and which a single "'heir shall recover,'" &c. So the Dya Krama Sangraha (Chapter 4, Section 2, Clause 6) says: "So Yajnyavalkya: 'An-"'cestral property which had been *before* "'*usurped* by any one, and afterwards re-"'covered by an heir,'" &c. And (Clause 8) he has stated a special rule regarding "land—'land inherited in regular succes-"'sion, but which has been *formerly lost*, "'and which a single heir shall recover,'" &c.

In Sir William Jones's translation of the Institutes of Manu (Chapter IX., Clause 209) the rule, which is probably the foundation of all the subsequent texts, is thus stated: "If "a son by his own efforts recover a debt or "property unjustly detained, *which could* "*not be recovered before by his father*, he "shall not, unless by his free will, put it "into parceny with his brethren, when, in "fact, it was acquired by himself."

No doubt, some of these texts are of general application, and do not relate specially to the recovery of land. But all of them have a bearing on the question, and, looking at them together, we have no doubt that they were all of them meant to apply to cases in which the property recovered (whatever its nature) had actually passed away from the family into the hands of strangers.

In the next place, it is not proved that the property, which is the subject of this suit, was, in fact, "recovered" by Bissessur, as alleged. The plaintiff instituted his suit some six months before the High Court decided, in the appeal in Bissessur's case, that Ram Chunder had not proved himself to be the adopted son of Shib Soonduree. The plaintiff in his plaint alleges Ram Chunder to be in possession: Ram Chunder, by his written statement, impliedly admits that he is so; and Bissessur nowhere in his written statement states that he is himself in possession. The mere obtaining a decree for possession would not, as it appears to us, be in itself "recovering" the property.

Finally, we find that "recovery," if not made with the privity of the co-heirs, must at least have been *bonâ fide*, and not in fraud of their title or by anticipating them in their intention of recovering the lost property. (*See* Strange, Vol. I., p. 217, 2nd Ed.) And in Halhed's Gentoo Code, which was quoted by the learned Counsel who supported the application for a review of our judgment, the same principle is expressly laid down. The rule is thus given (Chapter II., Section 9, page 79, of the edition of 1776): "If in the same "manner, *by permission of the partners*, "one of them occupies any glebe land of his "father and grandfather, then he shall "divide such glebe into four shares; and "from them he shall first take to himself "one share, and afterwards divide the three "remaining shares equally between himself "and his partners." (*See* also Colebrooke's Digest, Book V., Chapter 5, Section 2, para. 359, and the comments by Jugganatha.)

Bissessur, in his suit against Ram Chunder, chose to ignore his co-heir, the plaintiff in the present suit, and acted throughout antagonistically to, if not in fraud of, the rights of the plaintiff. Under such circumstances, even if Bissessur had "recovered" the property, he would not have been entitled to retain in the first instance a one-fourth share by way of remuneration for having recovered it.

On the whole, we are of opinion that we decided rightly in holding that the defendant Bissessur and his brothers were entitled to only an eight-annas share of the property inherited from Haradhun on the death of Shib Soonduree, and we reject this application with costs.

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The 3rd January 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Illegal ejectment — Suit for possession — Onus probandi.

Case No. 1532 of 1867.

Special Appeal from a decision passed by Baboo Gobind Chunder Chowdhry, Principal Sudder Ameen of Beerbhoom, dated the 10th April 1867, affirming a decision passed by the Moonsiff of that District, dated the 19th April 1866.

Radha Bullub Gossain and others (Defendants), *Appellants,*

versus

Kishen Gobind Gossain (Plaintiff), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellants.

Baboo Tarucknath Sein for Respondent.

In a suit to recover possession, when plaintiff proves possession and illegal dispossession, the *onus* of proving the title is shifted upon the defendant in the first instance; and, if the latter establishes his title, the plaintiff must then be required to prove his.

Loch, J.—THE plaintiff in this case sued to recover possession of certain homestead lands which he alleged had been purchased by his brother Gunga Gobind Gossain from Khettur Mohun Napit. His brother held possession till his death, and was succeeded in possession by the plaintiff who held that possession through one Nil Monee. He alleges that he was ousted in Bhadro 1271 by the defendants who carried off the thatch of the house, and have since retained possession.

The defendants allege that the land appertains to their lakheraj property; that Khettur Mohun held it on a condition of service, *viz.*, of shaving the members of the defendant's family, and that he had no authority to sell it; that, after he left the homestead, they have held possession through Nil Monee.

The Courts below have given plaintiff a decree for possession and the value of the thatch carried off by the defendants, holding that plaintiff had proved his possession and dispossession.

The defendants, in special appeal, urge that, as plaintiff sought to recover possession from their hands, plaintiff was bound to prove his title. A further objection to the decree of the Lower Courts is raised by Radha Gobind, defendant No. 5, to the effect that, as he is not charged with ousting the plaintiff, and was not originally a party to the suit, but was made so on the representation of the other defendants, it was wrong to give a decree against him, and he is entitled to his costs.

We think the first objection taken by the special appellants is not tenable. The plaintiff has proved possession and illegal dispossession. This was sufficient to shift the onus of proving the title upon the defendants in the first instance, and, had they succeeded in establishing their title, the plaintiff would have been required to prove his. The judgment of the Privy Council reported at page 12 of VI. Weekly Reporter, and the decision of this Court in VII. Weekly Reporter, page 174, lay down this as the proper course to be followed in cases where illegal ejectment is proved. We, therefore, reject the special appeal with costs.

On the ground taken by the defendant Radha Gobind, we think he must get a decree. He was not charged by plaintiff with dispossessing him, and he was made a defendant in the course of the suit, but at whose representation we do not clearly see, as the whole record is not before us. Nothing, however, is proven against him. He must be released, and his costs must be paid by his co-defendants.

The 3rd January 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Arrears of rent — Lessees in possession — Real tenants.

Case No. 1471 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 9th May 1867, reversing a decision passed by the Deputy Collector of that District, dated the 26th February 1867.

Judoonath Paul (Plaintiff), *Appellant,*

versus

Prosunnonath Dutt and others (Defendants), *Respondents.*

Mr. R. V. Doyne and *Baboos Onookool Chunder Mookerjee* and *Hem Chunder Banerjee* for Appellant.

Baboos Kishen Kishore Ghose, Ashootosh Chatterjee, and *Greeja Sunkur Moojoomdar* for Respondents.

A Collector may give a decree for arrears of rent against the real lessees in possession, although no previous realization of rent directly from them is established, and no written agreement is shown to have been executed by them in their own names, another party being the ostensible holder of the lease, and not denying liability.

Seton-Karr, J.—THIS case was a suit for rent against a certain dur-putneedar, and it had been remanded by order of the former Judge for the plaintiffs to elect whether they would proceed against the ostensible holder of the tenure who was one Parbuttia, and afterwards his wife Sonamonee; or whether they would proceed against the Dutts, who were the parties whom plaintiff alleged to hold the real and beneficial interest.

The plaintiffs having elected to proceed against the real, and not the ostensible holders, the Deputy Collector went into the case, and found, as a fact, that the Dutts were actually in possession, and that they were consequently liable to pay the rents in full.

When the case came up in appeal before the Judge, several objections were taken to the finding of the Lower Court, some of which, regarding the plaintiff's title, were clearly irrelevant, while others were certainly not pressed at the hearing of the appeal.

Ultimately, the case was heard, in appeal, on the following question, namely:—

"Whether a Collector, under Act X, can "decree arrears of rent against parties, "only on the ground of their possession, "when no previous realization of rent from "them is established, and no written agree-"ment is shown to have been executed, "while, at the same time, another party is "the ostensible holder of the lease, and does "not deny liability for the rents of the "mehal."

The distinct finding of the Deputy Collector that the Dutts had the beneficial interest, and were the parties in possession, appears never to have been questioned; and, certainly, it is not reversed by the Judge in appeal. In this state of things, I think that there is nothing whatever to debar the plaintiffs, who have elected to proceed against the real holders, from proving their possession, and from, consequently, gaining a decree.

The Judge relies upon a case quoted at page 449. Hay's Reports, 11th November 1862 (Heera Lall Bukshee, defendant, appellant); but this case, which relates to the liability of agent and principal, does not appear to be analogous to the case before us.

The Judge nowhere finds, on the evidence, that in past years credit for the rents was given either to Parbuttia, or to Sonamonee, the ostensible holders; but without coming to such a finding, in clear and distinct terms, it was not competent to him to reverse the decision of the first Court in plaintiff's favor, more especially when he does not question, but rather takes as correct, the finding of the first Court as to the actual possession and enjoyment of the Dutts, against whom the decree was given.

In this state of things, it appears to me that the reasoning of the Judge on the facts found, and not impugned, is erroneous in law, and that there is no reason why the plaintiffs should not retain their decree against the parties whom they had elected to sue, and whom they have shown to be in possession; and, in this view, the decision of the Judge should be set aside, and that of the first Court in plaintiff's favor should be restored with costs and interest.

Macpherson, J.—I think the Judge was wrong in reversing the decision of the Deputy Collector, unless he first found, as a matter of fact, that credit was originally given, not to the real lessees, but exclusively to the person in whose name the lease was granted. The Judge accepts the finding of the Deputy Collector that the respondents were the real lessees in possession; and, if so, the relation of landlord and tenant existed between the plaintiff and them, and they were liable for the rents, unless there was a special contract to the contrary, that is to say, unless there was a special contract that the person whose name was used should alone be liable.

This decision agrees, generally, with the principles laid down in the Full Bench ruling reported at page 428, Volume VIII. of the Weekly Reporter.

The decree of the Lower Court must be reversed with all costs.

The 3rd January 1868.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Railway accident—Negligence of Railway Company—Damages.

Case No. 151 of 1867.

Regular Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 18th April 1867.

Mr. F. Woodhouse (Plaintiff), *Appellant,*

versus

The Calcutta and South Eastern Railway Company (Defendants), *Respondents.*

Messrs. G. C. Paul and *T. Stokoe* and *Baboo Obhoy Churn Bose* for Appellant.

Mr. F. Fergusson for Respondents.

The plaintiff was a passenger travelling on the defendants' Railway, and received severe injuries from a fall which he experienced in stepping upon the platform when the train stopped.

HELD that the Railway Company was guilty of negligence in not keeping the station properly lighted, in allowing the train to overshoot the station, and in not warning the plaintiff against alighting; also that the injuries sustained by the plaintiff were caused by the negligence in question, and that the plaintiff did not by his own want of care contribute to the accident.

Macpherson, J.—THE appellant in this case was the plaintiff in the Court below, and sued to recover damages from the defendants for injuries received by him while travelling as a passenger on their line of Railway.

On the evening of the 2nd December 1866, the plaintiff was a passenger in a train from Mutlah to Ballygunge, which is a station intermediate between the Railway termini at Mutlah and Calcutta. The train reached Ballygunge about 6-30 P. M., when it was quite dark. The plaintiff was travelling in a first-class carriage in company with two gentlemen, Mr. Schiller and Captain Jervis. On the train stopping at the station, Mr. Schiller and Captain Jervis got out, opening the door of the carriage for themselves. The plaintiff proceeded to follow them. He was in the act of putting his foot to the ground when Jervis called to him to take care as the train was moving. At the same moment almost his foot touched the ground, and he felt that the train was moving back. In the darkness, he could not see the platform distinctly, and, being afraid to alight, he tried to stop himself and to recover his position on the step of the carriage. In attempting to recover himself, he slipped and fell between the platform and the train. The consequence was that his leg was broken, and he received other serious injuries.

As to these general facts there is no dispute.

The plaint alleges that the accident was caused by the negligence of the Railway Company—

Firstly, in not keeping the station sufficiently lighted ;

Secondly, in "so negligently attending to" the place whereon passengers had to alight that the same was unsafe for passengers alighting ; and

Thirdly, in putting the train in motion as the plaintiff was alighting, and without notice to him, after the train had stopped for the purpose of allowing passengers to alight.

The defendants, in their written statement, deny that there was any negligence on their part, and plead that the accident was attributable to want of care and ordinary prudence on the part of the plaintiff.

The Judge, who tried the case, without finding as a fact that the station was properly lighted, or that the condition of the platform and station generally was such as it ought to be, was of opinion that neither the condition of the station nor the want of lights caused or aided in causing the accident. He held that the accident was to be ascribed primarily to the moving of the train as the plaintiff was in the act of alighting; but he held that, at the time the plaintiff tried to get out, the train had not stopped *for the purpose of allowing passengers to alight;* that the plaintiff had no sufficient reason for supposing it had stopped for that purpose; that the defendants were justified in putting the train in motion when they did ; that there was no negligence on the part of the defendants such as to make them liable for damages ; and that there was such want of care and prudence on the part of the plaintiff as to disentitle him from claiming damages.

The suit was accordingly dismissed with costs.

In appeal, it is contended on behalf of the plaintiff that the accident was caused solely by the improper moving of the train after it had once stopped, the want of lights, and the dangerous state of the platform ; that, at the time the plaintiff began to alight, he had every reason to believe that the train had stopped for the purpose of allowing passengers to alight; that, if the train had

not then stopped for that purpose, notice should have been given to the passengers that the train was about to be backed ; and that the train ought not to have been put in motion without such notice.

As regards the question of the unfinished and dangerous state of the platform, we think it is very clearly proved that a large portion of the platform was in an unfinished and most dangerous state, and that the Railway Company was guilty of the greatest negligence in allowing a platform in such a condition to be used at all, without having taken the most ample precautions both in the way of lighting and otherwise, for the safety of persons using their Railway. Mr. Shanks, the Acting Agent of the defendant Company, says: "In December last, the "facing wall of the station (*i. e.*, platform) "was complete. At the back of the wall "there was earth-work up to within 5 inches "of the top of the wall. The thickness of "the wall is 15 inches. * * * A man step-"ping out of a carriage would first step on to "the brick wall, and then on to the earth." Mr. Schiller's evidence is to the same purport.

It seems to us that a Railway Company can scarcely be guilty of any more gross or dangerous negligence than to leave in darkness a station which is in such a condition that a wall 15 inches wide with a drop of 5 inches to the earth on the further side of it is all that passengers have to alight upon. We think, however, that the injuries which the plaintiff received are not proved to have resulted from the condition of the platform. There is no very distinct evidence on the subject ; but the conclusion at which we arrive, on the whole, is that the carriage from which the plaintiff attempted to descend stopped, *not* opposite the unfinished portion of the platform, *but* opposite a portion which had been completed, and was in good order. Mr. Pendleton, the agent of the Railway Company, swears that, on the morning after the accident, he examined the platform, and a spot about 20 yards from the Calcutta end of the platform was pointed out to him by the station-master as that at which the accident occurred. But Mr. Pendleton himself was not present when the accident happened, and what the station-master told him is no evidence—especially as the latter was not called as a witness, although (as Mr. Fergusson who argued the case for the respondents told us) he was present in Court at the trial. Mr. Pendleton, however, says, speaking from what he himself saw on the morning of the 3rd of December, that from the Calcutta end of the platform to the commencement of the new platform, which he supposed was about 200 feet, nearly the whole of the platform was in good order. As Mr. Schiller and the engine-driver agree in laying the scene of the accident close to the Calcutta end of the platform, we cannot say it is proved that what occurred was owing to the improper or unsafe state of the platform.

But it appears to us to be proved conclusively that the station at the time of the accident was most insufficiently lighted, and that the negligence of the defendants in this respect was one of the main causes of the plaintiff's falling as he did.

We think the reasoning of the Judge below on this point is very fallacious. It may be true that Schiller, as he entered the station, could, notwithstanding the darkness, recognize the buildings sufficiently to know that he had arrived at Ballygunge. It may also be true that, after he got out of the carriage, he was able to see, to some extent, what the plaintiff did. All this, however, he might have very well done if there had not been a light of any sort in the station. First-class carriages, moreover, usually carry lights, and it may be that the light from the carriage in which he had been travelling showed the plaintiff's position more distinctly than it would otherwise have been visible.

The night "was dark and smoky," as the Engine-driver Maxfield says by way of excuse for having over-shot the station. Yet there were no lights of any description in the station, save what is called a "reading-lamp" in the Ticket-office, and two common hand-lamps (such as Railway officials of the like class generally use), held by the station-master and the peon respectively. The guard of the train, no doubt, had a lantern too; but that really does not affect the question of the sufficiency of the station-lights, especially as it is in evidence that neither the guard nor his lamp had left the break-van at the time of the accident. Some attempt has been made to show that the reading-lamp was so placed as to be of use in giving light to the platform. It is very doubtful whether, on the evening of the 2nd December 1866, it was so placed. But, granting that it was, it still remains wholly impossible for us to say that, even supposing the platform to have been in good

order, the station was lighted in any degree to such an extent as the safety of passengers demanded. It is not enough that the lights should be sufficient for the Railway Company and their own servants who know the premises; they must be enough to guide and direct strangers who are unacquainted with the station (*see* Martin *vs.* Great Northern Railway Company, 16 C. B. 180).

In the present instance, the station was practically left in the dark, so far, at any rate, as the plaintiff was concerned. This darkness was, as it seems to us, of all things the most likely to cause the plaintiff, first to hesitate on the step of the carriage, and then to fall as he did. It may be easy enough for a man to step on to a Railway platform from a moving train when he can see what he is about; but it is a very different thing for him to take a similar step in the dark, especially if he is ignorant that the train is in motion. The plaintiff says: "I was looking towards the ground. I was not aware "that the train had got past the platform. "I could not see the platform when I looked "down; I supposed there was a platform "because two others had got out. I could "not see the ground. I could not see anything." And again he says: "I do not "know whether the train had stopped when "Schiller and Jervis got out. It had stopped "when I got out. I know that the train "must have stopped, because it was backing "when I attempted to get out. No doubt, "it had stopped some time before that. I did "not know it was backing until I put my "foot to the ground." The plaintiff, in the belief that the train was standing still, commenced to alight. He could not see, owing to the darkness, that the train was moving slowly backwards. Just as he was about to put his foot on the ground, Captain Jervis called out to take care, as the train was backing; and, almost at the same moment, his foot touched the platform, and he felt the motion, for which he was unprepared when he began to put his foot out in order to step on the ground. Taken by surprise in this manner, it is in no degree wonderful that he hesitated, and wished not to complete the step which he had meant to take, and tried to recover his footing on the carriage. Had the platform been lighted, as it should have been, he would have seen from the first that the train was in motion; he would have seen and understood what he was about, and he would have had that confidence which one acting in the dark could not have.

Then, was there any negligence on the part of the defendants in backing the train when and as they did?

We agree with the Court below in finding that, as a matter of fact, the train, at the time when the plaintiff attempted to get out, had not stopped for the purpose of allowing passengers to alight. But we do not concur in the view apparently taken by the Lower Court on the question of negligence as connected with the overshooting of the platform by the train. We have no doubt whatever that the mere fact of a train overshooting a platform, at which the driver has orders to stop, is in itself *primâ-facie* evidence of negligence. Under ordinary circumstances, if there are proper signals, and the engine and rails are in good working order, a careful driver has not the smallest difficulty in stopping a light train, such as that in which the plaintiff was travelling, at the proper moment. The Judge says that it is a common occurrence for trains to overshoot the mark, and then move back. This may be true, as it is also doubtless true that Railway officials are frequently guilty of very gross irregularities and neglects of duty whereby they needlessly endanger the lives of hundreds of passengers. But the negligence is none the less negligence, and none the less culpable, because frequently repeated.

We do not mean to say that the overshooting of a station may not be perfectly excusable, and the result of circumstances which may defy the efforts of the most careful and skilful of drivers; for example, it is well known that, in certain states of the weather, the rails are in such a slippery condition that the breaks and other means ordinarily used to stop the train fail to produce that effect. In the present case, however, there is really no reason given for the train not having stopped when it ought to have done so. The driver can assign no better reason than that it was dark and smoky—a reason which, with reference to the same place, probably would apply equally to almost every other night during the cold season, on which there did not happen to be moon-light. But the driver mentions a fact which may possibly be the real cause of his having been too late in pulling up—the fact, namely, that there were no proper signals in use at the station. He says (and he is confirmed by Mr. Shanks) that there were no fixed signals, and no regular signal-post at the station, but that the custom was to hold up a green light at the end of the station. Without saying that

the want of proper signals was the reason why the train overshot the station, we find that no sufficient excuse for the overshooting is proved. We think that the defendants were guilty of negligence, therefore, in that the train overshot the platform. That it did so overshoot the platform was unquestionably the primary cause of the disaster which befell the plaintiff.

But, supposing there was no negligence, the overshooting of a station is an occurrence which necessarily is likely to produce great danger to passengers who are about to alight; and the least that a Railway Company are bound to do, if such an event does happen, is to take every possible means to divest the occurrence of its dangerous consequences. One obvious precaution is to warn passengers to sit still, and that the train is about to be backed; and, in the case now before us, we think there was great negligence on the part of the servants of the Railway in not warning the plaintiff and other passengers that the train was about to move, and that they must keep their seats. The carriage in which the plaintiff was seated was drawn up opposite to the platform where passengers usually alight. The servants of the Company saw, or ought to have seen, that, during the few moments that the train stood still, two passengers got out. If it was unsafe or wrong for them to get out then, they should have been prevented from so doing, or warned not to do it. But no objection whatever was made when Mr. Schiller and Captain Jervis alighted. What, then, was the reasonable and natural course for the plaintiff to pursue under the circumstances? He knew nothing of some of the carriages having gone beyond the end of the platform, or of the intention to back the train into the station; he felt that the carriage had stopped; he saw two fellow-passengers get out safely and without any objection or remonstrance on the part of the Railway officials. Why should he have doubted that the right time had come for himself to alight? Was he to sit still in his carriage and say to himself, "Though the train "is at a stand-still opposite to the platform, "and though these passengers have got out "and gone away safely, I am not actually "certain that the train has stopped in order "to allow passengers to alight; therefore, I "shall sit still until some of the Railway "officials come and tell me it is safe for me "to get out?" Such a course would have been entirely contrary to the usual practice of travellers either in this or in any other country—and certainly, upon the evidence, wholly contrary to the usual practice (apparently never objected to by the defendants) of first-class passengers upon the defendants' line. The plaintiff's case is not even that of a person who himself opens the door of a railway-carriage, and is the first to step out; for here the train was actually at a stand-still, other passengers had opened the doors, and had alighted safely and without any indication on the part of the railway authorities that they ought not to have done so; and the plaintiff had no notice, and no reason to suspect, that the train was going to be moved back. We say he had no reason to suspect the train was about to move, because the plaintiff swears he never heard any whistle; but, even if he had heard it, it would be impossible for us to say that it would necessarily have conveyed to his mind the information which the driver intended it to convey. We think that, as the train had stopped, and as other passengers had got out safely, and there was nothing to lead any man in the exercise of ordinary care to suppose that they ought not to have done so, the plaintiff was justified, and acted as any reasonable and careful man would have acted, in thinking that the proper time for alighting had arrived. We think there was no such want of care or prudence on the part of the plaintiff as to disentitle him to damages.

It is not because, possibly, the plaintiff might have exercised more care than he did, that therefore his right of action or his remedy is barred. Nor, even if there had been a certain amount of negligence on his part, would that necessarily be an answer to his claim. The question really is, whether the plaintiff did or did not exercise ordinary care (Davies *versus* Mann, 10 M. and W. 546). In a recent case (Stapley *versus* The London, Brighton, and South Coast Railway Company, 1 L. R., Exch., 21), the Court of Exchequer refused to disturb a verdict for the plaintiff, although the person injured had been guilty of far greater negligence than could possibly be attributed to the plaintiff in the present case, even supposing there was *some* want of care and prudence in what he did. In that case, the negligence on the part of the Railway was that a gate at a level-crossing was left open, and the gate-keeper was absent, at a time when an express train was overdue. The person injured passed on to the line, and was knocked down by the train which came up at the moment. A verdict was given against the Railway

Company, although it was proved that the person injured might have seen the train approaching, if he had chosen to look.

We have some difficulty in dealing with a case like this where numerous questions of fact are so closely mixed up with questions of law. The rule we apply is that which has been acted on in many cases in England, and is stated by Erle, C.J., in expressing the opinion of the majority of the Judges in the case of Scott *vs.* London Dock Company (34 L. J., Ex., 220), where he said : " There " must be reasonable evidence of negligence. " But, when the thing is shown to be under " the management of the defendant or his " servants, and the accident is such as, in the " ordinary course of things, does not happen " if those who have the management use " proper care, it affords reasonable evidence, " in the absence of explanation by the de- " fendant, that the accident arose from want " of care."

On the whole, we think that the Railway Company was guilty of negligence in not keeping the station properly lighted, in allowing the train to overshoot the station, and in not warning the plaintiff against alighting: and we think that the injuries sustained by the plaintiff were caused by that negligence, and that the plaintiff did not, by his own want of care, contribute to the accident.

There remains the question of damages. The evidence on this point is not so satisfactory or precise as it might have been. It is, however, undoubtedly proved that the plaintiff, at the time of the accident, was a Bill Broker, with a good business, and making a considerable income; that the effects of the accident were such as to disable him wholly from work for four or five months; and that, even after that time, he would not be able to attend to business so fully or profitably as before. When we consider, in addition to this, the amount of personal suffering he has gone through, and the fact (deposed to by Dr. Macnamara) that there will probably always be a stiffness of the leg which was injured, we feel assured that we are not assessing the damages too much in the plaintiff's favor when we assess them at Rupees 10,000.

We think the decree of the Court below ought to be reversed, and that a decree ought to be given for the plaintiff, with Rupees 10,000 as damages, and all costs (as in a suit for Rupees 10,000), both here and in the Lower Court.

The 4th January 1868.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Criminal proceeding not evidence—Civil Court bound to find its facts.

Case No. 1567 of 1867.

Special Appeal from a decision passed by Baboo Gobind Chunder Chowdhry, Principal Sudder Ameen of Beerbhoom, dated the 27th April 1867, modifying a decision passed by the Moonsiff of that District, dated the 19th February 1867.

Keramutoollah Chowdhry (one of the Defendants), *Appellant,*

versus

Gholam Hossein (Plaintiff), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Gopal Lall Mitter for Respondent.

A proceeding of a Criminal Court is not admissible as evidence: a Civil Court is bound to find the facts for itself.

Mitter, J.—THE judgment of the Lower Appellate Court in this case is extremely unsatisfactory. The action was instituted by the special respondent for damages for malicious prosecution. The Court of first instance found that he had failed to prove either malice or want of probable cause by any reliable evidence. This finding has been upset by the Lower Appellate Court upon no legal ground whatsoever. The Court observes that it has been proved by the testimony of one Meajan, that there was previous enmity between the parties; but the existence of such enmity does not necessarily raise the presumption either of malice or of want of probable cause. The Court then goes on to say : " In the absence of animus, no one can openly charge another with theft." This proposition is manifestly erroneous. The Court further observes: " When the plaintiff has been acquitted by the Fouzdaree Court, what doubt can there remain as to the plaintiff's having been maliciously charged with theft?" In the *first* place, the proceeding of the Fouzdaree Court herein referred to is not admissible as evidence; and in the *second*, even if it were, the Principal Sudder Ameen had to find the facts for himself, and not to

rely implicitly upon that proceeding. The rest of the judgment is irrelevant to the points before us. The judgment of the Lower Appellate Court is, therefore, reversed, and the case is remitted to it for a fresh finding upon the record.

The 4th January 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Cross-appeals—Interpleading—Section 348, Code of Civil Procedure.

Case No. 1653 of 1867.

Special Appeal from a decision passed by Moulvie Itrut Hossein Khan, Principal Sudder Ameen of Gya, dated the 25th April 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 27th September 1866.

Muhboob Ali and others (Defendants), *Appellants,*

versus

Zur Banoo Bibee (Plaintiff), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Baboos Chunder Madhub Ghose, Kalee Mohun Doss, and *Roopnath Banerjee* for Respondent.

A respondent, making a cross-appeal, can take objection to any part of the judgment of the first Court adverse to him to which the appellant can answer, and which affects the appellant's interests only; but the cross-appeal of a respondent does not open up any question between himself and his co-respondents, for they cannot be allowed to interplead. The law gives a respondent a right to raise objections at the hearing of the appeal; but under Section 348, Civil Procedure Code, reasonably construed, the contest is between two parties equally interested, and not with third parties.

Loch, J.—THE plaintiff sues to get possession of certain landed property left to her by her mother, according to the schedule at foot of the plaint, and alleges that she succeeded to possession, and was illegally ejected by the defendants.

To enable us properly to understand this case, it is necessary to refer to the pedigree of the family. Asadoollah died leaving five sons, of whom we need mention only two, Ruheem and Meer Oollah. Ruheem married Bibee Jer, and had by her a son called Ibrahim, and a daughter Zur Banoo, the plaintiff. Ibrahim had a son Bahadoor, who left a daughter Rahmut Bibee. It is alleged by the plaintiff that Ibrahim and Bahadoor lived in commensality with her mother, Bibee Jer, who outlived them, and succeeded to the whole estate belonging to her husband, son, and grandson; that she died in Bhadro 1270, and was succeeded in the property by the plaintiff, who retained possession till ousted, in Kartick 1271, by the defendants, who, with the exception of Rahmut Bibee, are descendants of Meer Oollah, the other son of Asadoollah mentioned above.

The defendants state that Ruheem died in April 1832; that neither Bibee Jer, nor the plaintiff held possession, and that plaintiff's suit is barred by limitation; that the property was held successively by Ibrahim and Bahadoor; and that the latter, under a deed of exchange, dated Assar 1261, gave up his rights in all the other villages which came to him from his grandfather, and received 12 annas 6 dams of Mouzah Myra in exchange from the defendant.

The suit was first dismissed on the plea of limitation, but, on appeal, it was sent back for trial on its merits, and then the Sudder Ameen gave plaintiff a decree for the 12 annas 6 dams of Mouzah Myra, holding the deed of exchange to be valid, and the transaction to be binding. It may here be remarked that plaintiff did not ask for this, but for a share in several villages, and, as far as we are shown, did not make any reference to the exchange said to have been made by Bahadoor.

The plaintiff was satisfied with this; but Rahmut Bibee, the daughter of Bahadoor, appealed, claiming Myra as the property of her father, and the Principal Sudder Ameen reversed the judgment of the first Court, and gave plaintiff a decree for a share in all the villages as claimed by her, with the exception of Mouzah Myra, to which he concluded that she had no right as the plaintiff had, by petition on 14th December 1861, stated as much.

Muhboob Ali and the other defendants, hose interests have been affected by this ecision of the Principal Sudder Ameen, ave come up in special appeal, urging the ea of limitation against the plaintiff's claim, nd abandoning the other grounds taken in eir petition. But, before going into their se, the Court found it necessary to examine e record to ascertain how it was that the hole case had been re-opened before the incipal Sudder Ameen, as the appeal of ahmut Bibee referred to only one portion the property in question, in which the her defendants, who had not appealed, were ot interested.

It appears that Rahmut Bibee made plaintiff nd her co-defendants the respondents in her peal, which was filed on 5th October 1866. n 23rd February 1867, the co-defendants ed a vakalutnamah, but, not having any ontention with Rahmut Bibee, took no further roceedings in the case; and when the appeal as heard, their vakeel was not present. n 11th March 1867, plaintiff filed a cross-peal under Section 348, Act VIII. of 1859, jecting to so much of the judgment of the ower Court as refused to give her possesion of the other villages which she claimed, nd which were in the possession of her o-respondents. It does not appear that ey were aware of the existence of this ross-appeal. Certainly no notice was rved upon them to meet it, but the Prinipal Sudder Ameen, apparently looking nly to the words of Section 348, and disegarding the precedents of the Court which ave laid down the proper construction of at section, thought that the cross-appeal e-opened the whole case, and enabled him try the merits as between all the arties. It has been repeatedly held by is Court that, where a cross-appeal is made, opens out the case only against the origin-l appellant, and not against the co-respondents. The respondent making the cross-peal can take objection to any part of e judgment of the first Court adverse to im to which the appellant can answer, and hich affects the appellant's interests only; ut the cross-appeal of a respondent does ot open up any question between himself nd his co-respondents, for they cannot be llowed to interplead. The law gives a espondent a right to raise objections at the earing of the appeal, as if he himself had referred a separate appeal, but, though the ords of Section 348 are very wide, the easonable construction to be put upon them is, that the contest is between two parties both equally interested in the matter of the appeal, and not with third parties who, though originally made parties to the suit by the plaintiff, have no interest in the subject of the appeal brought by one of the co-defendants. Had plaintiff wished to re-open the case in the present instance against the other defendants, the Principal Sudder Ameen might have given her time to file an appeal on good cause being shown for its not being filed within proper time. We think, therefore, that the Principal Sudder Ameen has committed an error in re-opening the case as regards the special appellants, and we reverse so much of it as affects their interests, with costs.

The 4th January 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Possession, how to be proved.

Case No. 1619 of 1867.

Special Appeal from a decision passed by Moulvie Ali Newaz, Principal Sudder Ameen of Chittagong, dated the 23rd April 1867, reversing a decision passed by the Moonsiff of that District, dated the 19th June 1866.

Ishan Chunder Behara and others (Defendants), *Appellants,*

versus

Ram Lochun Behara (Plaintiff), *Respondent.*

Baboo Rajendronath Bose for Appellants.

Baboo Poorno Chunder Shome for Respondent.

A witness's statement that a party "is in possession" is no evidence of the fact. The question of possession is a mixed one of law and fact; and the evidence produced must give the various acts of ownership which go to constitute possession, so that the Court may arrive at its own conclusion.

Mitter, J.—THIS was an action instituted by the special respondent for the possession of some *Dheepa lands.* The special appellant, who was defendant in the Court below, pleaded, among other matters, that the suit was barred by the law of limitation. The Court of first instance dismissed it upon the

ground that the respondent had failed to prove either possession or title. This judgment has been reversed by the Principal Sudder Ameen for the reasons set forth in his decision.

The special appellant contends that the adjudication upon the plea of limitation by the Lower Appellate Court is based upon no legal evidence. We are of opinion that this contention is right. The respondent produced only three witnesses to prove his possession within the period prescribed by the Statute of Limitation. The second witness, Kanoo, has been abandoned by his pleader, inasmuch as his testimony is mere hearsay. The first witness, Samud Ali, stated that the respondent was *in possession*, and that the special appellant *dispossessed* him by forbidding him to fish on the lands in the year 1221 M. S. The third witness, Jummo, merely stated that the respondent was in *possession*. Now, it is quite clear that a mere statement by a witness to the effect that a party *is in possession*, strictly speaking, is no evidence of *possession*. The question of possession is a mixed question of fact and law, which it is for the Court to determine. The evidence produced on the point must give the various acts of ownership which go to constitute *possession*, so that the Court might arrive at its own conclusion. This has not been done in the case before us. But, be this as it may, we do not find anything in the evidence above referred to to justify the conclusion that the respondent was in *possession* at any time within 12 years prior to the date of suit. The witnesses have merely said that the respondent "was in *possession*," but they are altogether silent as to the time up to which such possession continued. It is admitted that the suit has been brought after seven years from the alleged date of ouster. The respondent had, therefore, only five years remaining to complete the period laid down by the statute, and it was incumbent upon him to remove the bars pleaded against him by proving his possession at any time within this period. This he has completely failed to do, and his action, therefore, must fail. The Principal Sudder Ameen says in his judgment that "it has been *satisfactorily proved* that possession was held by the plaintiff till his *ouster* by the defendant on *the date* alleged by him." How the Principal Sudder Ameen could have used such strong expressions in the face of the record, it is difficult to make out, and we hope that he will be more careful in future. We decree this special appe with costs. The respondent's suit sha stand dismissed, and he shall have to pa all the costs incurred by the special appe lant in both the Courts below.

Loch, J.—I concur in the order.

The 4th January 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Execution-proceedings by Revenue Courts—Interference by Civil Courts.

Case No. 1238 of 1867.

Special Appeal from a decision passed b Mr. M. Beaufort, Additional Judge o Tirhoot, dated the 28th February 186 reversing a decision passed by Babo Brohma Dutt, Moonsiff of that Distric dated the 31st August 1865.

Bhoojunga Thakoor (Plaintiff), *Appellant,*

versus

Luchmee Narain Shahee and others (Defend ants), *Respondents.*

Baboo Shib Chunder Chatterjee for Appellant.

Mr. R. E. Twidale for Respondents.

Proceedings held by the Revenue Courts in executio of their own decrees are final, and cannot be interfere with by the Civil Courts unless on some special groun like that of fraud.

Mitter, J.—THIS was a suit instituted b the special appellant for the purpose o setting aside a sale held in execution o a decree passed against him under Act X of 1859. The Lower Appellate Court ha dismissed the suit upon the ground that th Civil Courts were not competent to inter fere with such a sale in conformity with Full Bench ruling of this Court reporte in page 147, Weekly Reporter, Specia Number.

In special appeal the two following point have been urged before us :—

1st.—That the sale in question havin been held by the Deputy Collector contrar to the provisions of Section 105 of Ac

of 1859, was null and void for want of jurisdiction, and that, therefore, the Civil Court was fully competent to set it aside.

2nd.—That the Lower Appellate Court was wrong in dismissing the claim of the special appellant with reference to Mouzah Bostum, which was not included in the sale.

With reference to the first point, it has been contended before us that the Deputy Collector had acted without jurisdiction in selling the property in dispute before proceeding against the under-tenure for the rent of which the decree was passed, as provided for by Section 105 of the Act. We are, however, of opinion that the irregularity complained of does not amount to a defect of jurisdiction. It is a mere irregularity in conducting the sale, and whatever might have been the force of the objection if we were competent to deal with the legality or otherwise of the sale, we do not think that it renders the proceedings of the Deputy Collector absolutely null and void for want of jurisdiction. The law expressly declares all proceedings held by the Revenue Courts in execution of their own decrees final and conclusive, and we are unable to interfere with such proceedings when no special ground, like that of fraud, has been pleaded before us.

* * * * * * *

The 4th January 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Suit for renewal of pottah—Section 4, Act X., 1859—Procedure of Revenue Court.

Cases Nos. 1543 and 1544 of 1867 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Tirhoot, dated the 25th February 1867, reversing a decision passed by the Assistant Collector of that District, dated the 7th May 1866.

Sheodie Mahatoon (Plaintiff), *Appellant,*

versus

Huree Kishen (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory for Respondent.

Where a tenant suing for a renewal of his lease proves right of occupancy, the Court should proceed to determine what rates of rent should be imposed, even should he fail to make good his claim to hold at fixed rates.

Loch, J.—In this case, plaintiff sued to obtain a pottah at the rates entered in a previous pottah which expired in 1272, and he alleges that he and his ancestors have held the land for several generations. The defendant denied the plaintiff's right to hold at a fixed rate, alleging that his tenancy commenced only in 1268, and that he refused to give a fresh pottah because the capabilities of the land had, during the period of plaintiff's lease, considerably improved.

The Assistant Collector found that plaintiff had a right of occupancy, but not to hold at a fixed rate, and he gave him a pottah for the current year at the rates mentioned in the former lease. On appeal by defendant, the Judge held that the plaintiff's suit was brought under Section 4, Act X. of 1859, and that he did not pray for rates at a fair rent under Section 5, and that, having failed to establish his right to hold the land at a fixed rent, he could not, in this suit, ask the Court to assess the land at fair rates; he, therefore, reversed the order of the first Court, and dismissed the suit.

We think the proceedings of both Courts to be erroneous. The first Court was wrong in supposing that the question of the proper rate of rent could not be tried because the defendant-zemindar had served no notice of enhancement, for this is not necessary when a tenant brings a suit to get a pottah, and the zemindar alleges that the rates offered are too low. The question to be determined in such cases is, the tenant's right to get a pottah at the rates he asks. If he claims to hold under fixed rates, that question must first be disposed of; and, if he fail on this point, there is no reason why the Court

respondent. Such a report is, in my opinion, utterly valueless as evidence. The pleader for the respondent, instead of denying the correctness of the above proposition, rested his case upon the ground that the Lower Appellate Court has come to an independent conclusion upon the evidence of the witnesses examined by the Ameen. I do not think that this contention is well-founded. The whole context of the Judge's decision clearly shows that he was mainly influenced by the report of the Ameen in coming to the conclusion arrived at. But, conceding this point to the respondent, I am still of opinion that the case has not been properly decided by the Lower Appellate Court.

The judgment of that Court, when analyzed into its component parts, reduces itself into the two following propositions:—

1st. Plaintiff in his notice alleges that this land is of the kind styled *bheet awul.* Defendant in his answer does not deny this. Hence the land in the possession of the defendant must be considered as *bheet awul.*

2nd. The Ameen states that he examined certain ryots *of the neighbourhood and of the same mouza* with defendant, and it is not denied that these ryots are *of that nature,* or that their lands are of *the kind* described by them. Hence the rate paid by these ryots is the "*prevailing* rate payable by the ryots of the *same class* with the defendant for land of a similar description, and with similar advantages in the places adjacent."

Both of these propositions are, in my opinion, erroneous in law. For the purpose of determining whether the respondent had made out the ground of enhancement relied upon by him, three important points ought to have been kept in view, namely, *1st,* the character of the land with reference to its fertility and advantages of situation; *second,* the *class* to which the special appellant belonged as a ryot; and, *third,* the *prevailing* rate payable by similar ryots for land of a similar character in the places adjacent.

The first of the two propositions as above mentioned refers to the character of the land, but the reasoning upon which it is based appears to me as altogether fallacious. The defendant, special appellant, was not bound to traverse the allegation made by the respondent in the *notice* of enhancement, to the effect that the land in question was of the description called *bheet awul.* The doctrine of admission by non-traverse is not, in my opinion, applicable to written statements filed under Act X. of 1859. The law, Section 59 of the Act, requires that the points of law and fact upon which the parties are at issue must be ascertained by examining them or their agents. Whether the land held by the special appellant was of the description called *bheet awul* or not ought to have been found out by examining him on that point. This was not done, and, in the absence of any distinct statement by the special appellant one way or the other, the respondent should have been called upon to prove his allegation by evidence. It is clear, therefore, that the Court below was wrong in assuming that the land held by the special appellant was *bheet awul* land.

As to the "*class*" of ryots to which the special appellant belongs, and the rate "*prevailing*" in the neighbourhood, the Judge's reasoning, which is contained in the second proposition above referred to, is still more untenable. It is admitted that the special appellant is a ryot having a right of occupancy. The evidence of the witnesses examined by the Ameen and referred to by the Judge does not show that those witnesses are ryots of the same class, or, in other words, that they are also ryots having rights of occupancy. The Judge says that they are *stated* by the Ameen to be "ryots of the neighbourhood, "and of the same mouza with the defend-"ant," and that it is not denied by the special appellant that they are "of that nature." Now, it is clear that, under the law, it was a question of the utmost importance to determine the rate payable by *ryots* of the same class with the special appellant. Act X. of 1859 divides the ryots into two great classes, namely, ryots having a right of occupancy, and ryots not having a right of occupancy; and it is to this division that the words "same class" used in Section 17 evidently refers. Any number of ryots coming forward to depose that they are "of the same neighbourhood and of the same village with the defendant," without stating that they are occupant ryots, would not make the rate of rent paid by them the *rate payable* by the *same class* of ryots "with the defendant." Non-occupant ryots have no right to hold their lands except on such terms as their landlords might choose to let them, and, for anything known to the contrary, the ryots examined by the Ameen might be non-occupant ryots; so that the

rate of rent paid by them cannot be in any way assumed as the proper standard of adjustment in this case.

Nor do I think that the Judge has found the "*prevailing* rate" in the neighbourhood in the manner required by the law. The witnesses referred to by him do not say that their lands are held by them at the uniform rate of 3 rupees per beegah, the rate decreed by the Lower Appellate Court. According to their testimony, the lands held by them appear to have been held at various rates, and it has been a matter of very great difficulty with me to make out how the Judge could come to the conclusion that 3 rupees per beegah was the *prevailing* rate. But, granting even that these witnesses had deposed that the lands held by them were *bheet awul* lands, and that the rate paid by them was one uniform rate of 3 rupees per beegah, I am still of opinion that this evidence is not legally sufficient to prove the *prevailing rate*. The word "*prevailing*" used in Section 17 must have some definite meaning attached to it. It means the rate generally prevalent or the rate paid by the *majority* of the ryots in the neighbourhood. Now, the evidence of 20 ryots (for that is the number referred to in the present case), simply showing that *they* paid their rents at the rate of 3 rupees per beegah, does not go to prove the *prevailing* rate or the rate paid by the majority of the ryots. I do not mean to say that all the ryots in the neighbourhood are to be examined, and then the rate, paid by the majority of them, is to be found out. But I do mean to say that the evidence given must purport to show the rate paid by the majority; otherwise it cannot be said that the prevailing rate has been established. In the case before us, the Ameen had examined 30 other ryots, who deposed that the rate of rent prevailing was one rupee per beegah, or, in other words, the same as the rate at which the special appellant has been hitherto paying his rent. The Ameen gets rid of this evidence by the remark that these ryots too have been served with similar notices of enhancement with the special appellant. The Judge has not alluded to the evidence of these 30 witnesses at all, and this I think is a sufficient ground in itself for holding that his decision is defective in law. But, be that as it may, it appears from the decision of the Judge that he too was of the same opinion with the Ameen that evidence of those ryots in the neighbourhood who have been served with notices of enhancement by the respondent ought not to be taken into consideration. The Judge says: "It is urged that the Ameen did not examine the ryots holding the lands which are directly adjoining those of the defendant. This may be true, but it is certain that notices have been served upon these latter ryots." This one passage clearly shows that the Judge had no clear and definite idea of the point he was called upon to decide. Against the evidence of 20 ryots, deposing that they paid their rents at a particular rate, there was the evidence of 30 ryots who deposed to a different rate already examined by the Ameen, besides that of others whom he did not examine. I cannot understand how the fact of these ryots having been subsequently served by the respondent with similar notices of enhancement can affect their eligibility as witnesses in the cause.

Suppose that a village consisted of 100 ryots all belonging to the same class, and all holding lands of a similar description, and with similar advantages of situation. Suppose also that 91 of these ryots paid at the rate of 1 rupee per beegah, and the remaining 9 at the rate of 3 rupees per beegah. What is the *prevailing* rate in question? Surely 1 rupee per beegah. Suppose, then, that the proprietor of the village, being desirous of enhancing the rents of the 91 ryots above referred to, serves them with notices of enhancement, and institutes his suit against any one of them as a first experiment, the only ground of enhancement assigned being that the rate paid by him is below the *prevailing* rate. Can it be said that the evidence of the 90 witnesses is to go for nothing, and that the *prevailing* rate must be found to be 3 rupees per beegah upon the evidence of the 9 remaining ryots who pay at that rate? Such a proposition would be absurd upon the face of it, and it would end in nothing else but in allowing the landlord to make out the *prevailing* rate in any manner he thinks proper. This is what appears to me to have precisely happened in the present case. The respondent did not want to go into Court upon any of the other grounds mentioned in Section 17. He wanted to proceed upon the ground of the *prevailing rate* solely and exclusively, and, it being entirely within his own power and discretion to serve his own ryots with notices of enhancement, he resorted to that expedient as the safest course by which he could make out that the rate paid by the minority was, in fact, the *prevailing* rate current in the neighbourhood. I think, there-

fore, that this case has not been properly investigated at all. The law has been overlooked in all its essential parts, and the decision arrived at is manifestly illegal and unjust.

I wish also to remark that a practice has been fast growing by which Ameens are made the real Judges of important questions of law and fact, which it is the duty of the Court itself to determine. Local investigations ought to be restricted to points which really require some local *inspection* for their elucidation. It is absurd to suppose that the Legislature intended that, in every case for enhancement, an Ameen ought to be deputed to enquire into and report upon the rates at which the enhancement is to be made, and the mischievous consequences of acting upon such a supposition are painfully manifest in the present case. It appears that another Ameen was deputed before Dwarkanath to hold a local investigation in this case. He examined a certain number of ryots brought forward by both parties, and made his report to the effect that, in his opinion, 1 rupee per beegah was the prevailing rate. The second Ameen, Dwarkanath, examined no less than 50 ryots, and reported that, in his opinion, the proper rate of enhancement ought to be 3 rupees per beegah. Now, if Ameens are merely to examine witnesses, and to send up their depositions with their own surmises as to what ought to be the decision of the case, and then, again, if the report of the last Ameen is alone to be taken into consideration without any allusion to the reports of those who preceded him, as has been done in the present case, no satisfactory result can possibly be arrived at. The evidence of the ryots examined by the two Ameens in the present case, as far as that evidence goes, might have been as well taken by the Court itself as by the Ameens, and I think it to be a manifest departure from the intention of the Legislature to allow witnesses to be examined out of Court by Ameens except with reference to such points for the determination of which a *local investigation* is legitimately required. It is of the utmost importance to the ends of justice to insist upon the examination of witnesses in open Court and by the Court itself. This should always be observed as a general rule by which all Courts are bound, and any deviation from this rule ought not to be permitted except in cases in which the Legislature has expressly sanctioned it; as for instance, where witnesses are to be examined by commission, or where an Ameen deputed to hold a local investigation thinks it necessary to examine witnesses on the spot with reference to such matters as fall within the legitimate scope of the enquiry entrusted to him. I would, therefore, reverse the decision of the Judge, and remand the case to him for a fresh investigation, with reference to the foregoing remarks.

Loch, J.—I concur in the order of remand.

The 4th January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Evidence—Reports of officers under Regulation I., 1814—Purchaser with notice.

Cases Nos. 317 and 353 of 1867.

Special Appeals from a decision passed by Moulvie Wahidooddeen Khan, Judge of Small Cause Court, exercising the powers of a Principal Sudder Ameen of Bhaugulpore, dated the 12th December 1866, affirming a decision passed by the Moonsiff of Mudehpoor, dated the 23rd June 1866.

Bhikoo Sahoo (Defendant), *Appellant,*

versus

Teik Ali Khan (Plaintiff), *Respondent.*

Baboo Khettur Mohun Mookerjee for Appellant.

Baboos Sreenath Banerjee and *Luckheechurn Bose* for Respondent.

Reports of officers appointed under Regulation I., 1814, if received as evidence in the first Court, and not objected to in the Appellate Court, may, under certain circumstances, be accepted *quantum valeat.*

A party, purchasing with notice that his vendor's title is contested, must take his chance if that title turns out invalid.

Jackson, J.—In these cases, the decrees of the Lower Appellate Court are objected to as being based on reports of Jagheer officers, which are said to be no evidence at all. They appear to be reports of officers appointed under Regulation I. of 1814, and to have been received as evidence in the first Court, and no attempt was made to have them removed from the record as no evidence in the Appellate Court; nor was this objection then raised in that Court. We think that they might, under all the circumstances, have been taken *quantum valeat.* Besides this, we find that the final decision rested, not only on this particular evidence, but on all the evidence filed.

It is also objected that the defendants' rights, as innocent purchasers, have been overlooked; but, on the statement of the appellant's vakeel and on the evidence, it is clear that defendants purchased with notice that their vendor's title was contested, and they must, therefore, take their chance if that title turns out invalid.

In appeal No. 253, it is also urged that the question of limitation has not been decided. We have some doubts whether it was specially urged before the Lower Appellate Court at the hearing. If it was urged, we think that there is a sufficient finding in the judgment of the Appellate Court to cover that plea. "The legal heirs of Nizam Khan were in possession, and still are in possession" are the words of the Principal Sudder Ameen. We think that a Principal Sudder Ameen, with powers of a Small Cause Court Judge, might be more exact and explicit in his judgments, so as not to allow room for such clear objections as that he did not try the question of limitation when urged before him. But, looking to the judgment as a whole, we think the Principal Sudder Ameen did intend to decide this point.

We dismiss the appeals with costs.

The 6th January 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Joint Hindoo family—Partition—Uterine brothers—Succession.

Case No. 1055 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 30th January 1867, reversing a decision passed by the Moonsiff of that District, dated the 28th May 1866.

Shib Narain Bose (one of the Defendants), *Appellant,*

versus

Ram Nidhee Bose and others (Plaintiffs), *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Bungshee Dhur Sein for Respondents.

A family joint in mess is not necessarily joint in estate; nor is a partition by metes and bounds necessary before a division can take place: an agreement amongst the members that the ownership is to be in certain defined shares takes away the character of joint enjoyment.

On the death, without issue, of one of several uterine brothers undivided in estate, the surviving brothers succeed equally to his share.

Kemp, J.—The points taken in special appeal are, *1st,* that the Principal Sudder Ameen is wrong in his interpretation of the Hindoo Law; and, *2nd,* that he has decided the plea in bar improperly.

We take the *second* point first. The Principal Sudder Ameen observes that the suit of the plaintiff is not barred, because the evidence shows that both parties held joint possession until they separated in Cheyt 1265.

A portion of the evidence upon which the Principal Sudder Ameen relied has been read to us, and it certainly does not war-

rant the conclusion at which he arrived, *viz.*, that the family were joint in estate up to 1265 B. S. The Principal Sudder Ameen seems to think that, because the family were joint in mess up to 1265, they must also necessarily have been joint in estate up to the same period. The evidence of the surburakar and lowazima papers show that the collections were made and paid in distinct shares, and it is not necessary that there should be a partition by metes and bounds before a division can take place between members of a joint Hindoo family. The members of this family appear to have agreed amongst themselves that the property was to be the subject of ownership in certain defined shares: thus taking away the character of joint enjoyment in the estate. The Principal Sudder Ameen has, therefore, in our opinion, failed to give the evidence its proper legal effect, being led away by the impression that, because the family remained joint in mess up to 1265, they were also joint in estate up to that year. The case must, therefore, go back for a proper finding upon the plea in bar on a consideration of the evidence adduced as to the share in dispute being separately enjoyed by the defendants for more than 12 years prior to suit.

On the *first* point, we think that the Principal Sudder Ameen is not wrong. There were four brothers, *viz.*, Kisto Pershad and Ram Pershad, uterines, and Lall Mohun and Ram Mohun, half-brothers of the two first named. Ram Pershad, one of the uterines, died without issue; at the time of his death, the three surviving brothers were undivided in estate, and they would, therefore, succeed equally to the share of Ram Pershad. Weekly Reporter, Volume II., page 41; Dyabhaga, Chapter XI., Section V., paras. 35 and 36, page 211; Shama Churn's Vyavashta Durpana, page 187, Volume I.

The case is remanded for trial on the issue in bar. Costs to follow the result.

The 6th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Suit for arrears of rent at an enhanced rate — Section 13, Act X., 1859 — Evidence of an expert.

Case No. 1760 of 1867.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 29th of April 1867, affirming a decision of the Assistant Collector of that District, dated the 13th February 1867.

Bindessuree Dutt Singh (Plaintiff), *Appellant*,

versus

Doma Singh (Defendant), *Respondent*.

Baboo Opender Chunder Bose for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

In a suit for arrears of rent for 1273 at an enhanced rate, plaintiff relied upon an agreement said to have been executed by defendant in that year. The Assistant Collector found that the agreement had not been executed by defendant. In appeal, the Judge called an expert who proved that the signatures of the attesting witnesses were not all genuine, and the decision of the Assistant Collector was affirmed.

HELD that the Judge was wrong in calling for and acting upon the evidence of the expert.

HELD, with reference to Section 13, Act X., 1859, that, even if the agreement were proved, it would not support the claim for enhanced rent for 1273. It was entered into after the month of Cheyt, and it does not mention the period for which the rent was to be enhanced, and the Court could not infer that it was intended to apply to the rent of 1273.

Peacock, C.J.—THIS is a suit for arrears of rent for 1273 at an enhanced rate of three rupees a beegah. It was found that rent had been paid at one rupee a beegah.

The plaintiff, however, relied upon an agreement alleged to have been executed by

defendant in Bysakh 1273, to leave it to an arbitrator to fix the amount of rent, and upon an award made in Sraban 1273, in which the rent was fixed at three rupees a beegah.

The Assistant Collector found that the agreement had not been executed by defendant. On appeal to the Judge, upon the ground that only two of the attesting witnesses had been cited and examined by the Assistant Collector, the Judge called an expert, who proved that the signatures of the persons who were cited as attesting witnesses were, in fact, written by the attesting witness who was called, and he affirmed the decision of the Assistant Collector. The Judge was wrong in calling for and acting upon that evidence; but we are of opinion that, even if the agreement had been proved, the suit could not have been maintained.

Section 13, Act X. of 1859, enacts that "no under-tenant or ryot, who holds or cultivates land without a written engagement, "or under a written engagement not specifying the period of such engagement, or "whose engagement has expired, or has "become cancelled in consequence of the "sale for arrears of rent or revenue of the "tenure or estate in which the land held or "cultivated by him is situate, and has not "been renewed, shall be liable to pay any "higher rent for such land than the rent "payable for the previous year, unless a "written notice shall have been served on "such under-tenant or ryot, in or before the "month of Cheyt, specifying the rent to "which he will be subject for the ensuing "year, and the ground on which an enhancement of rent is claimed."

The agreement to refer to the arbitrator was entered into after the month of Cheyt, and it does not mention the period for which the rent was to be enhanced. We cannot infer that it was intended to apply to the rent of 1273, but rather to the rent for the ensuing year. But the arbitrator says that, as the defendant appropriated the crops, he ought to pay rent at the rate of 3 rupees per beegah for 1273. This, however, was beyond the power conferred on him.

It is said that it was alleged in the plaint that the plaintiff was an ijardar for one year only, *viz.*, 1273, and consequently that the agreement must be intended to have had relation to that year; but that fact was not proved, nor was it mentioned in the agreement. We are of opinion that, if the agreement had been proved, it would not have supported the plaintiff's claim for enhanced rent for 1273, and that the decision of the Lower Appellate Court must be affirmed with costs.

The 6th January 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

A lessee's contract as to non-relinquishment by his heirs—Section 19, Act X., 1859.

Case No. 904 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 12th February 1867, affirming a decision passed by the Deputy Collector of that District, dated the 10th August 1865.

Gopal Pal Chowdhry and others (Defendants), *Appellants,*

versus

Tarinee Pershad Ghose and others (Plaintiffs), *Respondents.*

Baboos Sreenath Doss and *Bhowanee Churn Dutt* for Appellants.

Baboo Mohendro Lall Shome for Respondents.

A perpetual contract by a lessee for his heirs, reciting that they shall never relinquish the jote, cannot operate against Section 19, Act X., 1859, which says any ryot may relinquish his jote if he does so in a legal manner.

Bayley, J.—In this case, plaintiff sued defendant for rent of the year 1271 B. S. on the specific terms of a kubooleut executed by defendant's father, in which the father set forth that the kubooleut should be binding on his heirs for ever, and that a relinquishment of the jote should *never* be permitted.

The defendant's answer was that he was ignorant of the genuineness of the kubooleut; that he relinquished the jote in 1270 B. S.,

the year before that the rent of which is sued for; and that the father's deed could not bind defendant never to relinquish a tenure, when the law clearly enacted (Section 19, Act X. of 1859) that that power should be with a tenant under certain defined provisions.

It was finally held by both the Lower Courts that the kubooleut was a genuine one.

On how far it bound defendant not to relinquish his jote, both the Courts held that the kubooleut of the father had been accepted by defendants with its *profit* and loss, and that, therefore, defendant was bound to pay the rent sued for of 1271.

The Lower Appellate Court ruled (citing Kashee Roy's case, May 19th, 1860, Weekly Reporter, Volume V., Act X. Rulings, page 81) that the general provision of Section 19, Act X. of 1859, could not prevail against such express stipulations as were set forth in his kubooleut, and it was added that defendant might bring a regular suit to set aside the kubooleut.

Defendant appeals specially. There is no further plea urged before us as to the genuineness of the kubooleut, but it is strongly pressed on us that, assuming the kubooleut to be genuine, it must bind the defendant.

I think the Lower Courts are wrong. There seems no doubt that the defendant tendered his resignation of the jote legally in the way as prescribed by Section 19, Act X. of 1859, in 1270, a year before that for which the rent is sued for. Great stress is laid by the special respondent on the point that the defendant took his father's place on the terms of the kubooleut, and with it the *profits* of the tenure up to 1270 B. S., and that, therefore, he is bound by the other terms of the kubooleut, *i. e.*, never to relinquish the jote. But, in my opinion, such a plea cannot be allowed to override the distinct provisions of Section 19, Act X. of 1859. The suit is brought under that Act, and its provisions seem to me to apply to both parties alike. One of those provisions is that any ryot may relinquish his tenure on giving a certain notice, &c.

The case relied on by the Lower Appellate Court, *viz.*, Kashee Singh, page 81, Weekly Reporter, Volume V., is quite different from this case both on its facts and on its law. *There* the defendant himself had covenanted for a five years' lease, and threw it up on its currency. *Here* the defendan has entered into no such covenant, an there is no period of the lease. The la there laid down was, that when the ryot defendant had entered into a contract in a way not contrary to law, he was not to break his contract. But I think a perpetua contract by a party for his heirs, and reciting that they shall never relinquish the jote, cannot operate against the law, which says any ryot may relinquish his jote, if he does so in a legal manner.

In this view, I would decree the appeal.

Phear, J.—I concur. I wish, also, to say that I entirely agree in the opinion expressed by the Judges who decided the case of Kashee Singh *versus* Onraet and another; but it seems to me that an undertaking by a man on the part of himself and his heirs for ever not to relinquish is not a special contract of the nature which was contemplated by the Court in that case.

The 6th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Suits for rent and possession are for different causes of action.

Case No. 1718 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 4th May 1867, reversing a decision passed by the Moonsiff of Raojan, dated the 19th September 1866.

Kadir Buksh and another (two of the Defendants), *Appellants*,

versus

Golam Ali Gomashtah (Plaintiff), *Respondent*.

Baboo Sreenath Banerjee for Appellants.

Baboo Motee Lal Mookerjee for Respondent.

A suit to recover rent against a tenant, and a suit recover possession against a trespasser, are not for the same cause of action.

Peacock, C. J.—It appears to us to be clear that a suit to recover rent, which treated the

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defendant as a tenant, and a suit to recover possession, which treats him as a trespasser, are not suits for the same cause of action. The decree of the Lower Court must be reversed, and a decree given for the defendant with costs of this appeal, and the costs in the Lower Appellate Court.

The 6th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

A proceeding in a case between other parties no evidence—Prescription.

Case No. 1728 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Gya, dated the 6th May 1867, affirming a decision of the Principal Sudder Ameen of that District, dated the 27th July 1866.

Joy Prokash Singh (one of the Defendants), *Appellant*,

versus

Ameer Ali (Plaintiff) and Government (Defendant), *Respondents*.

Messrs. R. V. Doyne and *C. Gregory* and *Baboo Motee Lal Mookerjee* for Appellant.

Mr. G. C. Paul for Plaintiff, and *Baboo Kishen Kishore Ghose* for Government (Defendant), Respondent.

A proceeding in an Act IV. case between entirely different parties, and a map used on that occasion, are not evidence in this suit.

The English Prescription Act does not apply to the Mofussil.

Peacock, C. J.—THE proceedings in 1841 under the Act IV. case, which was between entirely different parties, and the map used on that occasion, are clearly not evidence either for or against either of the parties in this suit. The Judge has used and attached great importance to them. He says: "To me the proceedings, and especially the "map in the Act IV. case of 1841, make it "quite clear that this bund was not then in "existence; and, this being so, away goes "the defendant's plea of prescription."

The case must be remanded to be determined upon the merits without reference to that map or the proceedings of 1841.

The suit was commenced in March 1866, and the bund might, therefore, have been more than 20 years old when the suit was commenced. Even if the Judge is right in his conclusion that it did not exist in 1841, when the Judge says that the proceedings in 1841 make it quite clear that the bund was not then in existence, and, this being so, away goes the defendant's plea of prescription, he seems to show that, in his opinion, prescription in the Mofussil and prescription in England are the same. This, however, is not so.

The defendant merely says that the bund was kudeemee or ancient. The Judge should find whether it was ancient or not, that is to say, whether it was so ancient as to confer a right. The plaintiff could not sue to have the bund removed, if the defendant had exercised the right of having it in the state in which it existed at the time of the commencement of the suit for a period of 12 years previously.

In England an easement may be claimed by non-existing grant after it has been used adversely and uninterruptedly for a period of 20 years, and the period of 20 years in many cases confers a right under the English Prescription Act.

That Act, however, does not apply to the Mofussil here, and there is no magic in the number 20.

I am inclined to think that, by analogy to the Indian Limitation Act, an adverse and uninterrupted use of an easement for 12 years would confer a right to it. But it is premature for us to decide the point in this case. The point has not been argued, and any decision at present upon that point would at most amount to a dictum.

The Judge on the re-trial, in determining whether the bund is ancient or prescriptive, should define the sense in which he uses those words, so that, if necessary, the law may hereafter be applied to what he may find to be the facts of the case, with reference to the period for which the bund has been used adversely and uninterruptedly.

The 7th January 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Suit for damages for breach of contract and for abatement of rent—Limitation—Alteration of terms of a contract.

Case No. 441 of 1866.

Regular Appeal from a decision passed by Mr. DaCosta, Principal Sudder Ameen of Manbhoom, dated the 29th September 1866.

Nil Monee Singh Deo Bahadoor (Defendant), *Appellant,*

versus

Issur Chunder Ghosal (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Juggodanund Mookerjee* for Appellant.

Baboos Onookool Chunder Mookerjee, Unnoda Pershad Banerjee, and *Kalee Pershad Dutt* for Respondent.

In a suit for damages by a lessee, where the plaint shows a distinct prayer for abatement of rent, and also sets forth, as the *main ground* of the suit, a fraudulent *breach of contract* by misrepresentation and refusal of deduction, and refund stipulated for, so much of the claim as refers to abatement is by Clause 3, Section 23, Act X., 1859, beyond the jurisdiction of the Civil Court; but the rest of the suit is properly cognizable by such Court.

Such a suit is not barred by the limitation of three years.

An application to have a contract altered in regard to the amount of rent to be paid under it in future cannot be generally entertained by a Civil Court, which can only re-form a contract so as to make its terms accord with the original intentions of the parties. Where a party was induced to agree by fraudulent misrepresentation, this may entitle him to avoid a contract altogether; but, if he abides by it, he cannot have its terms altered by the Civil Court.

Bayley, J.—THE hearing of this case was deferred at the request of both parties to enable them to compromise it. This not having been done, we proceed to hear the appeal.

It is admitted that plaintiff in this case took a putnee-lease from defendant.

Plaintiff, however, alleges that, "defendant "having fraudulently included, in my put-"nee, bynamahs, mouzahs, and lands, whose "very names, traces, and positions, are *not* "*in existence,* and rents which *never were* "*realized,* and not realizable in connection "with the defendant's zemindaree, I have been "wronged by him. I, therefore, bring this "action for *remission of the rents* which "cannot be realizable from the aggregate "jumma mentioned in the bynamahs of the "talooks, and for getting the proportionate "amount of the consideration-money with "interest, and rent in proportion to the "amount unrealized out of the rent paid "for 1267 to 1270, with interest refund-"ed to him, laying the claim at Rupees "7,767-8-1," *viz.*—

1. Remission of rent	...	1,750
2. Refund of consideration	...	1,170
3. Interest	...	530
4. Refund of rents	...	3,500
5. Interest on ditto	...	816

The plaintiff classifies his claim as—

1.—Lands mentioned in his deed, of which *no trace* can be found.

2.—Lands in his deed *held by others* as their property.

3.—Lands in the deed recorded as *part of original villages,* but *not* to be found therein.

4.—Lands the *rents* of which have been *decreed to others.*

The plaintiff's further allegations, as in his written statement, are that he took the lease at the amount of lands and jumma stated in the deed "*on reliance on the words and acts of the defendant;*" that the lease required notice to be given within eight months of any deficiencies of area; and that, not only was this notice given, but the defendant at first ordered enquiry, but afterwards refused all redress.

Defendant, on his part, pleaded that the Civil Court had no jurisdiction, as this was a suit for *abatement;* that plaintiff had not complied with the conditions of the lease, *viz.*, that he was to give notice of any claim in respect to deficiency of area and assets within eight months of the lease; that plaintiff had in his possession all that was conveyed to him under the lease; that none of what was conveyed under the lease to plaintiff belonged to other parties; that the agreement was not to make up *individual* and *separate* deficiencies, but only such an amount as on a balance of deficiency and surplus might be found to be the net deficit; and that plaintiff did fully satisfy himself of the assets by enquiry for six or seven months.

The Lower Court held that, as the suit was not only for *abatement,* but also involved a plea of fraud on the part of the lessor,

and of misrepresentation as to assets affecting substantially the *real contract*, the Civil Court had jurisdiction. The Lower Court also held that limitation did not bar the suit.

On the *merits*, the Lower Court found, as a fact, that plaintiff did inform the defendant of the deficiency of assets within eight months, as stipulated in the lease; and that the evidence showed the defendant had intentionally concealed facts with a view to defraud plaintiff of rent and consideration; and that defendant did not give plaintiff full possession of all the lands and jumma stated in his pottah; and that plaintiff was, therefore, entitled to a proportionate diminution of rent and refund of consideration, and of rents paid in full.

The decree of the Lower Court was for 5,568-15, *viz.* :—

Remission of rent	1,575	5	4
Refund of nuzurana, or consideration	1,152	9	17
Refund of rent	3,150	0	0
Interest on amount to be refunded from the date of payment to date of suit ...	1,265	11	3

The defendant appeals against this decision, urging—

1st.—That the Civil Court had no jurisdiction, the claim being substantially one for *abatement* of rent.

2nd.—That limitation barred the plaintiff's suit, the plaintiff having paid the full rent without objection for *three* years.

3rd.—That the plaintiff did not comply with the terms of the kubooleut, inasmuch as he did not, within eight months, set forth any deficiency of area and assets; and that the letters of amlah relied upon by plaintiff to show that plaintiff did so are not binding on defendant.

4th.—That there is no evidence to show that defendant acted in fraud, and that plaintiff ought to have had the burden upon him of proving the fraud, which, however, was not put on him by the Lower Court.

5th.—That the deficit of area and assets was not to be taken by specific parcels, but on the *general net loss found over the whole* area and assets of the putnee, after deduction of *all surplus.*

6th.—That the decree should not have been based on the Ameen's report, which is incorrect.

7th.—That interest was improperly allowed by the Lower Court.

I am of opinion that, while the plaint shows a distinct prayer for abatement, it also sets forth, as the *main* ground of the suit, a fraudulent *breach of contract* by misrepresentation and refusal of deduction and refund stipulated for on a specification of assets, and area not proving to be to the extent contemplated by the parties.

I further think that, with reference to Clause 3, Section 23, Act X. of 1859, so much of the claim as refers to *abatement* is beyond the jurisdiction of the Civil Court; *but* that the rest of the suit, that is, the *main part* of it, is based on the loss arising from fraudulent conduct of defendant, and, therefore, is properly cognizable by the Civil Court; and that the appeal so far may, consequently, be tried by us.

It is, indeed, urged for plaintiff that this is not strictly a case of abatement as contemplated by Act X. of 1859, but rather a claim in which abatement is a necessary ingredient, *because* of the loss being the result of fraud in the inception of the contract. But that might be a ground to take the decree on the contract as evidence in a suit for abatement; but it could not give jurisdiction, when there is none by law.

On the matter of *limitation, viz.*, that the suit cannot lie, as more than three years have elapsed, even since the expiry of the eight months during which plaintiff was bound to give notice of any deficit of assets, this plea will not apply under the view I take of this case, *i. e.*, of its being one of fraud on the part of defendant, for fraud would remove the bar.

After a careful consideration of the terms of the kubooleut, admitted by both parties, and of the other evidence in the case, I can come to no other conclusion than that the defendant induced plaintiff to take the lease on the understanding that all the assets referred to in the deed were forthcoming, and that, if they were not so, deductions and refunds should be made accordingly by defendant, but that, in fact, the latter fraudulently and intentionally did not keep to this covenant, and that plaintiff did give notice as stipulated.

It has been strongly pressed upon us that the plaintiff had the fullest notice of the possibility of mistake in such a jungle-mehal property as this, and that it was with the object that the plaintiff should not thereafter

have to complain that the unusual stipulation was made in the deed that plaintiff was to enquire and give notice within eight months of any deficiency; that, consequently, the principle of *caveat emptor* most fully applied. But I am of opinion that the basis of the contract, as understood by the parties, was that the defendant undertook, upon notice of deficit in specific assets supposed by the parties to be available to the plaintiff, to make enquiries as to the *specific* items, and according to the result to make up the lessee's *specific* loss on each item, by a deduction of rent and refund of consideration. The preceding *general* conditions of no excuse being admitted for loss of assets by drought or inundation, and the like, are quite modified by the specific, or as it is called "*only*," condition, which is that above mentioned. This remark, I think, further meets and answers the plea that it was only on the *general* balance, if taken on both sides of a profit-and-loss account, that this condition was to have effect. In fact, the kubooleut, read as a whole, is that defendant (Rajah of Pachet) covenanted to make up the entire amount of land set forth in the kubooleut to defendant, if not available to the lessee, whether it was from *not* being *found* within the defendant's *property* or in possession of *others*, or gone from defendant's possession under decrees, or not part of the original villages mentioned, or in other villages not in the lease, or described as open to enhancement when not so (*i. e.*, Ekdufa).

As to the plaintiff having the burden on him, and not having discharged that burden, it is, of course, for plaintiff, who makes the allegation of fraud, to prove it. But, looking at all the evidence before us, I think plaintiff has sufficiently proved his case, so as to require defendant to rebut it, and that the defendant has entirely failed to do this. The Ameen's report is in favor of plaintiff, and defendant in no way shows it to be one not to be relied on. There is the usual objection in one and all such cases that the report is an improper one; but no one specific item of error or act of partiality or wrong by the Ameen is demonstrated to us on proper evidence. It thus only remains for me to add that, I think, on the evidence relied on by the Lower Court, plaintiff has fully shown that he gave the notice which he covenanted to give to defendant.

Such being my view of this case, I would dismiss the appeal, with all costs, except as to abatement, as to which the Civil Court had no jurisdiction.

Phear, J.—I agree generally with Mr. Justice Bayley. In substance, the plaintiff sues for damages for breach of contract, and further seeks to have the contract altered in regard to the amount of rent to be paid under it for the future. The latter part of the plaintiff's application is such as cannot generally be entertained in the Civil Court. All that a Civil Court can do in this respect is to reform a contract in such a way as to make its terms accord with the original intentions of the contracting parties. It does not appear that, in the present case, any suggestion is made that the parties were not originally of accord in respect to the amount of rent contracted to be paid. The plaintiff only complains that he was induced to agree to that amount by the fraudulent representations of the defendant. This may entitle him to avoid the contract altogether, but, if he chooses to abide by it, he is not entitled on this ground to have its terms altered by the Civil Court. His remedy, if any, on this head, has not been rendered unnecessary by the damages awarded by the Civil Court, and must be sought in a suit for abatement of rent in the Collector's Court. I, therefore, think the Lower Court was wrong in decreeing future abatement of rent.

In other respects, I think the judgment is clearly right. The defendant has certainly failed to fulfil his contract with the plaintiff, and it appears to me that the several items of the amount which the Lower Court has decreed to the plaintiff are directly traceable as damages to the defendant's breach. I would reverse the decision of the Court below so far as it decrees abatement, and affirm it with costs in other respects.

The 8th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Confusion of boundaries of talooks—Interference of Civil Court—Principle of proportion.

Case No. 1788 of 1867.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 30th of April 1867, reversing a decision of the Principal Sudder Ameen of that District, dated 14th September 1866.

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Khemamoyee *alias* Khemessuree Dabea and others (some of the Defendants), *Appellants*,

versus

Shushee Bhoosun Gangooly and another (Plaintiffs), and Juggendro Narain Chowdhry and another (Defendants), *Respondents*.

Baboo Gopal Lall Mitter for Appellants.

Baboo Kishen Sukha Mookerjee for Plaintiffs, *Respondents*.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Defendants, *Respondents*.

In equity, if through the default of a tenant or a copy-holder, who is under an implied obligation to preserve the boundaries of separate estates which he holds, there arises a confusion of boundaries, the Court will interfere as against such tenant or copy-holder to ascertain and fix them.

In a case in which the boundaries of three talooks had been found to be unascertainable, it was decreed that they should be defined and fixed in such a manner that the produce of the total land in each talook should bear the same proportion to the jumma payable by such talook, as the produce of the whole of the said lands bears to the total of the jummas payable on account of the three talooks.

Peacock, C.J.—THIS is a special appeal, and we are not to interfere with the facts as found by the Judge, but to apply the law to those facts.

It appears that there were three talooks, Oottum, Ramnath, and Joykissen, which, in 1788, were paying distinct revenues to Government, and those three talooks are now on the serishta of the zemindar of Munthana, who receives the revenues for them. There can be no doubt in my mind, therefore, that as the zemindar is entitled to collect the revenue of these three talooks, they were, at the time of the Permanent Settlement, dependent talooks, in respect of which, by a distinct engagement with the zemindar, the revenues were to be paid through him within the meaning of Regulation VIII. of 1793. The zemindar, being assessed at the time of the Permanent Settlement for the zemindaree of Munthana, is entitled to the revenue of these three talooks. Under these circumstances, a difficulty which suggested itself to my mind in the course of the argument, that the Government ought to have been made a party to the suit, does not arise. All the parties interested are before the Court, the zemindars who are entitled to collect the revenue having been made parties to the suit.

It seems that the three talooks, though subject to the payment of different amounts of revenue, and being separate talooks, have for a long time been in possession of the same person, and ultimately in the possession of Khemamoyee's husband, and after his death in the possession of Khemamoyee herself. In consequence of the three talooks having been occupied by the same person, the boundaries of the three have become confused, and, it is now substantially found by the Judge, it is impossible to distinguish one from the others.

It appears that a portion of Oottum was sold to the defendants at a public sale under an execution against Khemamoyee, to whom the property appears to have gone upon the death of her husband, and that afterwards the remainder of that talook was sold, and purchased by the defendants under another execution against her, and that, subsequently, talooks Ramnath and Joykissen were sold and purchased by the plaintiffs. It further appears that, in 1857, when the Government survey of these lands was made, the three talooks being then held by one person, and the boundaries of them not being ascertainable, they were included in one boundary on the survey-map and in the register, which was made at the time the lands in Ramnath and Joykissen were described as included in those which were set opposite to Oottum.

It is found by the Judge that the lands, which formerly comprised the three talooks, now bear the name of Oottum only, but that, when the defendants purchased Oottum, they did not purchase the lands which are now included under the name of Oottum, but only those lands which were included in the talook Oottum, for which the revenue of Rupees 519 was payable.

It was contended by the defendants that the plaintiffs never got possession of Ramnath and Joykissen, and that, as the defendants had purchased the whole of Oottum, the plaintiffs, in fact, purchased nothing. That would have been correct, if what the defendants purchased was that which in the survey was designated as Oottum, but is not correct if the defendants purchased only the lands included in the original talook Oottum, though they took possession of all the land which was included in the name of Oottum in the survey-map. The defendants, then, being in possession of the lands which are comprised in the talook Oottum, which they purchased, as well as those which were comprised in the two talooks which were purchased by the plaintiffs, and as the talooks cannot

be distinguished from each other, the plaintiffs seek to have the boundaries of these several talooks fixed and distinguished, and to be put into possession of Ramnath and Joykissen.

We are bound to determine according to the principles of equity, justice, and good conscience; and if there were no decisions upon the subject, it would appear to us to be consistent with equity that when a person has occupied three different estates as a tenant or dependent talookdar for a long period, and has allowed the boundaries of those estates to become so confused that the one cannot be distinguished from the other, the three estates ought, when necessity arises, to be divided according to an equitable principle of division; but the case does not depend merely upon that theory, for we have the authority of the Civil Law, and also authority of the Courts of Equity in England, as a guide for our decision in this case. We find that, in equity, if through the default of a tenant or a copy-holder, who is under an implied obligation to preserve the boundaries of separate estates which he holds, there arises a confusion of boundaries, the Court will interfere as against such tenant or copy-holder to ascertain and fix them.

In the case of Willis and Parkinson, 2 Merivale 507, to which I referred in the course of the argument, in a case by a prebendary against the lessee of prebendal lands, who was also the owner of other lands within the parish in which the prebendal lands were situate, and had allowed the lands of the two estates to become intermixed, and confounded by reason of his unity of possession, the Court decreed that the respective boundaries of the prebendal lands and of those which belonged to the defendant should be ascertained, and that the land should be distinguished and divided by metes and bounds, and that, if by reason of the confusion of boundaries or alteration of names, or any other circumstances, the Commissioners appointed to set out the boundaries should not be able to distinguish and ascertain the said prebendal lands, or any of them, they should, in that case, set out such quantity of lands which were then in the possession of the defendant as might be of equal value with the prebendal lands, or so much thereof as could not be distinguished or ascertained.

There are other authorities upon the subject, which will be found referred to in Story's Equity Jurisprudence, Chapter XI.

The Judge was wrong in awarding a butwarah, if that word was used in its ordinary meaning; but the Judge probably intended to do that which we think it necessary to do, and to express in more precise language than he has done.

We, therefore, think that the following decree should be substituted for that which was given by the Judge, *viz.*, that it be declared that the land described in the mouzawar register of Munthana, Zillah Rungpore, by J. J. Pemberton, Esquire, revenue-surveyor, in the years 1857 and 1858, opposite mouzah Oottum, No. 146, are the lands comprised in the three talooks Oottum, Joykissen, and Ramnath referred to in this suit, and that it be decreed that the boundaries of those talooks be severally defined and fixed by a Civil Court Ameen to be appointed by the first Court in such manner that the produce of the total quantity of land to be included in such of the talooks so to be defined shall bear the same proportion to the jumma payable for such talook as the produce of the whole of the said lands bears to the total of the jumma as payable on account of the said three talooks; and that, for this purpose, the jumma of talook Oottum be taken as Rupees 519-7-10, the jumma of talook Ramnath as Rupees 105-0-5, the jumma of talook Joykissen as Rupees 193-12-5 gundas.

It is unnecessary for us to word our decree in the manner in which the decree was drawn up in the case to which I have referred, as in that case the Commissioners were ordered to set out the prebendal lands if they could be ascertained, but, if they could not be ascertained, then, &c. In this case, it has been found by the Judge that the boundaries cannot be ascertained; and it is, therefore, only necessary for us to do what ought to be done upon that assumption, and not refer to the Ameen to ascertain that which the Judge has already determined to be unascertainable. The plaintiffs are entitled to something beyond having the boundaries ascertained. They are entitled to have possession of the talooks Ramnath and Joykissen as soon as the boundaries shall have been ascertained. Our decree, therefore, will proceed to direct that the plaintiffs be put into possession of such of the lands as may be included within the boundaries of talook Ramnath and talook Joykissen as are in the possession of the defendants Khemamoyee, Kishoree Debea, and Kisto Churn Roy, or any of them.

But, further, the defendants, being in possession of the 3 talooks, may abstain from paying the revenue of Ramnath and Joykishen. The plaintiffs may be unable to pay the revenues in consequence of their being kept out of possession of the rents by the defendants. It is, therefore, necessary in order to do complete and substantial justice that the defendants should not be allowed to remain in possession of the 3 talooks pending the ascertainment of the boundaries. We, therefore, order that a receiver and manager be appointed by the Court of first instance, and that possession of all the lands above described, or such of them as are in the possession of the defendants, be put into the possession of the receiver, with power to collect the rents and profits, and to apply the same in discharge of the jummas payable for the said 3 talooks, and the charges of such collection and management; and the Court will fix such commission as may be thought reasonable and just to be paid to such receiver, and take such security as may be thought necessary for the due performance of his duties.

With regard to that portion of the defendant's appeal which relates to the costs of appeal to the Judge of the zemindars who were co-defendants, we think that that part of the Judge's decree which orders them to be paid by the present appellants should be reversed; and, considering that, as far as the plaintiffs are concerned, the decree of the Judge has been substantially affirmed, we think that the defendants, appellants, ought to pay the costs of this appeal of such of the respondents as were plaintiffs in the suit, but not of the zemindars-respondents, inasmuch as that part of the decree which relates to the zemindars' costs has been reversed.

We would remark that, although we have no power to compel the parties to come to an amicable settlement, they will probably be consulting their own interests by at once having the boundaries set out amicably, and adjusting their differences without further litigation.

The 8th January 1868.

Present:

The Hon'ble Sir B. Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Right to timber washed on to an estate—Rights to wrecks, &c., by Lords of Manors—Evidence—Act V. (B. C.), 1861.

Case No. 406 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 14th of December 1866, affirming a decision of the Moonsiff of that District, dated 28th April 1866.

Chutter Lall Singh (Plaintiff), *Appellant*,

versus

The Government (Defendant), *Respondent*.

Baboo Otool Chunder Mookerjee for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

Timber claimed by a landowner as having been washed on to his estate by a river is not unclaimed property within the meaning of Section 25 and the following Sections of Act V. (B. C.) of 1861.

Where a plaintiff sued for damages for value of timber carried away by Government after being washed on to his estate, and to have his right declared as against Government to all timber that in the future may be washed on to his estate: HELD that the suit was not one which was cognizable by a Court of Small Causes. HELD further that it was not necessary for plaintiff to produce documentary evidence in support of the right, or some decree or decision of competent authority establishing the custom. Lords of Manors are allowed to establish rights to wrecks, &c., by long continued and adverse assertion of, and enjoyment under, such claim; and the plaintiff was entitled to have the question tried by the evidence he had adduced.

Peacock, C. J.—THE plaintiff in this case sues the Government, and seeks to recover damages for some timber which was taken away by the Government, and he claims that property, not as being the origina owner of it, but by reason of its being pro-

perty of some unknown person which has been washed away by the river Soane, and floated on to his zemindaree. He says that this timber having been washed on to his estate became his property, and he claims to be entitled by way of damages for the value of the timber, and asks to have his right declared as against Government to all timber that in the future may be washed on to his estate under similar circumstances. If he had sued merely for the value of the timber, the case would have been one of a nature cognizable by a Small Cause Court, and, the value of the timber being under 500 rupees, a special appeal to this Court could not have been maintained. But a suit to have a right of this nature declared is not one which is cognizable by a Small Cause Court, or ever could have been intended to have been referred to such a jurisdiction.

If the plaintiff claimed this property under a right such as that to which I have referred, then it is clear that the property was not unclaimed property within the meaning of Section 25 and the following Sections of Act V. of 1861 (B. C.). It would be no more unclaimed property so far as a police-officer was concerned when claimed by the plaintiff than it would have been if this zemindaree had been held khas by Government, and the timber had been claimed by a Government officer.

The Principal Sudder Ameen, as I understand his judgment, decided that a right to property of this description could not be proved merely by witnesses, but that some documentary evidence must be produced in support of it, or some decree or decision of a competent authority establishing the custom. In this, I think, he was wrong. Rights to wreck and other things, which belong to the Crown by virtue of its prerogative, may be, and frequently are, claimed by the Lords of Manors as being appurtenant to their Manors; and in support of such claim it is not necessary to prove an actual grant, but the claim may be established by long continued and adverse assertion of a right, and the enjoyment of property under such claim. I do not mean to say that the plaintiff can make out any title of that kind, but still he is entitled to have the question tried; and the case must be remanded to the Principal Sudder Ameen to try whether by the evidence adduced in the cause the plaintiff has or has not made out any such right as that claimed by him.

The 8th January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Hindoo Law—Possession held not to confer title unless it were adverse possession.

Case No. 1119 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 25th February 1867, affirming a decision passed by the Moonsiff of that District, dated the 6th July 1866.

Mussamut Woozeerun (Defendant), *Appellant,*

versus

Noorul Jan and others (Plaintiffs), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Chunder Madhub Ghose and *Luckhee Churn Bose* for Respondents.

Where two brothers, members of the same family, succeeded to equal shares in the paternal estate, the mere fact of one brother being absent and the home-staying brother being in possession does not deprive the former of his rights of inheritance, unless it is clearly shown that the possession by the latter was adverse to the absent brother.

Jackson, J.—THE plaintiff in this suit asked for confirmation of his possession in a certain estate, and recovery of possession of 15 beegahs, of which the defendant had ousted him. He admitted that his brother Nowab Jan had inherited a 7-annas share of the estate with him, and that the defendant held under a deed of sale from Nowab Jan; but his averment was that Nowab Jan had been all his life absent in Moorshedabad, and that the possession of the estate had always been in his hands, with the exception of 2 annas which, however, his mother had made a gift of to him.

The Principal Sudder Ameen has found that the actual possession of the estate was so far with the plaintiff inasmuch as the defendant was absent in Moorshedabad; but he has also found that the names of the two brothers were jointly registered in the Collectorate, and jointly appeared as proprietors in a kubooleut in 1836, and subsequently, on the occasion of the gift by the mother to the plaintiff of her two annas in the year 1854, the deed recited the fact that the brother Nowab Jan was entitled to 7 annas of the estate, and actually held possession of it, which deed was duly registered and made public before the Cazee. The Principal Sudder Ameen considered on this evidence that the right and title of Nowab Jan had never lapsed, and indeed plaintiff does not attempt to show that it did lapse in any way, but he asks the Court to enforce his possession on the strength of his long possession alone.

The Principal Sudder Ameen having dismissed plaintiff's claim to possession to 7 annas of the estate which, he held, was proved to belong of right to the defendant, Nowab Jan's vendee, the plaintiff on special appeal asks this Court to confirm his title by prescription, as the Principal Sudder Ameen finds his possession proved.

We have read the Principal Sudder Ameen's judgment, and we are of opinion that his remarks as to possession allude to the presence of the plaintiff on the estate, and the absence of the brother Nowab Jan in Moorshedabad, and that his subsequent reference to the Collectorate Registers, the kubooleut, and the deed, as proving that the right and possession of the brothers had not altogether ceased, show that he did not consider the possession of the plaintiff to have been adverse to that of his brother, but rather to have been in his behalf.

A long argument has been addressed to us to the effect that the recital in the deed as between the mother and son is no evidence, and should have been rejected in the suit between the two brothers. We think the conduct of the parties to that deed—near relatives disposing of a portion of the estate, and taking the opportunity to record the position of the family in the estate—to be most important evidence in the case—the more so when we find that the plaintiff gave greater significance to the facts so recorded, facts more particularly within his own cognizance, by having them publicly registered before a Cazee.

We, therefore, dismiss this appeal with costs.

Kemp, J.—I concur with my learned colleague in dismissing this appeal.

The case of the plaintiff is briefly this. Mirza Jafer Beg was the common ancestor.

He died in 1815, leaving as his heir a son, Mirza Moful Beg, who died in 1820 leaving a widow, Bibee Jan, and two sons, Nowab Jan and Akul Jan. It is averred that the elder son Nowab Jan, during the lifetime of his father, Mirza Moful Beg, left the family-residence in zillah Bhaugulpore, and went to reside in zillah Moorshedabad; that he never returned to his home; that, on the death of Moful Beg, his widow, Bibee Jan, succeeded to a 2-anna share, and his son Akul Jan to a 14-anna share in the estate. Akul Jan died, it is said, in 1836, leaving a widow, the plaintiff, special appellant before us. She succeeded to her husband's share of 14 anna, *plus* the 2-anna share of her mother-in-law, Bibee Jan, by deed of gift, or altogether to 16 annas.

The absent brother Nowab Jan has conveyed his title in the estate of Mirza Jafer Beg to the defendant Chutturdharee Singh, who has again sold to Dhurm Singh, who obtained registry of his name in the mutation register under the orders of the revenue-authorities, dated 14th May 1864.

The object of the present suit is for confirmation of the plaintiff's (special appellant's), possession over the whole estate, and for recovery of possession of 15 beegahs of land from which she alleges ouster in 1272 Fuslee, for the reversal of the order of the revenue authorities, and to set aside the deed of conveyance to the defendant.

The defendant answered briefly to this effect, that as Akul Jan, the husband of the plaintiff, died leaving a widow, the plaintiff, and a son, one Diljan, the share of the plaintiff in her husband's estate, according to the Mahomedan law, was only $\frac{1}{8}$th; and further that her claim was barred under the Statute of Limitations, as the defendant's vendor Nowab Jan and his mother Bibee Jan were in possession of the estate after Mirza Moful Beg's death, and not the plaintiff.

Both the Lower Courts found that the plaintiff's suit was not barred; that the deed of gift by Bibee Jan to the plaintiff was proved: but that, according to the Mahome-

dan law of inheritance, the plaintiff was entitled to a 9-anna share only, that is, to say, to 7 annas in right of her husband Akul Jan and to 2 annas by gift from Bibee Jan, and that the remaining 7-annas share was the estate of Nowab Jan by whom it had been conveyed to the defendants. The plaintiff's claim was, therefore, decreed in a modified form, *viz.*, over 9 annas only.

The special appellant contends that, as the Principal Sudder Ameen finds that the plaintiff has held long and uninterrupted possession of the whole estate, and that Nowab Jan was never in possession, the plaintiff has acquired a title over the whole estate by prescription, inasmuch as it is not enough for the defendant to show a title in his vendor, unless such title is not barred by lapse of time; that the recitals in the deed of gift by Bibee Jan *quoad* the share of Nowab Jan are not binding upon the Bibee Jan's donee, the plaintiff; that the income-tax returns should not have been accepted by the Principal Sudder Ameen as evidence, particularly as the plaintiff denied having filed them.

I have no doubt that the Principal Sudder Ameen, upholding as he did the decision of the first Court, substantially found that the possession of the plaintiff and her husband before her was not adverse to the absent brother, Nowab Jan, the defendant's vendor. The title of Nowab Jan is not disputed; but it is urged by the pleader for the special appellant that long possession must override that title which, however good, has been lost by lapse of time.

There can be no doubt that possession is *primâ-facie* proof of title; but in a case like the present, where the two brothers were members of the same family, and admittedly succeeded to equal shares in the estate, *i. e.*, to 7 annas each, the mere fact of one brother being absent on service, or for any other reason, and the home-staying brother being in possession for himself and as trustee for his absent brother, will not deprive the latter of his rights of inheritance, unless it be clearly shown that the possession of the brother staying at home was adverse to the absent brother.

The plaintiff coming into Court for confirmation of his possession seems to me to indicate very plainly that she never held adverse possession as against the defendant's vendor, Nowab Jan. The recital in the deed of gift, on which the plaintiff relies as the basis of her claim to the share which has devolved to her by gift from Bibee Jan, to the effect that Nowab Jan's share was 7 annas, of which he was in possession, seems to me, if not altogether conclusive, to be a very weighty piece of evidence. This gift was executed within 12 years prior to the present suit, and the distribution of the family-property in that deed was clearly tacitly assented to by the plaintiff who, moreover, procured the registry of the deed. The revenue-authorities registered the name of the defendant's vendor on the mutation-roll. This must have been done in proof of his joint possession, although an absentee.

Holding, therefore, that neither the possession of the plaintiff nor of her husband was ever adverse to the defendant's vendor, and as the title of the defendant's vendor is admitted, I concur in dismissing this appeal with costs and interest.

The 9th January 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Limitation—Confirmation of sale by a Court not a proceeding under Section 20, Act XIV., 1859.

Case No. 422 of 1867.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 10th May 1867, reversing an order passed by the Sudder Moonsiff of that District, dated the 16th January 1867.

Juggut Mohinee Bibee (Decree-holder), *Appellant,*

versus

Ram Chand Ghose and others (Judgment-debtors), *Respondents.*

Baboos Chunder Madhub Ghose and *Shushee Bhoosun Bose* for Appellant.

Baboos Tarucknath Sein and *Romanath Bose* for Respondents.

The mere formal confirmation by a Court of a sale by a decree-holder cannot be said to be a proceeding on the part of such decree-holder to execute his decree.

Hobhouse, J.—THE decree-holder in this case sold certain property of the judgment-debtor on the 9th March 1863. The sale was confirmed on or about the 7th April 1863. The next application on which the decree-holder relies is of date the 14th March 1866, and his pleader contends that the law permits him to date from the 7th April 1863, and that his application of the 14th March 1866 is, under Section 20, Act XIV., 1859, in time.

We think that this contention is not sound. The mere formal confirmation by the Court of a sale cannot be said to be a proceeding on the part of a decree-holder to execute his decree, and cannot, therefore, save the decree in this instance. The last proceeding of the decree-holder was taken on the 9th March 1863, and, as he did not again legally apply until the 14th March 1866, his remedy is barred.

We dismiss the appeal with costs.

The 9th January 1868.

Present :

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Suit under Section 15, Act XVI., 1864 —Pleader's fees.

Case No. 409 of 1867.

Miscellaneous Appeal from an order passed by Baboo Gobind Chunder Ghose, Principal Sudder Ameen of Patna, dated the 7th May 1865.

Mowla Buksh (Defendant), *Appellant,*

versus

Bahadoor Ali Khan (Plaintiff), *Respondent.*

Baboo Woomesh Chunder Banerjee and *Moulvie Syud Murhumut Hossein* for Appellant.

Messrs. R. E. Twidale and *C. Gregory* for Respondent.

A suit under Section 15, Act XVI., 1864, is not a summary, but a regular suit, and full fees should be awarded for pleaders.

Hobhouse, J.—THIS was a case in which the Registrar of Assurances refused to register a certain document, and in which the plaintiff, appellant, sued under Section 15, Act XVI., 1864, to compel registration.

The Court below treated the suit as a regular suit, dismissed it, and saddled the plaintiff with full costs of the pleaders as in a regular suit.

Appellant now contends that the suit was a summary and not a regular suit, and that the Lower Court should have awarded, as costs, pleader's fees as for a summary, and not full fees as for a regular suit.

The words of the Section 15, Act XVI., 1864, are quite plain, and they call the suit a regular suit; and it follows that the Lower Court was right in awarding pleader's fees as for such a suit, and not as for a summary suit.

The appeal is dismissed with costs.

The 9th January 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Malikana—Limitation—Clause 12, Section 1, Act XIV. of 1859.

Case No. 169 of 1867.

*Application for a second review of judgment, passed by the Hon'ble H. V. Bayley and Shumbhoonath Pundit, JJ., on the 8th August 1866, in Special Appeal No. 1248 of 1866.**

Herranund Shoo, *Petitioner,*

versus

Mussamut Ozeerun and others, *Opposite Party.*

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Petitioner.

Mr. C. Gregory for Opposite Party.

The right to malikana is a proprietary right constituting an interest in land, and not the same as rents, and the law of limitation applying to it is Clause 12, Section 1, Act XIV. of 1859.

Phear, J.—It seems to me that the right to receive malikana is a distinct proprietary right, and that it constitutes an interest in land. It is, in truth, very much of the nature of a rent-charge. Therefore, I think that, if there has been no enjoyment of malikana for a period of 12 years, the right to sue for money receivable under it is barred by Clause 12, Section 1 of Act XIV. of 1859. The petition ought, in my view, to be rejected with costs.

Bayley, J.—Malikana is, in fact, a deduction from the assets of a Government settled estate of a sum which is payable to proprietors in consideration of their position as such, and of their relation to Government as the payers of revenue. The question is whether, coming from the rents which form the above assets, the law of limitation is to be applied to malikana as to rents, which are a perpetually recurring cause of action, or whether that law shall be applied as to an interest in land, being of the nature of property, and not the same as rents.

After fully hearing counsel, and considering the circumstances, I am of opinion that malikana is an interest in land, not rents, and that, therefore, the proper law of limitation is that applying to an interest in land, *viz.*, Clause 12, Section 1, Act XIV. of 1859. In this view, I would reject the petition.

* *See* 6 W. R., Civil Rulings, p. 151.

The 9th January 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Application for review—Section 377, Act VIII. of 1859—Full Bench decision no guide for the past.

Case No. 149 of 1867.

Application for a third Review of Judgment, passed by the Hon'ble H. V. Bayley and G. Campbell, JJ., on the 13th April 1863, in Regular Appeal No. 403 of 1860.

Dwarkanath Doss Biswas, *Petitioner,*

versus

Manick Chunder Doss, *Opposite Party.*

Mr. R. V. Doyne and *Baboos Sreenath Doss* and *Bhugobutty Churn Ghose* for Petitioner.

Baboos Onookool Chunder Mookerjee and *Greeja Sunkur Mojoomdar* for Opposite Party.

An application having been made for a review of a judgment passed 3 years previously, it was found to be a renewal of an application made within that time; the renewed application being on the ground that a judgment of a Full Bench had, *since* the date of the former application, laid down the law in conformity with petitioner's contention in his former application.

HELD that the fact pleaded did not constitute a "just and reasonable cause" within the meaning of Section 377, Act VIII. of 1859. A Full Bench decision does not warrant interference, in review, with a determination of the law come to prior to such decision.

Phear, J.—THIS is an application for a review of a judgment passed just three years ago. The petition ought, therefore, not to be admitted, unless *just and reasonable* cause be shown why the application was not made within the time limited for that purpose by Section 377 of Act VIII. of 1859. On enquiry, it turns out that exactly the same application *was* made within that time, namely, in August 1865. The present is but a renewal of that application of August 1865, and the only justification for it is that a judgment of a Full Bench has *since* that date laid down the law in conformity with the contention made by the petitioner in his former petition of review, and contrary to the principle upon which this Bench acted in rejecting it. I do not think that this fact constitutes a "*just and reasonable cause*" within the meaning of Section 377. It appears to me that we ought not, merely on the ground of the Full Bench decision, to admit a petition for the purpose of interfering, in review, with a determination of the law by a competent tribunal which was come to before that decision was given. The decision is only a guide to the law for the future, not for the past. In this view, clearly, the enunciation of the law by the Full Bench is not a justification for the petitioner coming here out of time. In my judgment, this petition should be rejected with costs.

Bayley, J.—I concur.

The 9th January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Suit for enhancement — Prima-facie proof of rent-free title — Onus probandi — Costs on partial failure of special appeal.

Case No. 1284 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 14th March 1867, reversing a decision passed by the Deputy Collector of that District, dated the 4th January 1867.

Heera Ram Bhuttacharjee (Defendant), *Appellant,*

versus

Ashruf Ali (Plaintiff), *Respondent.*

Baboos Nil Monee Sein and *Judoonath Mookerjee* for Appellant.

Baboo Umbica Churn Banerjee for Respondent.

In a suit of enhancement for rent where defendant gives *primâ-facie* proof of a rent-free title, such as a proceeding of the resumption-authorities releasing his lands under Section 48, Regulation XIX. of 1793, the *onus* is on the plaintiff to prove receipt of rent.

Where a special appellant to the High Court failed as to a portion of his appeal, the costs of that Court were decreed against him.

Kemp, J.—THIS was a suit for enhancement of rent after service of notice. Two grounds were stated, *viz.*, that the rate was below prevailing rate, and that the value of the produce or the productive powers of the land had increased, &c. *Vide* Section 17, Act X.

The defendant pleaded parcel rent-paying and parcel rent-free. He further stated that the plaintiff had claimed as appertaining to his estate Khas Kolla lands situated in Potra.

The plaintiff's averment was that the defendant held 51 beegahs.

The first Court dismissed the plaintiff's suit.

On appeal, the Judge found that, with reference to 26 beegahs 18 cottahs mâl lands, the defendant had failed to prove that the rent had not been changed. The case was, therefore, sent back to the first Court to fix a fair and equitable rate. With reference to the lakheraj portion, the Judge held that, out of 18 beegahs 2 cottahs claimed as such by the defendant, he had made good his claim to 14 beegahs. The remaining 4 beegahs 13 cottahs was added on to the mâl area of 22 beegahs 15 cottahs, making a total of 26 beegahs 18 cottahs.

In appeal, it is contended that the Judge has thrown the *onus* on the wrong party; that plaintiff ought to have proved the receipt of rent from the said 4 beegahs 13 cottahs; that the Judge was wrong in remanding the suit to try the question of what were fair and equitable rates, but ought to have confined the enquiry to whether the productive powers of the soil had increased, &c.

On the *first* point, we think that the Judge has thrown the *onus* on the wrong party. It was for the plaintiff to prove that the 4 beegahs 13 cottahs were mâl, that is to say, rent-paying, and that he had received rent. The defendant started his case with *primâ-facie* proof of an ostensible rent-free title. The proceeding of the resumption-authorities releasing these lands under Section 48, Regulation XIX. of 1793, is filed. The *onus* was clearly on the plaintiff. We asked the pleader to point out evidence as to the receipt of rent, and he failed to do so. It is, therefore, unnecessary to remand the suit, as there is no evidence of the receipt of rent.

On the *second* point, the Judge's order is quite right, as the question of prevailing rates was one of the grounds on which enhancement was asked for.

The decision of the Judge is modified with reference to the 4 beegahs 13 cottahs, which must be excluded from the decree, and the appeal of the special appellant is decreed to that extent, his appeal on the second point being dismissed. Special appellant having failed in the latter portion of his appeal, he will pay the costs of this Court. The costs below to be paid by either party in proportion to the extent of land decreed liable to enhancement.

The 10th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Suit for declaration of the validity of a deed and confirmation of possession under Section 15, Act VIII. of 1859.

Case No. 1611 of 1867.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 11th of March 1867, reversing a decision of the Principal Sudder Ameen of that District, dated the 22nd July 1865.

Phool Chunder Lall (Plaintiff), *Appellant*,

versus

Sheoranee Koonwur (Defendant), *Respondent*.

Baboos Debendernarain Bose and *Khetter Nath Bose* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

When a plaintiff sues to declare that a deed is valid, and to confirm his possession under it, and fails to show sufficient cause for the Court's interference under Section 15, Act VIII. of 1859, the Court ought simply to declare to that effect, and not to determine that the plaintiff has no right, and that the deed is void.

Peacock, C. J.—I THINK the Judge is wrong in this case, because he has substantially determined that the appellant had no right, and that the deed was void. He ought simply to have declared that the plaintiff had not shown a sufficient cause to induce the Court to interfere under Section 15 of Act VIII. of 1859, and to declare that he had a right, and ought to have his possession confirmed.

The decision of the Judge and of the Lower Court should be reversed upon the ground that the plaintiff has not made out sufficient cause for a declaration of his right.

Each party will bear his own costs of this appeal and his costs in the Lower Courts.

I frequently find that in the Mofussil parties are not satisfied to have their rights determined in one suit, and that they prefer having the same question determined in two different suits: one, a suit to determine and enforce the rights of the parties; the other, to declare them. The parties are not the persons beneficially interested in these mat-

ters, but it is those who profit by the litigation. The Court ought to set its face as much as possible against such proceedings. Considering, however, that the reversionary heirs were objecting to the plaintiff's title, and the practice which has hitherto prevailed of instituting suits for declarations of right and confirmations of possession, and other similar suits, we do not think it necessary to order the plaintiff to pay the costs in this case. That is our reason for not awarding costs against him notwithstanding he has failed in his suit; but, after this intimation, the Court, we think, ought to be more particular in giving decrees in these suits merely for declarations of right when no substantial relief is sought for, especially in cases in which the question of title is raised in another suit between the same parties for enforcing the right of the opposite party. In this case, one party sues to set aside a deed; the other sues to declare that the deed is valid, and to confirm his possession under it. Both cases have gone through three different Courts, and full stamps have been paid upon each, when one suit was sufficient to determine the whole question between the parties.

The 10th January 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

A Hustabood filed under Regulation VIII., 1800, no evidence against third parties.

Cases Nos. 896 and 898 of 1867.

Special Appeal from a decision passed by the Officiating Additional Judge of Nuddea, dated the 25th April 1867, reversing a decision passed by the Deputy Collector of that District, dated the 30th November 1865.

Ram Nursing Mitter and another (Defendants), *Appellants,*

versus

Tripoora Soondurce Dassia and others (Plaintiffs), *Respondents.*

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Appellants.

Baboos Bhowanee Churn Dutt and *Kalee Mohun Doss* for Respondents.

An authenticated copy of a hustabood of 1209 B. S., of which the original was put into the Collectorate by the zemindar according to Regulation VIII., 1800, was held to be no evidence against third parties, defendants in a rent-suit.

Bayley, J.—It is admitted that one and the same decision by us in Special Appeal will govern these two cases.

The questions which we have to decide are, *1st,* whether a certain duly authenticated copy of a hustabood of 1209 B. S. (the original being in the Collector's records) is admissible as evidence; *2nd,* whether it can be used as evidence in order that the entries of rent in it may be considered to prove that the defendant's jumma has varied; and, *3rd,* whether the entries can be taken to show that the rents entered have been *realized;* and, if they do not show this, whether the entries by themselves will suffice to rebut the presumption found for defendant of uniform payment for 20 years, so as to entitle defendant to the benefit of Section 4, Act X. of 1859.

We think it will suffice to say that the copy of the hustabood of 1209 is not any evidence against the third parties, now defendants. It is a paper which, it is admitted by both parties, was put into the Collectorate by the zemindar according to Regulation VIII. of 1800, with a view to show the Collector the assets of the mehal. It would be evidence against the zemindar himself, but go no further as direct evidence. Supposing, for argument's sake, that the hustabood might be regarded as an official document, still it would only be used as corroborative evidence, certainly of any such fact as might be independently shown by other evidence. But that the defendant's rent in this case was one which varied is *not* shown by any independent evidence.

In this view, we consider the Lower Appellate Court was wrong in holding, as it did, only upon the evidence of that hustabood of 1209 B. S. that a variation of defendant's rent was proved.

It is, indeed, stated by Baboo Kalee Mohun Dass, for respondent, that the plaintiff's servants clearly deposed to the defendant's rent having been less and more (*komee beshee*), but that is not a distinct fact which we could say is distinctly corroborated by the hustabood of 1209.

Such being our view, we decree this special appeal with costs.

The 10th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Limitation—Holding under an ijara not adverse possession—Remand for re-trial not allowable where the defective finding is the ground of appeal.

Case No. 1719 of 1867.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Chittagong, dated the 1st May 1867, affirming a decision passed by the Moonsiff of Sundeep, dated the 20th September 1866.

Mohomed Ahsan and others (Defendants), *Appellants*,

versus

Mahomed Yasin (Plaintiff), *Respondent*.

Moulvie Murhumut Hossein for Appellants.

No one for Respondent.

In a suit brought in 1272 to recover possession of certain land alleged to have been purchased in 1262, plaintiff alleged that defendant held the property up to 1265 under an ijara, and defendant pleaded that he had been in possession under a prior purchase from the same vendor in 1257.

HELD that, if defendant paid rent under an ijara, limitation would reckon from the time at which the ijara expired, and not from the date of the plaintiff's purchase.

Where the ground of regular appeal to the Lower Appellate Court was that the Court of first instance ought to have found that an ijara existed, it was the duty of the Appellate Court to determine whether that fact had been proved, and not to remand the case for re-trial.

Peacock, C.J.—THE plaintiff in this case sued to recover possession of certain land, alleging that he purchased it in Bysack 1262, corresponding with 1855, and that the defendant held the property up to 1265, corresponding with 1858, under an ijara which had been renewed. The suit was brought in 1272.

The defendant set up as a defence that he had been in possession under a prior purchase from the same vendor in the year 1257, and that the plaintiff's suit was barred by limitation.

If the defendant really held under an ijara which expired in 1256, and paid rent under that ijara, then the plaintiff's suit was brought within the period of 12 years from the time at which the ijara expired, and was not barred by limitation.

In cases of Special Appeal, the record sent up to this Court ought always to show the grounds of appeal from the decision of the Court of first instance; and, if there has been an appeal from a re-trial upon a remand, the grounds of the first appeal, as well as of the second appeal to the Lower Appellate Court, ought to be sent up. In the present case, there have been two appeals from the Court of first instance to the Lower Appellate Court: *1st*, an appeal from the decision in the first instance; and, *2ndly*, an appeal from a trial upon a remand of the case by the Principal Sudder Ameen upon the first appeal. The Principal Sudder Ameen has neglected to send up to this Court the first petition of appeal to him. We are, therefore, unable to find what were the grounds of appeal otherwise than from the recital of them in the decree by which the case was remanded by him.

The Court of first instance, upon the first trial, found that the ijara was not proved; and from the grounds of appeal, as recited in the decree of remand, it appears that the only ground of appeal to the Principal Sudder Ameen from that decision was that the Moonsiff ought to have found upon the evidence that the defendant held under an ijara. It appears that the Principal Sudder Ameen was guilty of great negligence in trying the first appeal, besides exhibiting great ignorance of the law.

He finds, *first*, that limitation dated from the time of the plaintiff's purchase, which, in the present case, was not twelve years before the commencement of the suit. If this were so, then, if the plaintiff's vendor had been barred by limitation, he would still have had the power of conveying to the plaintiff a good cause of action. A knowledge of the rudiments of law would have prevented the Principal Sudder Ameen from falling into such an error.

In the *second* place, the ground of appeal being that the Moonsiff ought to have found that an ijara existed, it was the duty of the Principal Sudder Ameen upon regular appeal before him to have determined whether it was proved that the defendant held under an ijara or not. Instead of doing that, he says in his judgment by which he remanded the case, "If it is true that the defendants have been in possession under an ijara granted by the former proprietor, as alleged by the plaintiff, or that the defendant Sahebana has been in possession as

a bowladar or ryot, then that possession must be considered as the possession of the former proprietor."

Thirdly, the Principal Sudder Ameen says that. the defendant's possession being based on a bill of sale, that possession would go for nothing if the bill of sale is not proved, and then he remands the case by stating that this appeal be decreed; that the decision of the Moonsiff be reversed and set aside, and that the case be remanded to him : that he, after inspecting the documents and evidence adduced by both parties, might try the plaintiff's claim, and the truth or otherwise of the defendant's objections; and that the case be tried from the beginning. So that, the appeal being to the Principal Sudder Ameen upon the ground that the Moonsiff ought to have found that the ijara existed, he sent the case back to the Moonsiff to try the case from the beginning, which involved the question as to whether the ijara existed or not.

The Moonsiff, on the second trial, found that the plaintiff's purchase deed was true, and the defendant's purchase-deed was false, and under the directions which had been given in the first decision of the Principal Sudder Ameen decreed for the plaintiff.

The defendant again appealed upon the ground of limitation, and then the Principal Sudder Ameen again exhibited a very great degree of carelessness, for he says that the Moonsiff on the first trial found that the defendants were in possession under an ijara-lease, and dismissed the plaintiff's claim, holding it to have been barred by limitation; whereas the Moonsiff found that the ijara was not proved, and the very ground of appeal to the Principal Sudder Ameen was that the Moonsiff had not found that the defendants held under an ijara, as he ought to have done according to the evidence.

It is quite clear that, if the defendant had held adversely for more than 12 years before the commencement of the suit, the plaintiff's claim was barred by limitation, and that he had no right to succeed whether the defendant proved his purchase-deed or not. But the Principal Sudder Ameen found that the plaintiff was entitled to succeed, because the defendant had not proved his purchase-deed. We cannot, upon special appeal, go into the evidence in the cause for the purpose of determining whether the ijara existed or not; and, consequently, this case must be remanded to the Principal Sudder Ameen to determine whether the defendant held under an ijara or not; and now, notwithstanding the second trial by the Moonsiff, the decision of the second appeal by the Principal Sudder Ameen, and this special appeal to the High Court, the parties are precisely in the same position in which they were when the first appeal was heard by the Principal Sudder Ameen, and all the expense which has been incurred and all the litigation and delay which have taken place since the hearing of the first appeal by the Principal Sudder Ameen on the 13th of August 1866, have been wholly useless, and caused by his not having properly considered the case when it was then before him; and all this for a small piece of land valued at 32 rupees.

In determining the question whether the defendant did or did not hold under an ijara, we think it right, in order to prevent further litigation and expense, to inform the Principal Sudder Ameen that the *onus* of proving that fact lies upon the plaintiff. The costs of this appeal are to be paid by the respondent. Let the costs of the suit and of the two appeals to the Lower Appellate Court be paid by the party who, according to the final determination, fails in the suit.

Let this case be sent to the Registrar, in order that it may be further considered with reference to the carelessness of the Principal Sudder Ameen, and the Registrar is directed to take a note of the case, and to bring it before the Chief Justice.

The 10th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Sale by Hindoo Widow—Rights of reversioners.

Case No. 1664 of 1867.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the

11th March 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 17th July 1865.

Phool Chand Lal (Defendant), *Appellant,*

versus

Rughoobuns Suhaye (Plaintiff), *Respondent.*

Baboos Debendro Naraiu Bose and *Khettur Nath Bose* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

In a suit by reversioners to set aside a deed of sale by a Hindoo widow of part of her husband's estate, on the ground that the money which it was necessary to raise could have been raised by other means, it was held that, if the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorized her to raise, the sale would not be absolutely void as against the reversioners, who could only set it aside by paying the amount which the widow was entitled to raise with interest.

HELD also that, if a widow elects to sell when it would be more beneficial to mortgage, the sale cannot be set aside as against the purchaser if the widow and the purchaser are both acting honestly.

Peacock, C. J.—THIS is a suit brought by the plaintiff against the widow of Nursingh Suhaye, deceased, who was a cousin of the plaintiff, the plaintiff and Nursingh Suhaye being the sons of two brothers. Nursingh having died without male issue, the plaintiffs claim under the Mitakshara Law to be the reversionary heirs of Nursingh upon the death of his widow, and the suit is brought for determination of right of inheritance by setting aside several deeds of sale by the widow of various parts of her deceased husband's estate, one of which is the subject-matter of this appeal.

If there were any necessity, such as the Hindoo Law warranted, for a sale of part of the property, and the widow sold a larger portion of the estate than was necessary to raise the amount which the law authorized her to raise, it appears to me that the sale would not be absolutely void as against the reversioners, but that they could only set it aside upon paying that amount which the widow was entitled to raise with interest; and, if the widow was not authorized to sell any part of the estate, because it would have been more beneficial for the reversioners that she should raise the amount by mortgage, instead of sale, I am of opinion that the reversioners could not set aside the deed of sale without placing the purchaser in the same position as that in which he would have been, if the widow had mortgaged instead of selling.

I am not at all sure that, even if it could be made out that it would have been more beneficial for the widow to mortgage instead of selling, the purchase could be set aside. The widow takes a widow's estate by inheritance from her husband. It is not an absolute estate for all purposes, and it is not merely an estate for life; but she takes the estate of her husband for the benefit of her deceased husband, which includes her own maintenance, and the performance of her religious duties, rather than for the benefit of those who may become the heirs of her husband upon her death. It is unnecessary in this case to determine whether in any case a widow is bound to mortgage. My impression is, that, if a widow elects to sell when it would be more beneficial to mortgage, the sale could not be set aside as against the purchaser, if the widow and the purchaser are both acting honestly. It must be remarked that, if a widow were bound to mortgage, the interest of the money raised by mortgage must be paid out of the estate, and thus the income of the widow would necessarily be reduced for the benefit of the reversionary heirs.

The plaintiffs in this case brought their action in the lifetime of the widow, and she was one of the defendants. The death of the widow pending the suit could not alter the nature and object of the suit itself, and, therefore, we must see what the plaintiffs asked for as against the widow and the purchaser.

They did not ask to have the deed set aside upon the ground that the widow had sold, whereas she ought to have mortgaged, offering to put the purchaser in the situation of a mortgagee; nor upon the ground

t the widow had sold for the purpose of sing a larger amount than the law author- d her to raise, offering to pay to the pur- ser the amount which the widow was fully authorized to raise. It is very likely that the plaintiffs, when they com- nced this suit, would have been willing pay to the purchaser out of their own ckets any amount which the widow might e been authorized to raise, because, even hey did so, and the deeds were set aside, y would not have been entitled to the ate during the widow's lifetime, and bably might never have been entitled to at all; for it was only in the event of ir surviving the widow that they would e been entitled to the inheritance. They to determine the right of inheritance setting aside the deeds, and they allege t those deeds were improperly executed, because there was no necessity to raise money, but because the money, which s requisite, could have been raised by er means.

If they had asked to have their own right inheritance declared, they would have n premature, because it might happen t they would not survive the widows. ey, therefore, as reversioners, and being persons entitled to protect the estate, ed, as I interpret the plaint, to have it clared that, upon the death of the widow, right of inheritance would attach in the me way as if those deeds had never been ecuted; in other words, that the deeds uld not be binding upon the heirs after death of the widow. They did not mean to that the Court should declare that, upon death of the widow, the persons, who- er they might be, who should be entitled take by inheritance, might have the deeds aside upon paying the amount which the dow was entitled to raise. If they had ne so, they would have asked what, as it ppears to me, they were not entitled to ve. The Court could not properly have ecreed in the lifetime of the widow that, on her death, the deeds should be set ide upon payment by the persons, who ould succeed to the estate, of the amount hich the widow was entitled to raise, in- much as it would be contingent upon the ill of the persons who might succeed to the heritance whether they would pay the mount or not; and the purchaser could not roperly have been placed by a decree of the ourt in a position in which for many years e might remain in a state of uncertainty as to hether or not he could safely expend capital in the improvement of the estate. Such a decree would have been unjust to the purchaser, and it would be contrary to public policy to place an estate in that position in which it could not be known whether the estate could be safely improved or not.

Under these circumstances, it appears to me that the only question for the consideration of the Court is, whether the deeds were absolutely void upon the ground that the widow ought to have raised the money which was required by other means than by selling a portion of the estate. Even if we could go beyond the pleadings, we could not go further than to determine the issue whether the deeds were absolutely void upon the ground that the widow was not authorized to raise any money at all.

Now, it appears that, with regard to the deed now under consideration, a portion of the purchase-money was raised for the purpose of paying Government revenue, a portion to pay off a debt incurred for the purpose of performing her husband's shradh, a portion to pay off a debt contracted to defray the funeral ceremonies of her husband, and a portion to pay off a decree which had been obtained against her husband. It appears to me that the widow was not committing waste by selling a portion of the estate to raise those sums, and that the purchaser was justified in advancing his money upon the representations of the widow that she considered it necessary to raise those moneys by selling, instead of raising the moneys either upon the security of the estate by mortgage or in any other way.

It is clear that the widow was not bound to borrow the money upon her own personal security, and to contract a debt which, if she should die before she could be able to repay it out of the profits of the estate, she would probably have no means of paying, and thus incur the guilt of the sin of leaving debts unpaid. I am also of opinion that the widow was not bound to borrow the money by mortgaging the estate, and thus necessarily reducing the income to which she was entitled during her lifetime for the maintenance of herself and her daughter, for the performance, if she thought necessary, of pilgrimage, and for other proper and necessary religious duties. But, as I have before remarked, it is not necessary to decide whether the widow could have raised the money by mortgaging the estate or a

part of it instead of selling. The suit is not brought to set aside the deeds upon putting the purchaser in the same position as that in which he would have been if he had advanced the money upon a mortgage of the estate, instead of paying it to the widow as the price of his purchase. If the decree of the Judge is right, and the deeds are to be absolutely set aside, and the heirs are to be entitled to take back the estate from the purchaser because it has been sold instead of being mortgaged, then the reversionary heirs are entitled to benefit by an honest mistake of the widow (for no fraud is imputed to her), in considering that it was better to sell than to mortgage.

We think that the decree of the Judge must be set aside, and the decree of the Lower Court dismissing the suit must be affirmed. The appellant will be entitled to the costs of this appeal, and to his costs in the Lower Appellate Court.

The 10th January 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

A right to repudiate a contract must be asserted within reasonable time.

Case No. 879 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 4th February 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 14th December 1865.

Ishan Chunder Mojoomdar and others (Defendants), *Appellants,*

versus

Sreekant Nath and others (Plaintiffs), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboos Sreenath Doss and *Issur Chunder Chuckerbutty* for Respondents.

Where a party to a contract seeks release from its obligations on the ground that, for some reason or another, he is entitled to repudiate it, he must assert this right as soon after becoming aware of it as he reasonably can. Long inaction unaccounted for must be held in equity to be a ratification of the contract.

Phear, J.—THE plaintiffs (zemindars) sue in this action to set aside a putnee-pottah under which the defendants, putneedars have for many years been holding lands of the plaintiffs, and to recover possession of those lands. The ground upon which the plaintiffs claim to be entitled to avoid the pottah is that it was granted during their minority by their mother and guardian, and for that reason is not binding upon them.

It appears, as a fact, that the plaintiffs after becoming majors, recovered rent from the defendants as their putneedars by proceedings taken in the Collector's Court under Regulation VIII. of 1819; and in those very proceedings reserved, in words their right to assert that they were not bound by the putnee-pottah granted by their mother. After this, they allowed the defendants to remain in *undisturbed enjoyment of the putnee* for a period of *six* years, but without receiving from them any rent.

Both the Lower Courts have decided in favor of the plaintiffs, holding that the above-mentioned facts constitute no bar to their right to recover.

It seems to us clear that, where a party to a contract seeks to get released from its obligations, on the ground that, for some reason or another, he is entitled to repudiate it, he must assert this right to repudiate as soon after becoming aware of it as he reasonably can. In the case before us, the plaintiffs, by their proceedings before the Collector, not only compelled the defendants to pay them rent under the pottah in question, but actually disclosed the fact that they then knew they possessed the right to question the validity, as against themselves, of that pottah, yet they forbore to take any steps to get rid of the pottah until six years afterwards. This long inaction is entirely unaccounted for, and, in the face of laches of this kind, we think the plaintiffs cannot be allowed in a Court of equity to say that they have not ratified the lease of which they have so long, with the full knowledge of the facts, permitted the defendants to have enjoyment.

The decision of the Lower Appellate Court is, we think, wrong in this point, and must be reversed. It follows that the plaintiffs' suit must be dismissed.

Accordingly, we decree this appeal, and dismiss the plaintiffs' suit with costs.

The 11th January 1868.

Present:

e Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. Hobhouse, *Judge*.

d for money pledging land as security—ections 17 and 18, Act XX. of 1866—Regis-ration—Evidence.

ference to the High Court by Baboo Nobin Kissen Paulit, Judge of the Small Cause Court at Midnapore.

Woodoy Chand Jana, *Plaintiff*,

versus

Nitye Mundul and Poresh Mundul, *Defendants*.

bond for money, in which land is pledged as a mere lateral security, is not one of the instruments defined Clause 2, Section 17, Act XX., 1866, the registra- of which is compulsory; but is one of which registration is optional under Clause 7, Section 18 of law.

he reception of such a bond as evidence, though not istered, is not barred by Section 49 of the Registra- Act.

Case.—PLAINTIFF sues to recover the incipal and interest, amounting to Rs. 300, e on a bond for Rs. 252, in which bond, obligors, after reciting the particulars and the necessity for, the loan, and sti-lating the period for re-payment, have edged certain rent-paying lands, as secu-y for payment, in the following terms :—

"As a security for the liquidation of is loan, we pledge our ancestral holding 43 beegahs 18 cottahs of lands in the vil-ge of Chundeepore in Pergunnah Midna-ore. Should we fail to make good our debt, u (obligee) shall be at liberty to sue for d recover your money by the sale of the id lands, and of other moveable and im-oveable property belonging to us. No jection shall be preferred to such sale or ecovery by ourselves, heirs, or representa-tives; nor shall we anywise alienate or transfer the said lands until we repay your money. Such alienation, if made by us, will be null and void, to which effect we execute this bond," &c.

The bond has not been registered, and, therefore, the pleader for the defendants contends that it cannot be received in evidence under Section 49, Act XX. of 1866, on the ground that it is one of the documents the registration of which is compulsory under Section 17 of that Act.

The question on which I solicit the decision of the honorable Court is, whether the bond in dispute is one of the instruments defined in Clause 2, Section 17 of the Registration Act, and whether or not it can be received in evidence in plaintiff's suit for money, in which a simple money-decree, such as will not affect the immoveable property mentioned in the deed, is sought or applied for?

I am of opinion that the land is pledged as a mere collateral security, and that the bond is, to all other intents and purposes, a simple bond for money lent, the registration of which is optional under Clause 7, Section 18 of the Act quoted above. Section 49 of the same evidently refers to those instruments which affect immoveable property, and provides that the property comprised in such instruments will not be affected by them if they are not registered. But, as no immoveable property will be affected by the personal or money-decree sought by the plaintiff, who has relinquished whatever lien was bestowed on him on the property pledged by the bond, I think that this bond can be admitted in evidence for the purposes of the present suit.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that the view taken by the Judge of the Small Cause Court is correct.

The 11th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. Hobhouse, *Judge*.

Jurisdiction—Definition of the term "place" in Section 19 of the Mutiny Act.

Reference to the High Court by the Deputy Commissioner of Darjeeling and Ex-officio Judge of the Small Cause Court within the Hill Territory of the District, dated the 29th July 1867.

Hosseinee Khidmutgar

versus

Lieutenant Dickinson.

Case.—Whether (Section 99 of the Mutiny Act notwithstanding) the defendants in certain cases, residents of Sinchal and Jullapahar, who are ordinary persons amenable to that Act, are or are not within the jurisdiction of the Deputy Commissioner of Darjeeling as *ex-officio* Judge of the Small Cause Court within the Hill Territory of the District.

HELD that the defendants are not amenable to the jurisdiction of the Small Cause Court.

HELD also that the word "place" in Section 99 of the Mutiny Act is not used in the limited sense supposed by the Judge of the Small Cause Court (who held that 'a place must have limits,' and referred to Webster's definition "a fortified town or post, a fortress, a fort"), and that Sinchal and Jullapahar are places in India beyond the jurisdiction of the Small Cause Court in Calcutta, and that the actions were cognizable only by a Military Court of Requests.

Case.—THE jurisdiction of this Court has been laid down by Government to extend to the ordinary jurisdiction of the Deputy Commissioner in the Hill Tracts of Darjeeling, but exclusive of the Terai and Dalimkote sub-division, *vide Calcutta Gazette* of the 8th May 1867, page 884, and I beg leave to submit for the orders of the High Court whether, Section 99 of the Mutiny Act notwithstanding, the defendants in the cases noted in the margin,* who are ordinary persons amenable to the Mutiny Act, are within the jurisdiction of this Court or not.

* No. 34, Hosseinee Khidmutgar *versus* Lieutenant Dickinson.
No. 66, Nuseeroodeen *versus* Khoda Buksh & Mahomed Khan.
No. 67, Pow *vs.* Ditto.
No. 70, Moshabar Moodee *vs.* Ditto.
No. 71, Chimniwala *vs.* Ditto.
No. 72, Dhummo Sirdar *vs.* Ditto.
No. 83, Mahomed Khan *versus* Pejo and Pow.
Messrs. Doyle and Co. *versus* Captain Dobbin.

I am of opinion that they are within the jurisdiction of this Court, the 99th Section of the Mutiny Act notwithstanding, and my reasons for holding this opinion, are as follows :—

The 99th Section of the Mutiny Act commences with these words: "In all places in India, where any body of Her Majesty's Forces may be serving," &c.; and further on it is laid down that "all personal actions against officers, &c., shall be cognizable before a Court of Requests, and not elsewhere provided the value in question shall not exceed Rs. 400, and that the defendant was a person of the above description when the cause of action arose."

To make a case cognizable by a Military Court of Requests, the defendant must be of a certain class serving with a body of troops in a certain place. A place must have limits. On referring to one of the best Dictionaries (Webster), I find that, in "military affairs," a place means "a fortified town or post ; a fortress ; a fort."

I presume that, where there are no limits the provisions of Section 99 are not applicable, and, therefore, do not bar the jurisdiction of a Small Cause Court over officers and others serving with a body of troops.

The defendants in the first six cases quoted are residents of Sinchal, and at the time the cause of action arose were attached to a Wing of Her Majesty's 58th Foot, equivalent to half a battalion. The boundaries of Sinchal have never been laid down in the manner contemplated by Section 5 of Regulation XX. of 1810.

The remaining defendant, at the time the cause of action arose was resident of Jullapahar, and was attached to the Convalescent Depôt, a detachment of troops of strength less than half a battalion. Jullapahar has no known limits.

I am, accordingly, of opinion that the whole of the defendants, who, at the time the causes of action arose, were attached to troops serving in India, but in no particular place, are liable to the jurisdiction of the Small Cause Court of Darjeeling.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—IT appears to us that the defendants are not amenable to the jurisdiction of the Small Cause Court. We think that the word "place" in Section 99 of the Mutiny Act is not used in the limited sense in which it has been construed by the Judge of the Small Cause Court. We are of opinion that Sinchal and Jullapahar are places in India beyond the jurisdiction of the Small Cause Court in Calcutta, and that, as a body of Her Majesty's Forces was serving in each of those places, the actions were cognizable only

by a Military Court of Requests under the Section above quoted.

We presume that the causes of action did not exceed 400 rupees.

The 11th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. Hobhouse, *Judge*.

Limitation—Suit to recover Pleaders' fees—Section 5, Regulation XX., 1812—Clause 9, Section 1, Act XIV., 1859.

Reference to the High Court by Mr. W. W. Linton, Additional Principal Sudder Ameen of Dacca.

Rash Mohun Goswamy, guardian of Kissory Mohun Roy, minor (one of the Defendants), *Appellant*,

versus

Issur Chunder Mookerjee (Plaintiff), Shosanko Mohun Roy, and Lolit Mohun Roy (Defendants), *Respondents*.

A suit brought to recover fees due to plaintiff as pleader in three suits was held to be barred by limitation as instituted after 3 years, that being the period of limitation in one case in which the defendants had agreed to pay the fees according to law, such agreement being an obligation for the payment of money within the meaning of Section 5, Regulation XX. of 1812, and that being also the limitation applicable, under Clause 9, Section 1, Act XIV. of 1859, in the other cases in which there was no written engagement to pay the fees.

Case.—THIS suit was instituted by the plaintiff to recover from the defendants the sum of Rs. 71-4-6, due to him for fees as a pleader in three several suits wherein he was engaged by the defendants in the defence thereof, and Rs. 34-9-6 for interest due on the said sum of Rs. 71-4-6, making a total of Rs. 105-14. The plaintiff obtained a decree in the Lower Court for the full amount of his claim.

One of the defendants, Rash Mohun Goswamy, guardian of Kissory Mohun Roy, a minor, appeals to this Court on the following grounds, *viz.* :—

(1.) The decision of the Lower Court should be reversed, as the claim of the plaintiff has been barred by the law and precedents in force.

(2.) The Lower Court holds that sufficient time was given to adduce proofs. This was not the case, for the suit was instituted on the 25th of August, and was disposed of on the 3rd of October.

(3.) We were served with a summons a little before the case was disposed of; we could not, therefore, bring forward sufficient proofs to prove our allegation. The Lower Court was wrong in not giving us time to enable us to bring forward our proofs, although we prayed for it.

(4.) It was illegal for the Lower Court to shift the onus probandi on the defendants, as also to give a decree for interest.

On the hearing of the appeal, the appellant's pleader, abandoning his other grounds of appeal, urged the two following :—

(1.) That the plaintiff's claim was barred by limitation.

(2.) That the Lower Court was wrong in allowing interest on the sum due to plaintiff as his fees.

The three vakalutnamahs (the subject-matter of this suit) have not been filed as exhibits in this suit; neither has the Lower Court raised the issue whether the defendants executed the vakalutnamahs or not, nor has any evidence as to the execution of the vakalutnamahs been taken by the Lower Court. The defendants appeared and put in their written statement wherein they pleaded as follows :—

(1.) The plaintiff's claim ought to be dismissed, inasmuch as this suit was not instituted within three years.

(2.) Payment.

(3.) As we agreed to pay no interest, the plaintiff cannot get a decree for the same.

The appellant's pleader admitted the execution of the vakalutnamahs by appellant.

I am of opinion that the plaintiff's suit is not barred by the Statute of Limitation. Clause 9, Section 1 of Act XIV. of 1859, enacts as follows :—

"To suits to recover money lent on interest or for breach of any contract—the period of three years from the time when the debt became due, or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money lent on interest or a contract in writing signed by the party to be bound thereby, or by his duly authorized agent."

Clause 10, Section 1 of the above-mentioned Act, enacts as follows: "To suits brought to recover money lent on interest or for the breach of any contract in cases in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof, the period of three years from the time when the debt became due, or the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof."

From the Clauses of Section 1 of the above-mentioned Act, it appears that the period of limitation is three years, if there is no written contract, or if there is a written contract not registered within six months from the date thereof.

Now, the question arises, could the contracts, which are admitted by the appellant's pleader to be executed by appellant, be registered or not? I am not aware of any law or regulation in force at the time of the execution of the vakalutnamahs, which could have enabled the plaintiff to register them. I have carefully looked through the Acts and Regulations, and can find no Regulation or Act by which documents of this description could be registered.

Regulation XX. of 1812, Section 5, Clause 1; enacts as follows:—

"The person holding the office of Registrar of Deeds is likewise hereby authorized and required, from and after the first of January 1813, to register bonds, promissory notes, and generally all obligations for the payment of money. Provided, however, that such register shall only be made on the application in person or by the representative of the party by whom the said bonds, promissory notes, or other obligations, may have been executed."

By the above Regulation, the Registrar of Deeds could not register documents such as these are. If the documents could be registered, the limitation of three years would apply; as they could not be registered, Clause 16, Section 1, is applicable to them, and the period of limitation is six years from the time when the cause of action arose.

Two suits in which the plaintiff was engaged for the defence were decided on the 19th of July 1862.

The third one, in which the plaintiff was also engaged for the defence, was decided on the 23rd of June 1863, and the cause of action arose when the decision in those suits were passed, *vide* the decisions of the High Court in the following cases:—

Dwarkanath Moitro *vs.* T. J. Renny, vol. 5, Weekly Reporter, page 1, Small Cause Court references.

Kassee Nauth Roy Chowdree *vs.* Issur Chunder Mookerjee, Weekly Reporter, vol. 5, page 297, Civil Rulings.

I have sent for and inspected three vakalutnamahs, and find they do not make any provision for the payment of interest. The Lower Court was, therefore, wrong to allow interest when the documents are silent as to the payment of it.

The appeal is dismissed with costs on the first ground of appeal, and the judgment of the Lower Court reversed on the second ground of appeal, with costs in proportion.

I have dismissed this appeal contingent upon the opinion of the Hon'ble the Judges of the High Court on the point of limitation.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that the suit was barred by limitation as regards the fees in all of the three cases. In the vakalutnamah of the 25th of Bysaak 1270, the defendants agreed to pay the fees according to law. That was an obligation for the payment of money, and might have been registered under Section 5, Regulation XX. of 1812. Consequently, three years was the period of limitation. The two other vakalutnamahs contained no contract on the part of the defendants to pay the fees, and consequently there was no written engagements to register them. The suit, as regards the fees due for business done under those vakalutnamahs, comes under the rule laid down in Clause 16, Section 1 of Act XIV. of 1859; and the period of limitation is also three years.

b

The 11th January 1868.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

High Court's Appellate Jurisdiction—Act VIII., 1859, and Section 11, Act XXIII., 1861—Section 15, Letters Patent.

Case No. 49 of 1867.

Application for Review of Judgment passed by the Hon'ble Justices G. Loch and A. G. Macpherson, on the 29th May 1867, in Miscellaneous Appeal No. 402 of 1866.

Gobind Nath Sandyal and others (Appellants), *Petitioners,*

versus

Ramcoomar Ghose (Respondent), *Opposite Party.*

Baboos Onookool Chunder Mookerjee and *Mohinee Mohun Roy* for Petitioners.

Baboo Romesh Chunder Mitter for Opposite Party.

The High Court cannot admit an appeal which Act VIII. of 1859 and Section 11, Act XXIII. of 1861, do not allow. Section 15 of the Charter does not apply to the question.

Loch, J.—We think this application for review must be admitted, for we find that Ramcoomar Ghose, who was the appellant before us, was no party to the suit between the Sandyals and Bhuttacharjees, and it was in execution of the decree obtained by the Sandyals in that suit that the order appealed against was passed. It is urged by the opposite party that, under Section 15 of the Charter Act, this Court had power to interfere; but we do not think that law applicable to the case now before us, which is simply whether this Court could admit an appeal which the law (Act VIII. of 1859 and Section 11 of Act XXIII. of 1861) does not allow. We think it could not. We, therefore, reverse the order passed by us on 29th May 1867, and dismiss the appeal with costs.

The 13th January 1868.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Partition—Compensation claimed by trespasser.

Case No. 979 of 1867.

Special Appeal from a decision passed by Baboo Jugobundhoo Banerjee, Principal Sudder Ameen of Nuddea, dated the 5th February 1867, affirming a decision passed by the Moonsiff of Santipore, dated the 26th September 1866.

Mudhoo Soodun Chatterjee (Defendant), *Appellant,*

versus

Juddooputty Chuckerbutty (Plaintiff), *Respondent.*

Baboos Gopal Lal Mitter and *Anund Chunder Ghossal* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

Where plaintiff sued for certain land in dispute as his own, and the Lower Court found that it was his share, and that defendant held his separately, no further formal partition was held to be necessary.

Equitable compensation was held not to be due to a defendant who had trespassed and built a wall on plaintiff's land.

Bayley, J.—The grounds taken in this special appeal are that, under the precedent, Full Bench, Volume VI., Weekly Reporter, page 228, the special appellant should have equitable compensation for the wall he built; *2nd*, that there was no formal partition.

Plaintiff sued for the land in dispute as his own, on which defendant had trespassed and built a wall. Defendant claimed the land as his jointly with plaintiff.

The Lower Courts on evidence found that the land was in plaintiff's own share, and that the defendant held his separately. This was a finding of fact on which no special appeal can lie, and no further formal partition is necessary.

As to equitable compensation being due to special appellant under the precedent cited, we think that it does not apply, because it contemplates the case of an admitted sale by a vendor in possession; whereas here

Clause 10, Section 1 of the above-mentioned Act, enacts as follows: "To suits brought to recover money lent on interest or for the breach of any contract in cases in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof, the period of three years from the time when the debt became due, or the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof."

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The 13th January 1868.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Partition—Compensation claimed by trespasser.

Case No. 979 of 1867.

Special Appeal from a decision passed by Baboo Jugobundhoo Banerjee, Principal Sudder Ameen of Nuddea, dated the 5th February 1867, affirming a decision passed by the Moonsiff of Santipore, dated the 26th September 1866.

Mudhoo Soodun Chatterjee (Defendant), *Appellant,*

versus

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Baboos Gopal Lal Mitter and *Anund Chunder Ghossal* for Appellant.

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Where plaintiff sued for certain land in dispute as his own, and the Lower Court found that it was his share, and that defendant held his separately, no further formal partition was held to be necessary.

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Bayley, J.—The grounds taken in this special appeal are that, under the precedent, Full Bench, Volume VI., Weekly Reporter, page 228, the special appellant should have equitable compensation for the wall he built; *2nd,* that there was no formal partition.

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The Lower Courts on evidence found that the land was in plaintiff's own share, and that the defendant held his separately. This was a finding of fact on which no special appeal can lie, and no further formal partition is necessary.

As to equitable compensation being due to special appellant under the precedent cited, we think that it does not apply, because it contemplates the case of an admitted sale by a vendor in possession; whereas here

is a disputed title and disputed possession, and here the party is found to have no title at all, and to have held as such, *i. e.*, as a mere trespasser, and not with such claim of title as in the case cited.

The special appellant wished to add a plea, not in the petition, of the finding being against evidence, but we thought ample time had been given for this being considered and certified in the petition of special appeal.

In this view, we dismiss this special appeal with costs.

The 14th January 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Foreclosure—The term "application" in Section 7, Regulation XVII., 1806—The term "notification" in Section 8—Issue by Court defined.

Case No. 906 of 1867.

Special Appeal from a decision passed by Baboo Kedarnath Banerjee, Second Principal Sudder Ameen of Hooghly, dated the 12th March 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 27th November 1866.

Suroop Chunder Nag (one of the Defendants), *Appellant,*

versus

Bonomalee Pundit (Plaintiff), *Respondent.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Ronunath Bose for Respondent.

A mortgagee's "application" for foreclosure, as the term is used in Section 7, Regulation XVII., 1806, means the whole transaction contemplated in Section 8, ending with the notification to the mortgagor; thus, the year of grace for payment and the year necessary for completion of foreclosure commence to run from the date of the notification.

By the "date of the notification" is meant, not the date on which it is served on the mortgagor, nor the date on which the *Perwannah*, or document of notification, is signed and sealed, but the *date of its issue* by the Court.

HELD also that such Perwannah is first issued when it is *handed to the peon for delivery.*

Phear, J.—IN this case, the plaintiff has obtained from the Lower Appellate Court a decree for possession of two plots of land on the ground that he is mortgagee, and has effected due foreclosure according to the Regulations.

The mortgagor, special appellant, objects to this decree so far as it affects one of the plots, contending that he had made a required deposit of the mortgage-money within the year of grace prescribed by Regulation XVII. of 1806, and was, therefore, entitled to redeem.

As to this matter, the material facts seem to be, that a properly executed Perwannah, according to the provisions of Section 8, was delivered to the Nazir of the Court on the 5th August 1864; that the peon's fees were deposited on the same day; that, on the 23rd of August 1864, the Nazir made over the Perwannah to his peon for service; and, lastly, that the mortgagor deposited the money in Court on the 17th August 1865.

The 7th Section of Regulation XVII. of 1806 runs thus: "In addition to the provisions made in the Provinces of Bengal, "Behar, Orissa, and Benares, by Regulation "I., 1798, and in the ceded and conquered "provinces by Regulation XXXIV., 1803, "for the redemption of mortgages and conditional sales of land under deeds of *bye-bil-wuffa*, *cut-kobalah*, or any similar "designation, it is hereby provided that, "when the mortgagee may have obtained "possession of the land on execution of the "mortgage-deed, or at any time before a final "foreclosure of the mortgage, the payment, "or established tender of the sum lent under "any such deed of mortgage and conditional "sale or of the balance due, if any part of "the principal amount shall have been discharged, or when the mortgagee may not "have been put in possession of the mortgaged property, the payment or established "tender of the principal sum lent, with any "interest due thereupon, shall entitle the

"mortgagor and owner of such property, or "his legal representative, to the redemption "of his property, before the mortgage is "finally foreclosed in the manner provided "for by the following Section, that is to "say, at any time within one year (Bengal, "Fussily, or Willaity, according to the era "current where the mortgage may take "place) from and after the application of "the mortgagee to the *Zillah* or City Court "of *Dewanny Adawlut* for foreclosing the "mortgage, and rendering the sale con-"clusive in conformity with Section 8 of "this Regulation, provided that such pay-"ment or tender be clearly proved to have "been made to the lender and mortgagee, "or his legal representative, or that the "amount due be deposited within the time "above specified in the *Dewanny Adawlut* "of the *zillah*, or city, in which the mort-"gaged property may be situated, as allowed "for the security of the borrower and mort-"gagor in such cases by Section 2, Regu-"lation I., 1798, and Section 12, Regula-"tion XXXIV., 1803, the whole of the "provisions contained in which Sections, as "applied therein to the stipulated period of "redemption, are declared to be equally "applicable to the extended period of one "year, granted for an equitable right of "redemption by this Regulation."

I take this to mean that the mortgagor shall, before the mortgage is foreclosed, in the manner provided by the 8th Section, be entitled to the redemption of his property if (among other things) the amount due be deposited by him in the Zillah Court within one year (according to the era current where the mortgage may take place) from and after the *application* of the mortgagee to the Zillah Court for foreclosure in conformity with that 8th Section.

But the 8th Section, after prescribing the mode in which the mortgagee should make his application for foreclosure, provides that the Judge, "*on receiving such written* "*application*, shall cause the mortgagor or "his legal representative to be furnished as "soon as possible with a copy of it, and shall "at the same time *notify* to him by a Per-"wannah under his seal and official signature "that, if he shall not redeem the property "mortgaged in the manner provided *for by* "*the 7th Section*, within one year from the "*date of the notification*, the mortgage will "be finally foreclosed, and the conditional sale "will become conclusive."

The language of these Sections is somewhat inexact. According to the last of them, it would appear that the mortgage becomes foreclosed only on the lapse of one year from the *date of the notification* to the mortgagor, which is to be made as soon as possible *after* the mortgagee's *application* for foreclosure; and the first entitles the mortgagor to redemption at any time before the mortgage is thus foreclosed, provided he deposits the money within one year from the mortgagee's *application*. Consequently, if the words be construed literally, the interval of one year, which must elapse before the mortgage becomes foreclosed, is not necessarily coincident with the year of grace within which the deposit is to be made.

At the same time, it is pretty clear that the Legislature intended to give the mortgagor the opportunity to redeem so long as the mortgage remained unforeclosed; and, accordingly, it has been uniformly held that the mortgagee's "application" in the 7th Section means the whole transaction contemplated in Section 8, ending with the notification to the mortgagor. Thus, the year of grace for payment and the year necessary for completion of foreclosure commence to run from the date of the *notification*.

This conclusion still leaves it open to question whether by "date of the notification" is meant the date when the Perwannah, or document of notification, is *issued* by the Court, or the date when it is *served* on the mortgagor. Were the matter *res integra*, we should certainly have been inclined to the view that the Legislature intended the time to run from the service of the notice on the mortgagor. The whole Regulation was passed for the benefit of mortgagors, and with the special purpose of securing to them a period of grace after the mortgagee's announcement of his intention to foreclose, within which they might take the necessary steps to avert the foreclosure. This consideration alone would lead to the supposition that the point of time, when *notice* of the intended foreclosure was given to the mortgagor, rather than one antecedent thereto, would be fixed as the starting point of the running against him of the year of grace. And the words actually used by the Legislature in Section 8 appear to confirm this supposition, for the Judge is there directed "*to notify*" to the mortgagor by a particular instrument that the mortgage will be foreclosed, if he does not redeem within a year, and then the date

of "the *notification*," and *not that of the instrument* by which it is to be made, is referred to as the commencement of that year. It is difficult to escape the conviction that the word "*notification*," as here used, meant the *act of making known to the mortgagor*. However, a series of decisions, long acquiesced in (by ourselves reluctantly in a former case), has determined that "date of notification" has reference to the making of the Perwannah by the Judge, and not to its *service* on the mortgagor.

It has also been held (Sudder Dewanny Adawlut Reports for 1858, pp. 627, 1477) that it does not mean the date of the document itself, *viz.*, the date of its being signed and sealed, but the *date of its issue* by the Court. This ruling, it must be said, finds but little countenance in anything which appears in Regulation XVII., and perhaps is not always capable of being easily applied. We understand it in effect to lay down that no time should be counted against the mortgagor during which the Perwannah, although it may be complete in all respects, is lying idle in the serishtah of the Court, and that, whatever might be the actual date when the Court put its hand to the document, still it is not to be treated as a *notification* within Section 8 until it has become an *active order* of Court. We are willing to concur in this view, considering, as we do, that the "notification" intended by the Legislature is not made until even a later period.

Turning now to the facts of the present case, we are of opinion that the Perwannah was not *issued* as long as the Nazir kept it in his desk, and that it was, in fact, first issued when, on the 23rd August 1864, it *was handed to the peon for delivery*. It follows that the deposit of the mortgagor was made in time, and that the Lower Appellate Court was wrong in decreeing foreclosure. This special appeal is, therefore, allowed, and so much of the judgment of the Lower Appellate Court as it appeals against is reversed with costs.

Bayley, J.—I concur.

The 16th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. Hobhouse, *Judge*.

Sale in execution of moveable property not the debtor's—Suit for restoration or damages—Sections 251 and 252, Act VIII. of 1859.

Reference to the High Court, under Section 28, Act XXIII. of 1861, by Mr. H. T. Prinsep, Officiating Judge of Moorshedabad.

Mohanund Holdar (Defendant), *Appellant*,

versus

Akial Mehaldar (Plaintiff), *Respondent*.

The sale of moveable property belonging to one man under an execution of a decree against another is not a mere irregularity within the meaning of Section 252, Act VIII. of 1859.

When such sale becomes absolute under Section 251, it transfers only the rights and interests of the debtor; and the owner of the property so sold is entitled to sue either for the restoration of the same specifically or for damages. If he makes an alternative claim, it is in the option of the Court to award him either, according to its own view of the justice of the case.

Case.—The plaintiff in this case sued for recovery of a boat or for its value which he alleged to be his, and to have been wrongfully sold in execution of a decree against one Akial Mehaldar. On its attachment and previous to its sale, plaintiff unsuccessfully claimed the boat.

Mohamud Biswas, Appellant, *versus* Woodur Dha, Respondent.

The Moonsiff has found that the boat was plaintiff's; but, acting under the late Officiating Judge's judgment in a previous case noted in the margin, he has held that he cannot order restoration of the boat, as a sale of *moveable* property cannot be set aside. He has, accordingly, given a decree for the money-value of the boat.

The defendant has appealed.

After hearing the pleaders for both parties and the evidence in the case, I agree with the Moonsiff that the plaintiff has proved that the boat was his, and not that of the judgment-debtor, and that, therefore, it has been improperly sold as the property of the debtor. As, however, I have doubts as

to the correctness of the law laid down by Mr. Molony, and which has been acted on by the Moonsiff, that sales of moveable property cannot be reversed under Section 28, Act XXIII. of 1861, I submit this point for the decision of the High Court. My own opinion is that, when property, even if it be moveable, is sold in execution of a decree, if a third party can establish his right to the same, he is entitled to recover it; and that it is only on account of *irregularity* in the sale-proceedings that a sale of moveable property cannot be set aside (Section 252). When moveable property belonging to *A* is attached and sold as that of *B*, an "irregularity" in the sale does not take place. By this term, I understand any omission to comply with the formalities prescribed by law, in bringing the property to sale.

The prayer in the alternative made by the plaintiff is, I apprehend, not irregular (*see* page 153, Macpherson's Civil Procedure); but, as the plaintiff claims the boat or its value, I submit, as a second point, whether the Moonsiff was not bound to restore the boat, supposing, of course, that the opinion of the Court on the first point submitted is in the affirmative. I would add that, as the boat is now in use by the purchaser, there would be no difficulty in restoring it. In my opinion, the Moonsiff was bound to order the restoration of the boat; he could give a decree for its equivalent only in the event of its being impossible to restore it.

The points, therefore, submitted are—

1st.—If moveable property proved to belong to *A* be sold in execution of a decree against *B*, can the sale be set aside on the suit of *A*?

2nd.—If such a sale can be set aside, and the prayer of *A* is that the moveable property so sold be restored to him or its value, if it is possible to restore the property, is not the Court bound to do so?

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—The plaintiff sued to recover a boat which belonged to him, and which had been seized in execution and sold under decree. He made an alternative claim either to the boat or to the value thereof in damages. The question which is submitted for our opinion by the Judge under Section 28, Act XXIII. of 1861, is, whether the plaintiff, assuming that the boat is proved to be his, is entitled to recover either the boat or the value of it in damages. The boat was sold under Section 249, Act VIII. of 1859. But under that Section only the rights and interests of the judgment-debtor were sold. By Section 251 of the same Act, it was enacted that, on payment of the purchase-money, the officer holding the sale shall grant a receipt for the same, and the sale shall become absolute. But, as the sale was only of the rights and interests of the debtor, when the sale became absolute, it transferred only the rights and interests of the debtor. By Section 252 it is enacted that no irregularity in a sale of moveable property under an execution shall vitiate the sale; but any person who may sustain any injury by reason of such irregularity may recover damages by a suit in Court.

We are of opinion that the sale of the moveable property belonging to one man, under an execution of a decree against another, is not a mere irregularity within the meaning of that Section. In this respect we take the same view as the Judge who referred the case.

The Moonsiff, from whom the appeal went to the Judge, treated the sale of the plaintiff's boat as an irregularity, and held that, as it did not vitiate the sale under Section 252, the plaintiff could not recover the boat, but could only recover the value of it in damages. But we think that Section 252 had no application whatever to the case.

The Judge seems to think that, as the plaintiff made an alternative claim to the boat or to the value of it in damages, the Moonsiff was bound to give him a decree for the boat. But the plaintiff was entitled to sue either for the restoration of the boat specifically, or for damages; and, notwithstanding it is found by the Judge that the boat is in existence and in constant use by the defendant, we are of opinion that, as the plaintiff asked either for the boat or for damages, it was in the option of the Court to award him either, according to its own view of the justice of the case.

Under these circumstances, we are of opinion that the Judge, on appeal, may, if he thinks fit, award to the plaintiff the boat specifically, or, if the damages assessed by the Moonsiff are reasonable, he can let the decree stand for the damages, or he may alter the amount to such a sum as he may consider to be reasonable.

If the Judge awards the boat specifically, he will probably think it right to award alternative damages under Section 200, in case the boat be not restored.

The 14th January 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Omitting mention of evidence no error in law—Possession—Evidence of title.

Case No. 911 of 1867.

Special Appeal from a decision passed by Mr. A. E. Russell, Officiating Additional Judge of Hooghly, dated the 25th January 1867, affirming a decision passed by Mr. A. Davidson, 2nd Principal Sudder Ameen of that District, dated the 16th January 1866.

Puranchunder Mookerjee (Defendant), *Appellant,*

versus

Protap Narain Paul (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Bycuntnath Paul* for Appellant.

Baboos Unnodapershad Banerjee and *Taruckknauth Sein* for Respondent.

Where the record of a case under Act IV. of 1840 had been filed as evidence of possession, it was held that it was no error of law on the part of the Lower Appellate Court not specifically to mention and dwell upon the fact contained in that record.

Possession need not be long in order to be some evidence of title.

Bayley, J.—In this case, plaintiff sued for possession on the allegation of previous possession and dispossession. He also sued for rents as wassilat.

Defendant denies that plaintiff ever held the lands in suit at all, or was dispossessed, and pleads limitation.

The first Court did not apparently try the plea of limitation specifically as a separate one in bar; but on the whole evidence found clearly as a fact that the land in dispute was plaintiff's land; and his "right and title to the disputed *gur* fully and satisfactorily proven."

In appeal, the Lower Appellate Court affirmed this decision. It found "on the whole of the evidence," to use its own words, the allegation of plaintiff as to dispossession, as stated in the plaint, proved.

The special appeal of defendant is on the grounds—

1st.—That the plea of limitation has not been considered in connection with a record of a case under Act IV. of 1840, in which it was found that a certain embankment was in the possession of defendant, and that, in consequence of that, defendant was entitled to possession.

2nd.—That the lowazima papers admitted by the Lower Appellate Court cannot show the fact of the land being in plaintiff's estate.

3rd.—That plaintiff's possession is not duly proved.

We have heard Counsel most fully in this case; and we are clearly of opinion that there is no reason whatever to interfere in special appeal with the decisions of the Courts below.

"On the whole evidence" (not only on the lowazima papers) does the Lower Appellate Court find as a fact plaintiff's possession and dispossession as alleged in his plaint.

Further, it is to be judicially presumed that, by the above expression, any and all evidence adduced by special appellant was fully considered. Nor do we think there is any error in law in the Lower Appellate Court not specifically mentioning and dwelling upon the fact in the Act IV. record, that a certain embankment was at that time (1852) in possession of defendant. The plaintiff's possession found by the Lower Appellate Court was some evidence of title (*vide* Marshall's High Court Reports, page 77, line 6 from top). The defendant brought no deed of title to rebut that evidence. It cannot be properly said that, when there is some evidence of title from possession shown by plaintiff, and defendant shows none of title to rebut it, plaintiff does not prove his title at all. The case cited from page 370, Volume VIII., Weekly Reporter, is one quite different from this. There the evidence adduced by plaintiff showed a bad title. This is not so here. In the case, page 333, Volume VII., Weekly Reporter, one of mortgage, possession was required to be look-

ed to because "long possession would be at least sufficient to raise a presumption of title." But it does not say that no possession save "*long*" possession would raise that presumption.

On the whole, we see no reason whatever to interfere in special appeal, and we dismiss this appeal with costs accordingly.

The 14th January 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Cause of action—Damages.

Case No. 112 of 1867.

Regular Appeal from a decision passed by Mr. S. DaCosta, Principal Sudder Ameen of Manbhoom, dated the 6th February 1867.

Rajah Nil Monee Singh Deo Bahadoor (Defendant), *Appellant,*

versus

Issur Chunder Ghossal (Plaintiff), *Respondent.*

Baboos Onookool Chunder Mookerjee, Bama Churn Banerjee, and *Tarucknath Sein* for Appellant.

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Respondent.

Where plaintiff had, in a former suit to recover a part of the consideration-money, and the excess rents paid by him on a putnee-settlement, which defendant had induced him to take on a false representation regarding the lots included in it, obtained consequential damages, it was held that he could not succeed in a second suit to get back so-called excess of rent paid by him in terms of the putnee-pottah since the institution of the first suit.

When once the cause of action is matured, the subsequent occurrence of further damage after or before adjudication of the original matter does not originate a fresh cause of suit.

Phear, J.—This is the second of two suits brought by the present plaintiff against the present defendant. In the first suit, the plaintiff complained that the defendant had induced him to take a putnee-talook settlement at a certain yearly rent on fraudulent and false representations as to mouzahs and lands alleged to be contained in the lots settled, but which the plaintiff asserted he has since discovered did not exist. He, therefore, claimed to recover back a part of the consideration-money, and of the rents paid by him in proportion to the rent assessed in the settlement upon the mouzah and lands found to be non-existent. He also sought to obtain an abatement of the same proportionate part of the rent for the future. This Court, on appeal, held that he had established the alleged fraudulent misrepresentations, and that he was entitled to be reimbursed the damages consequential thereto. These damages consisted of the excess moneys which he had paid, and which he had bound himself to pay under the *putnee*-contract, beyond what he would, in all reasonable probability, have agreed to pay had not the misrepresentations been made to him (for it must be remembered that by the very terms of his plaint he held to that contract, and did not repudiate it) together with the loss of profits which the absence of the missing mouzahs and lands would cause to him. On this view, the Court considered that all the money he claimed fell rightly under the head of consequential damages, and accordingly gave him a decree for the full amount; but, at the same time, it refused to give the declaration of right of abatement prayed for, on the ground that it had no jurisdiction to modify the contract between the parties.

In this second suit, the plaintiff seeks to get back the so-called excess of rent for two years, which he has paid to the defendant in terms of the putnee-pottah, since the date of institution of the first suit, and of which he prayed abatement in that first suit. He founds his right to recover this excess upon the same misconduct of the defendant as constituted the cause of action in the first suit. It seems to me that he ought not to succeed in his prayer. As long as the pottah remains in force, the defendant is entitled to be paid all the money due thereunder, and to keep that money when received. He has committed no wrong against the plaintiff *since* he made the misrepresentations referred to which constituted the cause of action in the first suit. As I have already said, it was a legitimate consequence of those false misrepresentations that the plaintiff became lodged amid the obligations of this disadvantageous contract, and the damages which he has already recovered, for the effects of those misrepresentations, must be taken to

cover this particular item of injury as well as all others. It is his own fault if he did not include the rent, which he would have to pay for the future, in the estimate of damages which he formed and laid before the Court in the first instance. In truth, the plaintiff's present contention amounts to this, namely, that whenever the cause of action is such as to produce a successive recurrence of damage, then the person injured may bring a fresh suit on the occasion of the accrual of each portion of such damage. But I think this is clearly incorrect. In many cases of wrong, no doubt, the cause of suit is not complete until actual damage has ensued; but when once the cause of suit is matured, the subsequent occurrence of further damage, whether after or before this has been adjudicated upon, does not originate a fresh cause of suit. Were it otherwise, litigation would have no end, for I suppose that in very few cases does the damage flowing from a wrong or a breach of contract cease with one event. I think, therefore, that in the present case the Court cannot give the plaintiff the decree which he asks without adjudicating on the cause of action furnished by the original misrepresentations of the defendant. But that has already been adjudicated upon, and the issues between the parties in this suit must be the same as those which were expressly or impliedly determined in the suit wherein that adjudication was come to, with the single exception perhaps of the form of the one which would relate to damages. It seems to me that this suit is barred, and should be dismissed with costs.

Bayley, J.—I concur.

The 15th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, *Judge.*

Section 17, Act X. of 1859—"Increase of productive powers."

Case No. 1749 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 30th April 1867, reversing a decision passed by the Deputy Collector of that District, dated the 21st May 1866.

Bissessur Chuckerbutty and others (Objectors), *Appellants,*

versus

Wooma Churn Roy (Plaintiff) and others (Defendants), *Respondents.*

Baboo Bungshee Dhur Sein for Appellants.

Baboo Nilmoney Sein for Respondents.

By the words "increase of productive powers" in Section 17, Act X. of 1859, the Legislature did not mean capacity for realizing a higher rent for building or other purposes; but an increase of the productive powers of the land itself.

Peacock, C. J.—The case was remanded to try whether the productive powers of the land had been increased through the agency of the defendant in digging a tank. That was the only issue to be tried on remand. The Judge says that evidence was taken on the issue fixed by this Court in accordance with the High Court's order of remand; but the circumstances to which he refers do not constitute an increase of the productive powers of the land. By those words, "increase of productive powers," as used in Section 17 of Act X. of 1859, we do not understand the Legislature to have meant that the land would let for a higher rent for building or other purposes, but that the productive powers of the land itself had been increased.

It appears to us that the decree of the Lower Court must be reversed with costs.

The 15th January 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Appeal—Section 84, Registration Act.

Case No. 417 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 8th June 1867.

Salgram Misser, *Appellant,*

versus

Mussamut Jankee Koer, *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Tarucknath Dutt for Respondent.

An order of a District Court under Section 84 of Act XX., 1886, is not appealable to the High Court.

Jackson, J.—THE preliminary objection taken must prevail. The order made by the District Court on the petition was under Section 84 of the Registration Act, XX. of 1866. The law is silent as to any appeal to the High Court against an order so given. We are not, therefore, competent to entertain it.

This appeal is, accordingly, disallowed.

The 15th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, *Judge.*

Ejectment—Section 25, Act X. of 1859—Illegal dispossession—Section 15, Act XIV. of 1859.

Case No. 1756 of 1867.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Mymensingh, dated the 27th April 1867, affirming a decision passed by the Moonsiff of Madareepore, dated the 3rd March 1866.

Sofaoll Khan and another (Defendants), *Appellants,*

versus

Woopean Khan and another (Plaintiffs), *Respondents.*

Baboo Kishen Dyal Roy for Appellants.

No one for Respondents.

A tenant in possession after expiry of his lease can only be ejected by due course of law (Section 25, Act X. of 1859), and, if illegally dispossessed, he is entitled under Section 15, Act XIV. of 1859, to sue and recover possession, notwithstanding a pottah set up by defendant.

Peacock, C. J.—THE question is, whether the defendant had any right to eject the plaintiff except by due course of law. The plaintiff had held under the zemindar for a lease which had expired, but he had been allowed to hold over with the consent of the zemindar. The zemindar subsequently granted to the defendant a *likhun* or a pottah.

The second ground of objection is, that the Court was wrong in not holding that the instrument was a pottah; but it is unnecessary to determine whether it was a pottah or not, for, assuming it to be a pottah, which is the most favorable view for the defendant, he had no right to eject the plaintiff without proceeding in due course of law.

Section 25 of Act X. of 1859 authorizes a zemindar, who requires assistance to eject a tenant after the determination of his lease or tenancy, to apply to the Collector, and directs the Collector to proceed and to pass orders in the manner provided for suits under the Act. The defendant, having a pottah from the zemindar, was not in a better position than the zemindar would have been, if he had not granted the pottah to the defendant.

It is said that a zemindar is not bound to apply to the Collector for assistance under that Section, and that it is only optional with him to do so when he requires assistance, and that, if he can turn the tenant out by force, he is at perfect liberty to do so.

It appears to us that that is an erroneous position, and that the zemindar is not at liberty to take the law into his own hands. The defendant having turned the plaintiff out of possession of his own authority instead of proceeding in due course of law, the plaintiff sued to recover from him the possession which he had unlawfully taken, and the Court was quite right in decreeing for the plaintiff in that suit.

The case falls precisely within the terms of Section 15, Act XIV. of 1859, for even assuming that the defendant was not bound to ask the Collector for assistance under Section 25 of Act X. of 1859, he ought to have proceeded by due course of law to recover possession from the plaintiff.

Section 15 of Act XIV. of 1859 says: "If any person shall, without his consent, "have been dispossessed of any immoveable "property otherwise than by due course of "law, such person shall, in a suit brought "to recover possession of such property, "be entitled to recover possession thereof, "notwithstanding any other title that may "be set up in such suit, provided the suit "be commenced within six months from "the time of such dispossession."

There is no ground of objection in this case that the suit was not commenced within the period limited by that Section. The plaintiff, therefore, having been, without his consent, dispossessed of the land otherwise than by due course of law, was entitled in this suit to recover possession from the defendant, notwithstanding the pottah or *likhun* which was set up by the defendant in the suit as his title.

The decision of the Lower Appellate Court will be affirmed without costs, as the respondent does not appear.

The 16th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Possession as regards lands not capable of occupation—Wrongful occupation—Cause of action—Limitation—Khas or bhurat lands.

Case No. 1846 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 1st April 1867, reversing a decision passed by the Moonsiff of that District, dated the 25th September 1866.

Sunnud Ali and others (Defendants), *Appellants*,

versus

Mussamut Kurimoonissa and others (Plaintiffs), *Respondents*.

Baboos Gopeenath Mookerjee and *Rajendernath Bose* for Appellants.

Moulvie Syud Murhumut Hossein for Respondents.

When lands which are not in their nature capable of actual occupation (such as a khal) appertain to lands which are occupied, the possession of the former in point of law necessarily follows that of the latter; but when a khal dries up and becomes culturable, if any one to whom it does not belong takes actual possession of it, a cause of action accrues to the person in possession of the land to which the khal appertains from the time of the wrongful possession, and not from the time of the khal becoming culturable or cultivated.

Limitation can be pleaded on the ground of possession for 12 years, even though the possession be without title, and the same Law of Limitation applies to *bhurat* lands or khals as to other lands.

Peacock, C. J.—THE judgment of the Principal Sudder Ameen in this case must be reversed so far as it relates to the question of limitation, and the case remanded to him for trial on that issue.

The Statute of Limitation says that the suit must be brought within the period of 12 years from the time when the cause of action arose.

When lands, which are not in their nature capable of actual occupation, such as a khal, appertain and belong to lands which are occupied, the possession in point of law necessarily follows the possession of the lands to which the former belong. But when, as in this case, the khal dries up and becomes capable of being cultivated, if any one to whom it does not belong takes actual possession of it, a cause of action accrues to the person in possession of the land to which it appertains. Generally speaking, a khal would continue in the possession of the person in possession of the lands to which it appertains until it becomes culturable, for it would not be worth the while of any one to take possession of it until the possession of it is beneficial; but if any one should take possession of it before it becomes culturable, or is brought into cultivation, the cause of action would accrue at that time, and not from the time at which the khal becomes dry and culturable, or is actually brought into cultivation. It is not correct, therefore, to state that limitation begins to run from the time when the khal was brought into cultivation. That, as we understand the Principal Sudder Ameen's judgment, which is by no means clear, is the time at which he considered the cause of action accrued. He says: "It is clear that the suit has been brought within time from the date the land was brought under cultivation;" whereas it ought to have been from the time that the defendant wrongfully took possession.

Then, again, he says: "If possession be not held on the strength of title, it would not be proper to apply limitation to a suit for such *bhurat* land;" that is, as we

understand, the defendant would not be entitled to the benefit of limitation if he had held for any number of years unless he had held on the strength of title; whereas, if he held on the strength of title, he would not require to take advantage of the Statute of Limitation.

There is no different Law of Limitation with regard to bhurat lands or khals than with regard to other lands; though with regard to bhurat lands or khals there might be more difficulty in determining the time at which wrongful possession was taken.

If the land, before it was filled up, appertained to the plaintiff's dag, the plaintiff would be in possession of the land after it was filled up until some other person took actual possession.

The Principal Sudder Ameen, with reference to these remarks, will have to try whether the plaintiff was in possession of the land within 12 years next before the commencement of this suit. Looking to the nature of the lands, and the presumption that the plaintiff, being in possession of the dag, was, by implication, in possession of that which appertained to it until some one else took actual possession, it will be for the defendant to show that he took possession of the land, whether he cultivated it or not, and whether the land was culturable or not, at a time more than 12 years before the commencement of the suit.

We think the appellant ought to have the costs of this appeal.

The 16th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Review of predecessor's judgment—Section 378, Act VIII. of 1859—Proceeding between other parties—Oral evidence—Boundaries.

Case No. 1859 of 1867.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Mymensingh, dated the 10th May 1867, affirming a decision passed by the Moonsiff of Nuseerabad, dated the 19th August 1865.

Ranee Surut Soonduree Debia and another (Plaintiffs), *Appellants*,

versus

Rajendur Kishore Roy Chowdhry and others (Defendants), *Respondents*.

Baboo Mohinee Mohun Roy for Appellants.

Baboos Sreenath Doss and *Onookool Chunder Mookerjee* for Respondents.

Section 378, Act VIII. of 1859, bars an appeal from the decision of a Principal Sudder Ameen, granting a review of his predecessor's judgment.

A plaintiff cannot be bound by a proceeding which was between other parties, and in which he had no opportunity of being heard.

Oral evidence is sufficient to prove boundaries.

Peacock, C.J.—THIS is an appeal against the decision of the Additional Principal Sudder Ameen of Mymensingh (Baboo Gopee Kishen Banerjee) given upon a rehearing of an appeal from a decision of the Moonsiff of Nuseerabad, the Additional Principal Sudder Ameen having granted a review of the judgment of his predecessor.

We cannot say that the Additional Principal Sudder Ameen has not the power to admit a review of his predecessor's judgment upon the grounds upon which he stated that he granted it; and, even if we considered him wrong in point of law in granting that review, we could not reverse his decision upon that ground, inasmuch as the Legislature has made that decision not appealable, Section 378, Act VIII. of 1859, declaring that the order, whether for rejecting the application or granting the review, shall be final. But we think that a Principal Sudder Ameen should be very careful before he grants a review of his predecessor's judgment.

The Lords of the Judicial Committee of the Privy Council* in the case of Moharajah Mohessur Singh against the Bengal Government said: "It must be

7 Moore's Indian Appeals 304.

* *See* 3 W. R., Privy Council Cases, p. 45.

borne in mind that a review is perfectly distinct from an appeal; that it was quite clear from the Regulations that the primary intention of granting a review was a re-consideration of the same subject by the same Judge as contradistinguished from an appeal, which is a hearing before another tribunal; that there might not be cases in which a review might take place before another and a different Judge, because death or some other unexpected or unavoidable cause might prevent the Judge who made the decision from reviewing it, but they said emphatically that such exceptions were allowable only *ex necessitate.*"

We think that one Principal Sudder Ameen ought not to review the judgment of his predecessor except upon grounds of grave importance. The Principal Sudder Ameen's reasons in this case are, that his predecessor had not disposed of the case after a clear statement of the merits or demerits of the exhibits filed by both parties, and because the boundaries of the disputed julkur had not been ascertained; and then this gentleman, who reviews his predecessor's judgment because he had not made a clear statement of the merits or demerits of certain exhibits, falls into the grave error of acting upon a document, which upon the slightest consideration he ought to have known was not admissible, and to define the boundaries as given in that document.

The document to which we allude was the proceeding of a Deputy Collector, dated the 15th December 1846, in a dispute between Kangalee Mundul and others, who were farmers of a khas mehal of Government which had recently formed, and Kalee Kant Mojoomdar, the defendant's predecessor. In that dispute, neither the plaintiff, nor his predecessor, was any party. The Deputy Collector stated that the boundaries of the defendant's julkur extended to Vedapore, which, if correct, included the plaintiff's julkur. It is clear that the plaintiff could not be bound by that proceeding, which was between other parties, and in which the plaintiff had no opportunity of being heard.

The Principal Sudder Ameen also lays down that the plaintiff had failed to show that the disputed julkur was a part of his julkur, because he had not been able to adduce old documents from which the boundaries of his julkur Hutooa could be ascertained, and then after stating that the quinquennial register of 1202, and the decision of the Sudder Ameen's Court, dated the 16th of March 1826, did not contain specification of the boundaries of julkur Hutooa, and that the plaintiff could not in any other way prove the boundaries of his julkur, he laid down as a point of law a most untenable principle that oral evidence is not sufficient to prove boundaries. He also used the above-mentioned Deputy Collector's proceeding of 1846, to which I have above referred, as rebutting the report of the Ameen who had made a local investigation in the suit.

Further, he relied upon the decision of the Judge of the 16th September 1853 and the proceeding of the Sudder Ameen of the 23rd of June 1853, which were wholly irrelevant in the present case, inasmuch as they merely showed that the defendant was entitled to the julkur, and did not give the boundaries thereof.

The decision of the Principal Sudder Ameen must be reversed; but, as this case comes before us on special appeal, we cannot go into the evidence, and say whether the Moonsiff's decision was right upon the other evidence in the case; and unfortunately, therefore, we must remand the case to the Principal Sudder Ameen in order to re-hear the appeal from the judgment of the Moonsiff.

The respondents must pay the costs of this appeal and the costs of the review in the Lower Courts. The other costs in the Lower Courts will abide the final result of the case.

The 16th January 1868.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Service-tenures.

Case No. 987 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 14th January 1867, reversing a decision passed by the Assistant Commissioner of that District, dated the 9th June 1866.

Shib Lall Sing (Plaintiff), *Appellant,*

versus

Moorad Khan and others (Defendants), *Respondents.*

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Baboo Anund Chunder Ghossal for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

A grant to a man and his heirs on condition of performing service does not in general mean that the service is to be personally performed by the grantee or his heirs; but that the grantee is to be responsible for its performance.

Markby, J.—In this case, the plaintiff sued for the possession of certain lands that had been held for many years at a low quit-rent as service-lands, and were now in the possession of the defendants.

There was considerable difference in the statements of the parties opposed as to how the lands eventually got into the hands of the defendants, but none whatever as to the terms under which they had been all along held, namely, under a grant to the tenants and their heirs at a quit-rent of 24 rupees per annum on the consideration of the tenants performing service as door-keepers.

The Lower Appellate Court has only expressed its opinion on one point, namely, that the tenants were not bound *personally* to perform the service, but that they were entitled to hold so long as the service was properly performed, and, on this finding, gave a decree in favor of the defendants.

I am satisfied that this was the only point raised before the Appellate Court. The appellant now complains in his first and second grounds of appeal that the Lower Appellate Court did not inquire into the terms on which the lands were held, and into the validity of a deed of gift to which the defendants referred as the origin of their holding. But it is quite clear to me that none of this was in dispute. From the very first commencement of the suit, the nature of the tenure has been admitted, and it would have been altogether superfluous for the purposes of this suit to inquire how or when the tenure was created.

These remarks also dispose of the fifth ground of appeal. The lands in Keree as well as the lands of Damoah are admitted to be held on the tenure above described, and the Lower Appellate Court treats them, quite properly, without distinction.

The only real contention is that raised in the third ground of appeal, namely, whether there has been a forfeiture for non-performance of service. It has been contended now, as it was contended below, that the service must be performed personally, but I think that a grant to a man and his heirs on condition of performing service does not, in general, mean that the service is to be personally performed by the grantee or his heirs, but that it is to be performed, and the grantee is to be responsible for its performance. It is inconsistent to grant land to a man *and his heirs* on the condition of performing service, and at the same time to require the service to be personally performed; because it is obvious that the word "heirs" includes a number of persons who are, or may be, unable to perform the service themselves. The only rational interpretation of such a grant is that above stated.

In the fourth ground of appeal, the appellant contends that, as the defendants were discharged for negligence, the right of reentry has accrued; but the only negligence charged is that the services were not personally performed, which, as I have said, is not required by the conditions of the tenure.

The sixth ground of appeal is not addressed to the decree, but only to an expression of the Judge as to the terms on which the lands are held; this is only a reiteration of the opinion he already expressed, and which I consider to be correct.

The appeal is, therefore, dismissed with costs.

Bayley, J.—I concur.

The 16th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Summoning witnesses where kubooleut is questioned—Section 66, Act X., 1859—Expenses of witnesses—Section 151, Act VIII., and Section 67, Act X., 1859—Sections 356 and 357, Act VIII., 1859.

Case No. 656 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 5th February 1867, affirming a decision passed by the Assistant Collector of Durbungah, dated the 25th January 1866.

Mohun Mundur (Defendant), *Appellant*,

versus

Brij Bhookun Singh, manager on behalf of Joggessur Suhay (Plaintiff), *Respondent*.

Baboo Anund Gopal Paleet for Appellant.

Mr. R. E. Twidale and *Baboo Mohesh Chunder Chowdhry* for Respondent.

In a suit to recover arrears of rent, in which the genuineness of the kubooleut was in issue, and the defendant asked the Deputy Collector to summon certain witnesses to prove that he had been paying at a particular rate—HELD that the witnesses should have been summoned according to the directions of Section 66, Act X. of 1859.

Under Section 351, Act VIII. of 1859 (extended to Revenue Courts by Section 67, Act X. of 1859), the defendant was not bound to pay into Court the costs of summoning and defraying the expenses of the witnesses, until the Court had fixed what was reasonable.

When defendant appealed in such a case, the Judge ought, under Section 356, Act VIII. of 1859, to have directed the Deputy Collector to sent up either the witnesses or their evidence, and, under Section 357, to have directed the evidence to be confined to the rate and time of payment, and the rent to which the payment had been appropriated.

Peacock, C. J.—THIS is a suit brought by the plaintiff against the defendant to recover 1,092 rupees odd, which he alleges to be due from the defendant for arrears of rent for 1270, giving credit for 52 rupees paid. The plaintiff alleges that the defendant held 209 beegahs 13 cottahs of land under a kubooleut at the rent of Rupees 932-12 annas. The defendant denied the kubooleut, and stated that he had paid 121 rupees in 1270. 224 rupees in 1271, and 223 rupees in 1272, making altogether 568 rupees, and consequently that nothing was due from him to the plaintiff for the year 1270.

The defendant says that he holds only 169 beegahs at the rent of 304 rupees for the whole, being at the rate of 2-8 a beegah for 100 beegahs, 1 rupee a beegah for 39 beegahs, and 8 annas a beegah for 30 beegahs, and he put in a petition to the Deputy Collector asking him to summon certain witnesses mentioned in that petition to prove his payments, and that he had been paying at that rate. The Deputy Collector ordered the petition to be put with the record, and proceeded to try the case without summoning the witnesses of the defendant, and he found that the defendant held under a kubooleut, as alleged by the plaintiff, and decreed for the plaintiff in full, with costs.

The defendant appealed to the Judge substantially upon the ground, amongst others, that the Lower Court had not cited his witnesses. The Judge held that none of his grounds of appeal "were worth anything, as the appellant did not show that the witnesses to the kubooleut were unworthy of credit."

If it is assumed that the kubooleut is a genuine one, it would be useless to examine witnesses to prove that the defendant had been paying rent at a different rate from that mentioned in the kubooleut. But when the kubooleut was in issue, and the question had to be determined whether the defendant had executed that kubooleut or not, it was important to see at what rate the defendant had been paying for the year 1270 and during subsequent years, for, if it had been proved that the plaintiff, during those years, had been receiving payments or giving receipts for rent at a lower rate than that reserved in the disputed kubooleut, it would have been strong evidence to show that the kubooleut was not a genuine one. It was very important, therefore, upon the issue as to whether the kubooleut was genuine or not, that those witnesses, who were cited by the defendant, should have been examined. It was also important to enable the defendant to prove that he had paid 121 rupees in 1270, instead of only 52 rupees for which credit was given, and also, if he could, that in 1271 and 1272 he had paid generally on account of rent a larger amount than that claimed for 1270: for in the absence of any specific appropriation of the payments made in 1271 and 1272 to the rents for those years, the payments ought to have been appropriated to the discharge of the rent for 1270, which was the earliest year.

We are of opinion that the Deputy Collector was wrong in not summoning the witnesses according to the directions of Section 66, Act X. of 1859.

It is said that the defendant ought to have paid into Court the expenses of summoning and defraying the travelling and other expenses of the witnesses; but he was not bound to pay into Court such expenses until the Court had fixed what was reasonable. That is pointed out by Section 151 of Act VIII. of 1859, extended to Revenue Courts by Section 67 of Act X. of 1859.

The Deputy Collector's having ordered the petition to be put with the record was tantamount to making an order refusing to summon the witnesses. If he had fixed

such an amount for expenses as appeared to him to be reasonable, and the defendant had refused to pay the amount into Court, there would have been sufficient excuse for not summoning them; but, there being no excuse in the present case, we think that the Judge upon appeal ought, under Section 356, Act VIII. of 1859, to have directed the Deputy Collector either to send the witnesses to him for the purpose of being examined, or required the Lower Court to take their evidence and to transmit it to him; and that, according to Section 357, Act VIII. of 1859, he ought to have directed that the points to which the evidence was to be confined were, whether the defendant had been paying at the rates mentioned by him during any part of the years 1270, 1271, and 1272, and whether the defendant had made the payments as alleged by him in those years, and whether the payments made in 1271 and 1272 had been specifically appropriated to any particular rent.

The Judge having held, with reference to the ground of appeal to which we have already adverted, that it was not worth anything, has, in fact, excluded evidence important with reference to the other issues, and which ought to have been taken before he determined those issues. We, therefore, under Section 351, Act VIII. of 1859, which has been substantially extended to rent-suits by Act X. of that year, reverse the decision of the Judge, and remand the case to him with directions to restore the suit to its original number, to cause the necessary witnesses to be examined as above directed, and, after their evidence shall have been taken, to proceed to investigate the merits, and to pass a decree.

Having remanded the case under Section 351, a certificate will be granted to return the stamp-duty on the appeal to this Court; and, as the appellant has succeeded in this Court, we think that the respondent should pay all the costs of the appeal, except the stamp-duty which the appellant will get returned. We think that the costs in the two Lower Courts should abide the final result of the suit.

The 17th January 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Objection not raised in Appeal no ground of Review.

Case No. 385 of 1867.

Application for Review of Judgment, passed by the Hon'ble W. S. Seton-Karr and A. G. Macpherson, JJ., on the 21st September 1867, in Regular Appeal No. 43 of 1867.

Munshad Bibee (Respondent), *Petitioner,*

versus

Baboo Luchmeeput Singh (Appellant), *Opposite Party.*

Baboo Tara Prosunno Mookerjee for Petitioner.

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Opposite Party.

That the Lower Court should have improperly neglected to examine a witness is not a ground for a review of judgment, if the objection was not taken when the case was heard by the Court in Regular Appeal.

Macpherson, J.—We think that this application ought to be rejected with costs. We see no reason to disturb our judgment on the main question of fact, as there is sufficient evidence to support it.

As to the objection that the evidence of Bind Raj was not taken in the Lower Court when the defendants applied to have him examined, we think that this objection is no ground of review, when it was not raised when the case was argued before us in regular appeal. We say this, taking it for granted that the defendants were entitled to have the witness examined in the Lower Court, and that the Lower Court acted irregularly in not enforcing his attendance.

If parties are aggrieved by the conduct of the Lower Court in matters such as this, it is their duty to bring it to the notice of this Court when the case is regularly before it on appeal. If they do not do so then, they cannot subsequently make the matter the subject of a review of judgment.

The 17th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

A written statement not a pleading in confession, and avoidance must be taken as a whole.

Case No. 1497 of 1867.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 23rd February 1867, affirming a decision passed by the Officiating Sudder Ameen of that District, dated the 26th June 1865.

Sooltan Ali (Plaintiff), *Appellant*,

versus

Chand Bibee and others (Defendants), *Respondents*.

Baboo Bama Churn Banerjee for Appellant.

Mr. R. E. Twidale for Respondents.

A written statement is not a pleading in confession and avoidance whereby a defendant is bound by the confession, and compelled to prove the avoidance; if used as evidence against a defendant, the whole statement must be taken together.

Peacock, C. J.—We think that it is quite clear that the Judge is right.

The plaintiff sued the defendants for the whole of certain property which he said had been mortgaged to him. Three of the defendants in their written statement stated (and we assume that they swore to their written statement) that the mortgage was granted to the plaintiff as one of four brothers for the benefit of himself and his three brothers; that two of the defendants were two of the brothers; that the third defendant was the widow of the third brother; that they were in possession of the shares which belonged to them respectively; and that the plaintiff was in possession of his own share. The other set of defendants stated that they were in possession under a *theeka* lease granted by the four brothers in 1265.

The Principal Sudder Ameen found that the mortgage was granted to the plaintiff for the benefit of himself and his three brothers, and he accordingly decided for the defendants.

Upon appeal, the Judge says "that, inasmuch as the deed contains the plaintiff's name alone, the *onus probandi* lay upon those whose defence rested upon varying its wording;" but he says that he cannot concur with the reasons assigned by the Principal Sudder Ameen for dismissing the case, as there was no evidence to prove that the mortgage was granted for the benefit of the four brothers, but he adds: "I do not think that the evidence of dispossession adduced is sufficient to prove the fact, and that, as the claim of the plaintiff has not been proved, the order of the Lower Court dismissing the suit must be affirmed."

The judgment of the Judge is objected to upon the ground that it was unnecessary for the plaintiff to prove dispossession, inasmuch as that fact was admitted by the defendants in their written statement.

A written statement is not, as we have frequently before observed, a pleading in confession and avoidance, by which the defendant is bound by the confession, and so compelled to prove the avoidance. A defendant's written statement may, like every other statement made by a defendant, be used as evidence against him, but, like every other statement made by a defendant, the whole statement must be taken together. If the written statement in the present case had been put in evidence against the defendants, then their admission of possession must be taken in conjunction with the other part, *viz.*, that, although the mortgage was taken by the plaintiff in his own name alone, it was taken for the benefit of the four brothers.

The Judge, it is true, would not have been bound to believe that part of the statement which was in favor of the defendants; but it would have been evidence upon which he might act if he believed it.

Suppose a man should be sued for goods sold and delivered, and should state and swear to the statement that the goods were bought and delivered to him in a shop by a person whom he did not know, and that he paid for them at the time. If that statement were true, he could not honestly state that he had never bought the goods; and, if the statement that he had bought them was to be taken against him, without also taking his statement that he paid for them at the time, the greatest injustice might be done, for he would be unable to compel the attendance of the man who sold the goods, inasmuch as he was unknown to him; but

if the plaintiff being unable to read one part of the statement as evidence against the defendant without reading in his favor what he said as to payment, the plaintiff would have to cite the man who sold the goods for the purpose of proving his case, and then, if the witness should speak the truth, the defendant would make out his defence by eliciting from the witness on cross-examination the fact that the defendant had paid for the goods at the time.

We have given this explanation of our view of the effect of a written statement, inasmuch as we constantly see that there is a great misunderstanding as to the mode in which it ought to be used, if intended to operate against the defendant as an admission.

The decision of the Judge, therefore, will be affirmed with costs of those respondents who have appeared.

The 17th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Declaratory decree—Title—Limitation—Onus probandi.

Case No. 1873 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 26th April 1867, reversing a decision passed by the Moonsiff of Seetakoond, dated 5th October 1866.

Nobokishore Dey and others (Plaintiffs), *Appellants*,

versus

Ramkishen Mohurir and others (Defendants), *Respondents*.

Baboo Kishen Succa Mookerjee for Appellants.

Baboos Romesh Chunder Mitter and *Luckhee Churn Bose* for Respondents.

In a suit for declaration of right which existed at the time the suit was commenced, but which had ceased to exist, pending the suit before decree, plaintiff is not entitled to a decree, and a declaratory decree of title will not be given when the plaintiff's claim would have been bound by limitation had he sued for possession.

A defendant, who sets up title and limitation, may succeed on limitation, even if he cannot prove title. The *onus* of proving limitation lies upon the plaintiff.

Peacock, C. J.—The first ground of special appeal is that the Principal Sudder Ameen is wrong in thinking that plaintiff cannot succeed his grandfather during the lifetime of his aunt Jussoda.

Upon this point, we think that the Principal Sudder Ameen was wrong; inasmuch as Jussoda was not the heir of Ramchunder, she being his sister and the plaintiff being a sister's son. So far as we can judge from the pedigree, the plaintiff, as a sister's son, appears to have been the heir.

The 2nd ground is, that the Appellate Court ought not to have enquired whether the mehal was sold or not, for that was not a point for trial in the case. The sale referred to in this ground of appeal was a sale pending the suit for arrears of rent under Regulation VIII. of 1819, which gave the purchaser, who was not before the Court, a title against the plaintiff.

We are not sure that, in a suit merely for a declaration of a man's right, we should give a decree in his favour, when circumstances are proved to have occurred, pending the suit which destroy that right. We could not say that the plaintiff in such a case is entitled at the time of making our decree, and it would be useless to declare that, at the time the suit was commenced, he was entitled, but that that title had ceased to exist.

The 3rd ground of special appeal is, that the Appellate Court has misconstrued the plaint. No point has been made upon this third ground with reference to the question which has been raised in argument whether the suit was one for a declaration of right and for possession, or simply for a declaration of right. It appears to me that the suit was not to recover possession, but merely for a declaration of the plaintiff's right, and that is what the special appellant now contends.

The ground upon which the plaintiff seeks to have that declaration is, that his aunt Jussoda held the lands as part of plaintiff's talook Paunchoo as his, plaintiff's, ryot; that the defendants had taken possession of the lands from that ryot upon the claim that they belonged to talook Teeluck; and that the ryot was acting in collusion with the defendants in allowing them to take possession of the lands as talook Teeluck. If the plaintiff had proved that allegation, this Court would probably have assisted him by declaring his right. But the plaintiff has not proved that his aunt was in collusion with defendants, or that she had held the lands as his ryot. On the contrary, it was found by the first Court that, from the investigations of the Civil Court Ameen, it was evident that Jussoda, the aunt, had held possession of talook Paunchoo for 25 or 26 years as talookdar, and not as plaintiff's ryot.

No appeal was preferred against the finding of the first Court upon that point, nor was any question made as to the correctness of that finding by way of cross-objection. The Lower Appellate Court and the Principal Sudder Ameen on the appeal treated it as correct when he says that "the Ameen "has also stated that Jussoda is not in "possession as a ryot." As regards Jussoda, therefore, if the suit had been to recover possession of the land, it would clearly have been barred by limitation.

The other defendants had taken possession from Jussoda, and not from the plaintiff; and, if the plaintiff was barred as against Jussoda, he would have been barred also as against those who turned Jussoda out of possession. It would be, therefore, improper for us in a suit to declare a title to give the plaintiff a decree by declaring his right when it appears that, if the suit had been brought for possession, the plaintiff's claim would have been barred by limitation. If the suit is a suit for possession, as well as for a declaration of right, then it is barred so far as it seeks to recover possession. It is unnecessary for us to say what period of time will bar a suit which does not seek for relief, but merely for a declaration of right; but we think the plaintiff is not entitled to have a decree in a suit for a declaration of right to property when he would be barred in a suit brought to recover that property.

The Principal Sudder Ameen in this case seems to have fallen into the same error as that to which we alluded two or three days ago, with reference to another judgment of his. He seems to be under the idea that a defendant who sets up title and also limitation cannot succeed upon the plea of limitation, unless he proves that he has held for more than 12 years under the title set up. He says: "The defendant could not satisfactorily prove that the land claimed appertained to Teeluck's property" (which was the property the defendant had purchased), "and has held possession as such for upwards of 12 years. There is, therefore, no ground to hold that the suit is affected by limitation."

If the defendant could have proved that the land was part of Teeluck's property, he would have proved his own title, and there would have been no necessity for relying upon limitation, for the plaintiff would have had no cause of action against him. Limitation assumes that the plaintiff has a title, but that he is barred in consequence of his not having asserted it by action within the time limited by law.

He also appears to think that in all cases the *onus* lies upon the defendant to prove limitation, instead of its being upon the plaintiff, who seeks to enforce a cause of action to show that that cause of action accrued to him within the period of limitation.

The decree of the Principal Sudder Ameen will be affirmed with costs, but for reasons altogether different from those which he has assigned for reversing the decision of the first Court.

This case shows that we should be careful in not encouraging parties who do not require relief to sue for declaration of right merely to confirm their titles, and thus probably to entail upon themselves the harassment of protracted litigation.

The suit is valued altogether at only 16 rupees, and was brought to have a declaration that the plaintiff was entitled to property worth that amount, and not for relief. The suit was first tried before the Moonsiff. It was appealed to the Principal Sudder Ameen, who remanded it to the Moonsiff for a fresh trial. From the decision of the Moonsiff on the second trial, there was another appeal to the Principal Sudder Ameen, from whose decision in appeal this case has come up to us on special appeal; so that, in fact, there have been five trials in a case in which the plaintiff did not ask for relief for an injury which had been done to him, but merely for a declaration of right in confirmation of title.

The 18th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. Hobhouse, *Judge*.

Attachment—Decree—General Warrant—Damages—Sections 92, 214, & 236, Act VIII. of 1859.

Reference to the High Court by Mr. R. Towers, Judge of the Small Cause Court at Kishnagurh.

Joykalee Dassee

versus

The representative of Chandmalla.

No one for Plaintiff.

Baboo Annund Chunder Ghosal for Defendant.

Where *A* seizes property in attachment of a decree which had been obtained by his own judgment-debtor, and there is nothing to show that that decree was sold to *B*, and *A* is not proved to have acted maliciously or without probable cause, *A* is not liable to *B* in a suit for damages. The seizure, moreover, having been made under the order of the Court, the defendant was not liable for what was done under the Court's order.

In attaching a decree under Act VIII. of 1859, the Civil Court should not proceed under both Section 92 and Section 236 of that Act, but under Section 236 alone, and the Collector has no power to attach such decree.

Semble.—Whether, if a judgment-creditor applies for a general warrant of attachment of all the defendant's property under Section 214, and under it causes property of a third person to be seized as property of the defendant, he is not liable to such third person.

Case.—THE plaintiff sues for damages comprising the amount of a decree, with interest, which she had purchased from one Ameer Biswas, and which, owing to an unlawful attachment by defendant, she was unable to execute.

As the circumstances of the case are unusual, and I have been unable to find any precedents strictly in point, I have thought it my duty to make a reference to the High Court on the following points :—

(1.) Is the injury sustained by plaintiff actionable?

(2.) What limitation applies?

The facts are as follows :—

Ameer Biswas got a decree under Act X. of 1859 against Mr. J. White on the 26th June 1865, and sold it to plaintiff on the 26th idem. Defendant, who held a decree against Ameer Biswas, which he was executing in the Principal Sudder Ameen's Court, petitioned that officer on the 30th June that the right of Ameer Biswas in the Act X. decree might be attached, and Mr. White ordered not to pay the money to Ameer Biswas, but to lodge it in Court. The Principal Sudder Ameen took the evidence of defendant's gomastah, to the effect that Ameer Biswas was endeavouring to dispose of the decree, and observing "that the prayer of the applicant (defendant) was only that the decree might not be allowed to be transferred," and, professing to act under Section 92 of Act VIII. of 1859, sent a proceeding to the Collector forbidding the transfer. The date of this order was the 7th July. He also issued an itlanamah to Mr. White, directing him not to pay the amount of the decree to Ameer Biswas. The Collector, accordingly, passed an order on the 5th August that the purchaser (plaintiff) should not be allowed to execute the decree.

On the 18th August, the Principal Sudder Ameen declared the decree, which defendant was executing against Ameer Biswas, barred by limitation, and released from attachment the Act X. decree which had formed the subject of the injunction under Section 92.

Meantime, plaintiff had applied to the Collector for execution against Mr. White on the 1st July. No order was passed on the application till the 9th September; when the Collector, observing that the attachment of the decree by the Principal Sudder Ameen had been rescinded by that officer's decision of the 18th August above quoted, directed execution to be proceeded with.

On the 21st September, defendant appealed to the Judge against the decision of the Principal Sudder Ameen, who had declared defendant's decree against Ameer Biswas barred by limitation. In this petition of appeal, defendant prayed that the Act X. decree, which the Principal Sudder Ameen had released from attachment, be again attached. The Judge, in compliance with the request, sent a proceeding to the Collector, dated 21st September, to re-attach

the decree, which the Collector did on the following day.

Plaintiff again applied to the Collector for execution against Mr. White, which was refused on the 29th November on the ground of attachment by order of Court.

Plaintiff next petitioned the Judge on the 29th March 1866, begging that the attachment of her purchased Act X. decree be withdrawn, and that she be allowed to execute it against Mr. White, whose property she alleged was being transferred and made away with, and stating that she (plaintiff), through delay in executing the decree, was running the risk of losing her money altogether. This petition was not complied with by the Judge, who, however, upheld on appeal the Principal Sudder Ameen's order (declaring the decree of defendant against Ameer Biswas barred by limitation) on the 5th October 1866, and this order was finally confirmed by the High Court on the 20th February 1867, but the Act X. decree remained under attachment all that time, and, as Mr. White had become insolvent in April 1866, plaintiff lost all benefit from the decree.

Defendant pleads that he is not responsible for any loss accruing to the decree while under attachment. In the case of Rajbullub Gope *versus* Issan Chunder Hujrah, VII. Weekly Reporter 355, it was held that the defendant was not liable to damages in respect of an attachment made under a warrant issued by the Court. In that case, however, the plaintiff seems to have acted illegally, inasmuch as he claimed the property in dispute as his own exclusively, while he was really entitled only to a half share; and in the case of Inder Chund Dogare *versus* Nunderam Sing, quoted at page 162 of Broughton's Civil Procedure, and 27 of Thomson on Limitation, it was held that damages could be recovered on account of the wrongful taking in execution of property which had been deteriorated in value while under seizure.

I think that, as defendant has not shown any want of good faith in the transfer of the decree by Ameer Biswas to plaintiff, his (defendant's) attachment of it, after that transfer, was wrongful *ab initio*, and that he is responsible for the injury resulting to plaintiff in consequence.

Finally, as to the question of limitation, the decree must be regarded as personal property, and defendant, therefore, contends that one year is the period of limitation applicable. If he is right, plaintiff is out of Court, as he cannot possibly date his caus of action later than White's insolvenc (April 1866), and the plaint was not filed ti more than a year afterwards. I think, how ever, that Clause 16, Section 1 of th Limitation Act, more properly applies. was so held in Inder Chund Dogare's cas quoted above, where it was laid down th wrongful seizure of goods under proces of law was not an injury to personal pr perty within the meaning of Clause 2 Section 1.

The judgment of the High Court was delive ed as follows by—

Peacock, C. J.—It appears to us that th defendants are not liable to damages, an that the suit cannot be maintained again them as the representatives of Chand Mala.

It appears from the statement which submitted for our opinion that the defendan who hold a decree against Ameer Biswa applied, on the 30th of June 1865, to attac a debt which Ameer Biswas had obtaine against Mr. White, the decree which Biswa had so obtained having been sold to th plaintiff previously to that application. Th application appears to have been made unde Section 92 of Act VIII. of 1859, instead under Section 236.

The Principal Sudder Ameen ordered a injunction to restrain Biswas from selling h decree, and he also ordered Mr. White n to pay to Biswas.

On the 18th of August the Princip Sudder Ameen held that the defendants we barred by limitation from executing the decree against Ameer Biswas, and release the decree from attachment. On the 21 of September the defendants appealed t the Judge against the order of the Princ pal Sudder Ameen, which declared the righ of execution to be barred by limitation and in their appeal they asked that th decree which had been released from attach ment should be again attached; and th Judge, in compliance with the request, se an order to the Collector on the 21st o September ordering him to re-attach th decree.

There seems to have been considerabl confusion in dealing with the case both b the Judge and the Principal Sudder Ameer The Principal Sudder Ameen appears t have acted partly under Section 92 an partly under Section 236 of Act VIII whereas the proper course was to procee under Section 236, and to attach at the su

of the defendants the debt due from White to Biswas.

But the Judge seems to have sent the case to the *Collector* to attach the decree. If the decree had been properly attached by the Civil Court, the plaintiff ought to have made an application to the Civil Court to release the decree from attachment, upon the ground that the debt did not belong to Biswas, inasmuch as he had sold it to the present plaintiff. But the plaintiff does not appear to have petitioned the Judge until the 29th of March 1866, when she petitioned that the attachment of the Act X. decree which belonged to her under her purchase might be withdrawn, and that she might be allowed to execute it against Mr. White; and she then brought to the Judge's notice the risk which she was running from the delay in executing the Act X. decree which she had purchased. But the Judge refused to comply with her petition, and to rescind the order which he had made on the 21st of September 1865.

Whether the injunction was issued under Section 92 or under Section 236, the Judge might have applied a remedy to prevent the risk of the debt being lost through the insolvency of Mr. White; for if the application was properly made under Section 92, the Judge might have appointed a receiver of the debt due by Mr. White to Biswas, or, if the application was made under Section 236, the Judge might have appointed a manager.

It does not appear that, up to the 29th of March 1866, the plaintiff ever made it known either to the Principal Sudder Ameen or to the Judge, or even to the present defendants, that she had purchased from Biswas the decree against Mr. White; and, therefore, the present defendants were perfectly justified in treating the decree which Biswas had obtained from Mr. White as the property of Biswas, and not as the property of the present plaintiff.

Besides, all that was done by the defendants was done by application to a Court of competent jurisdiction, and under an order of such Court.

The Judge, when he made the order, was as well aware as the present defendants that the Principal Sudder Ameen had held the right of execution barred by limitation; but he thought it right, pending the appeal to himself from the decision of the Principal Sudder Ameen, to order that the decree should remain under attachment against Biswas.

It was held in this Court in the case cited by the Judge of the Small Cause Court from 7 Weekly Reporter, page 355, that a defendant was not liable to damages in respect of an attachment made under a warrant of execution issued in pursuance of Section 233, Act VIII. of 1859.

In this case the order of the Judge was to attach the decree as the property of Biswas; and it appears to us that the defendants were not responsible for that which was done under the Judge's order.

It is not necessary to decide whether, if a judgment-creditor applies for a general attachment of all the defendant's property under Section 214, and obtains a general warrant of seizure, and causes the nazir under that general warrant to seize property of a third person which belongs to the defendants, he may not be liable to that third person. But by Section 218 of Act VIII. of 1859, whenever a general warrant is granted, the Judge may require the applicant to give security against any injury which may be occasioned by seizure of property which does not belong to the judgment-debtor.

It does not appear whether the seizure in the case* cited from Coryton's Reports was under a general warrant or under a warrant for the seizure of specific property. The case has reference merely to the question as to the time from which limitation ran in a suit for injury done to such property during seizure, and not to the question whether the defendant was liable or not.

If a plaintiff brings a suit or makes an application, maliciously or without probable or reasonable cause, to a Court of competent jurisdiction, to seize property of another person as the property of his judgment-debtor, he may be liable to damages for any injury which may be occasioned by reason of the order of the Court. Upon the same principle, a person may be liable to damages for applying for an injunction upon grounds which he knows to be insufficient; but in this case the defendants were not acting maliciously or without probable cause, but merely applied for the attachment of a decree which had been obtained by his own judgment debtor, when there was nothing to show that that decree had been sold to the plaintiff.

* *Inder Chund Dogare*, cited above in the *case* from the Small Cause Court Judge.

The 18th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. Hobhouse, *Judge*.

Jurisdiction—Small Cause Court—Pledge.

Reference to the High Court by Mr. C. D. Linton, Judge of the Small Cause Court of Kooshtea, dated the 13th December 1867.

Ram Gopal Shah, *Plaintiff*,

versus

Ram Gopal Shah and others, *Defendants*.

Baboo Greeja Sunkur Mojoomdar for Plaintiff.

Baboos Ashootosh Chatterjee and *Issur Chunder Chuckerbutty* for Defendants.

A obtained an ikrar from *B* by which *B* pledged to *A* certain buffaloes which *B* purchased with money borrowed from *A*. The ikrar also stipulated that *B* would not alienate his rights in the buffaloes till the sum borrowed was repaid. *A* obtained a decree against *B* for the amount of the loan, and attached the buffaloes in execution. This attachment was set aside at the instance of *C*, who purchased the buffaloes from *B* after the date of the ikrar given by *B* to *A*. *A* sues *C* (making *B* a party) in the Small Cause Court, praying for the sale of the buffaloes pledged to him by *B*, or, in default of that, for the sum due to him.

HELD that such a suit is not a suit within Section 6, Act XI. of 1865, to recover personal property, or the value of personal property, and is not cognizable by the Small Cause Court.

Case.—THIS is a regular suit under Section 246 of Act VIII. of 1859, brought by the plaintiff to establish his right or lien to the buffaloes mentioned in the plaint, and to obtain a declaration that they are liable in satisfaction of his decree; and there is a prayer in the alternative to make the first defendant liable for the amount of that decree, under the circumstances mentioned in the plaint, which runs as follows:—

"This is an action for enforcing the sale "of 17 buffaloes in satisfaction of decree in "case No. 791 of 1867, obtained by me, on "in the event of the buffaloes not being "available for the recovery of Rs. 460-6-9, "from first defendant, as per account given "in the schedule below.

"That the father of defendant No. 2 pur"chased the buffaloes with capital borrowed "from me, but, being unable to liquidate "the amount when it became due, he exe"cuted an ikrar on the 27th Magh 1273 "pledging the buffaloes, and binding himself "not to alienate them or transfer his rights "therein by any *by-hebba*, and stipulating "further that, until the amount of principal "interest due were liquidated, his other "property would be liable for the same, pro"vided the amount due be not realized by "the sale of the pledged buffaloes in the "first instance. Subsequently, the defend"ant having failed to pay off the amount "within the stipulated time, I sued defend"ant No. 2 in this Court, and obtained a "decree against him; and on my attaching "the pledged buffaloes in execution of the "said decree, defendant No. 1 filed a Mo"zaheur, alleging that he had purchased the "buffaloes on the 4th Pous 1273 B. S.; and "the attached property was accordingly re"leased on the 4th September 1867. The "father of defendant No. 2, having pledged "to me the said buffaloes long before the "execution of the kobala propounded by the "defendants, the latter had no right to alien"ate the same. I am, therefore, entitled "to realize the sum of Rupees 460-6-9 due "to me by the sale of the pledged buffaloes—"failing which—from the first defendant, inas"much as the said defendant purchased and "appropriated them to his own use."

Such a suit, under the frequent rulings of the High Court, is clearly maintainable, as the plaintiff obtained a money-decree on the ikrar pledging the buffaloes to him, but the question is, is the present suit maintainable in a Small Cause Court, or not?

Only the first defendant appeared, and on his behalf it was urged that such a suit is not maintainable in the Small Cause Court as the relief sought thereby cannot be granted by such a Court.

Now, the Hindoo as well as the Mahomedan Law recognized no distinction between mortgages of land and pledges of other property, and the Regulations in no degree recognize any necessity for the mortgagee being put in possession, and all the legislation of the English Government on the subject has proceeded on the basis that mortga

ges are valid, whether accompanied by possession or not. The late Supreme Court also recognized the validity of, and gave full effect to, Hindoo mortgages, whether accompanied by possession or not. *See* Macpherson on Mortgages, page 6, and the cases there cited.

In the ikrar on which the plaintiff obtained a decree, there is a clause against alienation in the following terms:—

"এই টাকার মাতবরি জন্য আমার খরিদা ছোট বড় ১৮ তেরোটা মহিস ও আমার সাবেক ৪ চারিটা মহিস একুনে ১৭ সতেরটা মহিস আপনকার বাকির জন্য আবদ্ধ রাখিলাম যে কাল পর্য্যন্ত টাকা আদায় না করিতে পারি সেকাল পর্য্যন্ত আমি কিম্বা আমার ওয়ারিসানেরা সেই সব বিক্রয় ও বয়হেবা করিব না ও করিবেক না যদি করি ও করে সে নামঞ্জুর উক্ত টাকার জন্য উক্ত মহিস আবদ্ধ রাখিলাম যদি এই মহিসে মহাশয়ের আসল সুদ টাকা আদায় নাহয় তবে আমার দোসরা জামাদ যে থাকে তদ্বারায় টাকা আদায় করিয়া লইবেন."

So that any alienation by him or his representatives in opposition to an express stipulation to the contrary, and a transfer made under such circumstances, is, *ipso facto*, void, or at least voidable; but the late decisions of the Calcutta Court distinctly lay it down that an express stipulation not to alienate property which is mortgaged until the debt, with interest and costs, are paid off, does not, according to the true construction of the law, preclude the mortgagor from transferring his own proprietary right, or making a second mortgage, *provided such transfer or mortgage be made subject to the first mortgage.* For the same authority, pp. 114-116; and there are cases showing that, where an assignor wrongfully sold the goods so that he could not deliver them on demand, the assignee was held entitled to recover their value in trover even against the *bond-fide* purchaser. Cooper *vs.* Williamott, 1 C. B. 672; Fenn *vs.* Bittlestone, 7 Ex. 152.

It is also laid down in Addison on Contracts, pp. 272 and 273: "If the mortgage-debt is to be paid by a day named, and the mortgagor is to hold possession until default has been made, there is a re-grant and bailment of the goods to the mortgagor for the intervening period, and the mortgagee has no right to the possession of them until the mortgagor's time of holding has expired; and, if he takes possession, he will subject himself to an action for a trespass. Brierly *vs.* Kendall, "17 Law Journal, Q. B., 937; 21 Law "Journal, Q. B., 161; 16 Jur. 449. "But if the mortgagor deals fraudulently "with the mortgaged goods thus left in "his possession, if he attempts to sell "them, or if he becomes bankrupt, and his "assignees take them and attempt to sell "them, the bailment is determined, the possessory title reverts to the mortgagee, and "he may immediately commence an action for "the recovery of the goods or their value. "Fenn *vs.* Bittlestone, 7 Exch. 152; 21 "Law Journal, Exch. 41. If goods are assigned to the mortgagee upon trust to permit "the mortgagor to hold and enjoy them until "default has been made in payment of the "mortgage-debt and interest by a day named, "and upon further trust to sell them upon "such default being made, the mortgagor "has the legal right of possession, incumbered "with the trust, as well as the right of property, and may maintain trespass against "a wrong-doer. White *vs.* Morris, 11 C. B. "1015; 21 Law Journal, C. P., 185. A "proviso in a mortgage of chattels, that after "default made in payment of the mortgage-debt after notice, it shall be lawful for the "mortgagee to receive and take into possession, and thenceforth to hold and enjoy, "the mortgaged chattels, and to sell and "dispose of them, and that, until default, "it shall be lawful for the mortgagor to "hold and make use of them, does not prevent "the mortgage from operating as an immediate transfer of the right of property in the "chattels to the mortgagee. The latter is the "legal owner whether in or out of possession. "Gale *vs.* Burnell, 7 Q. B. 850."

The present action may, therefore, be considered in the light of an action of trover, and such an action is the appropriate remedy where conflicting claims to chattel property call for adjustment. Considered in this light, it will clearly be maintainable in the Small Cause Court under Section 6 of Act XI. of 1865.

It has also been frequently ruled by the High Court that, where a suit is brought to establish a right to property sold in execution, the property being moveable and in value less than Rupees 500, the Small Cause Court alone has jurisdiction in such matters. I, therefore, think that the prayer for sale may be treated as surplusage, and that the plaintiff is entitled to the other relief sought by his plaint.

The registered kobalah held by first defendant, and dated 4th Pous 1273 B. S.

purports to have been granted by second and third defendants alone, and no evidence was offered to show that it was granted for valuable consideration and without notice; and it appears that the title (if any) acquired thereby is not complete, inasmuch as the other defendants have not joined therein. The kobalah, moreover, is not made subject to the plaintiff's ikrar which is of prior date, and the buffaloes mentioned therein were not sold in market overt. I, therefore, on the evidence adduced by the plaintiff, gave a verdict in his favor for Rupees 438-10-9 with costs, Rupees 73-15, total Rupees 512-9-9, to be paid by first defendant, and I gave him the option to return the buffaloes to plaintiff in order to enable him to have them put up to sale, in which event I made him liable only for the costs of the action; no relief was given against the other defendants, as none was sought for.

The above decree has been passed contingent on the opinion of the High Court on the following point, *viz.*:—

Whether the plaintiff's suit as laid is cognizable by a Small Cause Court?

The judgment of the High Court was delivered as follows by—

Peacock, C.J.—It appears to us that this is not a suit to recover personal property, or the value of personal property, but that it is a suit to ascertain what is due to the plaintiff on the mortgage-deed, and to have it declared that the plaintiff has a right of lien on the buffaloes to that extent, and to make the buffaloes available for realizing that amount.

If it were a suit to recover the buffaloes, the plaintiff upon succeeding would be entitled to a decree to have the buffaloes delivered to him. If it was a suit for the value of the buffaloes, plaintiff would be entitled to recover the full value.

In this suit, the plaintiff is not entitled to a decree against the first defendant for Rupees 413-10-9, which was the amount due under the mortgage, for the buffaloes may not be worth that sum. It is true that the Judge has given the defendant the option of returning the buffaloes to the plaintiff to enable him to have them put up to sale, but he does not order the plaintiff to sell them, and to return to the first defendant any surplus beyond 413 rupees and the costs, nor would he have the power to do so.

If this were a suit for the buffaloes, or the value thereof, then the plaintiff, upon succeeding in the suit, would be entitled t the buffaloes, without any condition, or to th full value thereof. This shows that the su is not cognizable by the Small Cause Co under Section 6 of the Small Cause Co Act.

The 18th January 1868.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Practice—Appeal—Stamp—Plain paper.

Loazima Miscellaneous Appeal from an ord passed by the Officiating Judge of Tirho dated the 13th July 1867, reversing order passed by the Principal Sud Ameen of that District, dated the 17 December 1866.

Chumun Chowdhry and another (Decr holders), *Appellants,*

versus

Shaikh Ali Azim (Judgment-debtor), *Respondent.*

Baboo Romanath Bose for Appellant.

No one for Respondent.

The rule of Circular No. 31, dated 3rd October 186 that the time allowed for obtaining a copy of judgme or decree shall not begin to count till the whole the requisite pieces of *stamp*-paper are put in, exten also to *plain* paper filed under the general rule at e of Schedule B, Act X. of 1862, when the copy cannot comprised within the *stamp*-paper put in.

Note by the Deputy Registrar.—On r ference to the endorsement on the copy the order against which this appeal preferred, it will be seen that "papers for the copy were filed on the 27th of Ju 1867.

The word "papers" in the endorsemen it is evident from the succeeding entry, *vi* "plain papers filed 18th November 1867, refers simply to the stamp-paper that w filed on the former date.

Circular Order No. 31 of the 3rd October 1864 (last Clause of para. 2) pr vides that "the time allowed for obtainin "a copy shall not begin to count till th "whole of the requisite pieces of *stam* "paper of the copy are put in."

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According to the letter of this rule, the stamp-paper having been filed on the 27th July 1867, and the copy being "ready" for delivery on the 20th of November 1867, the appellant would be entitled to a deduction, in calculating whether this appeal is in time or not, of 117 days, which would bring it within time.

But as the appellant has, under the "general rule" at the end of Schedule B., Act X. of 1862, to furnish the "plain paper" when the copy cannot be conveniently comprised within the stamp-paper put in, the principle laid down by the rule will, I presume, apply to plain paper equally with stamp-paper.

If this view be correct, the plain paper having been put in by the appellant on the 9th November 1867, the time to be allowed for obtaining the copy does not begin, under the terms of the rule in the Circular Order adverted to, to count until that date, and his appeal would, in that view, be out of time.

I beg to refer the point for the orders of the Court.

Judgment.

Jackson, J.—The appeal is, in my opinion, beyond time, and should be rejected.

The 18th January 1868.

Present :

The Hon'ble L. S. Jackson, *Judge.*

Practice—Stamp—Appeal—Execution-case.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 20th November 1867, affirming an order passed by the Sudder Moonsiff of that District, dated the 23rd July 1867.

Mohesh Chunder Banerjee (Objector), *Appellant,*

versus

Chunder Monee Dabee and another (Decree-holders), and another (Judgment-debtor), *Respondents.*

Baboo Sham Lall Mitter for Appellant.

No one for Respondents.

An appeal from an order of the Lower Appellate Court, declaring that a party who claimed to be in possession of property taken in execution of a decree to which he was no party, and with which he had no concern, had no *locus standi* in the execution-case, is in the nature of a Miscellaneous appeal, and should be on a stamp for an ordinary petition.

Note by the Deputy Registrar.—CERTAIN property having been attached in execution as belonging to the judgment-debtor, a party in no way connected with the case in execution claimed the property, and put in his objection claiming *bonâ fide* to be in possession of the property on his own account.

The Court executing the decree directed the claim to be numbered and registered as a suit between the decree-holder as plaintiff, and the claimant as defendant, under Section 229, Act VIII. of 1859.

The claimant appealed against that order, and the Lower Appellate Court dismissed the appeal on the ground that, as the appellant was not a judgment-debtor, nor was the decree in execution given against him or execution taken out against him, he had no *locus standi* in the case in execution, and could not, therefore, object to its issuing.

Against that order of the Lower Appellate Court, this appeal is preferred on a stamp for ordinary petitions, that is to say, on a stamp of the value of Rupees 2.

The question I beg to refer for the orders of the Court is, whether this special appeal, being from an order on a claim numbered and registered under Section 229, Act VIII. of 1859, should not be treated as any other special appeal, as regards the stamp to be used for its engrossment, in which case the present stamp would be insufficient; or whether, as the appeal is from an order of the nature of an interlocutory order, *if there be in that case an appeal at all (see* Section 363, Act VIII. of 1859), it should not rather be treated as a miscellaneous appeal, in which case the stamp used would be sufficient.

Judgment.

Jackson, J.—I am inclined to think that this appeal should be on a stamp for ordinary petitions. It is in the nature of a miscellaneous appeal.

The 18th January 1868.

Present :

The Hon'ble Sir Barnes Peacock *Kt.*, *Chief Justice*, and the Hon'ble C. Hobhouse, *Judge.*

Liability—Promise by other than borrower to repay loan.

Reference to the High Court by Baboo Banee Madhub Shome, Judge of the Small Cause Court of Pubna, dated the 14th August 1868.

Pearee Lall Shaha, *Plaintiff*,

versus

Woomesh Chunder Mojoomdar and others, *Defendants.*

Baboos Kalee Mohun Dass and *Nilmonee Sein* for Plaintiff.

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Defendants.

Where a brother promised in a letter to repay a debt contracted by his deceased brother, which was secured to plaintiff by a note of hand which had been given by the deceased, it was held, on a consideration of the terms of the letter, that the defendant, who was sued on the letter, had taken upon himself the liability of repaying the debt, although the amount of the loan was not stated in the letter. A promise to pay a debt is binding in many cases, although the amount of it may not be ascertained at the time.

Case.—THE plaintiff's averment is that the deceased Shib Chunder Mojoomdar, in his lifetime, borrowed of the plaintiff Rupees 300, and executed in his favor a hand-note for the same on the 25th July 1865; that, on the death of Shib Chunder, the money was demanded from his brother, defendant No. 1, who admitted it to be his own debt, and on the 1st Pous 1273 B. S. wrote a letter to that effect, and that, in consequence thereof, the said defendant No. 1 is justly liable for the money, and, therefore, plaintiff has brought this suit to recover the said amount with interest against defendant No. 1, making at the same time Lall Coomaree a co-defendant. Defendant Woomesh Chunder Mojoomdar, in answer to the suit, states that he was not aware of the fact of the hand-note; that the letter of the 1st Pous 1273 B. S. was written by him to the address of the plaintiff simply at the instance of Hurish Chunder Doctor, but that he is not liable for the money claimed under that letter. It has been urged on behalf of the defendant Lall Coomaree that, inasmuch as she was not aware of anything of the hand-note in question, she is not liable for the money covered by it.

Issues.

1st.—Did Shib Chunder, in his lifetime, actually borrow of the plaintiff Rupees 300 and execute the hand-note in question ?

2nd.—Whether, under the letter of the 1st Pous 1273, Woomesh Chunder, defendant No. 1, is or is not liable for the claim of the plaintiff?

With regard to the second issue, Baboo Radha Madhub Dutt, pleader for the plaintiff, verbally contends that, inasmuch as defendant Woomesh Chunder Mojoomdar when he heard from witness Hurish Chunder Doctor of the existence of the debt secured by the hand-note, admitted it to be his own debt, and expressed in the letter his desire to liquidate it by instalments, he, the said Woomesh Chunder, is undoubtedly liable for the said debt.

Baboo Ishan Chunder Moetry, vakeel for defendant Woomesh Chunder, argues that the aforesaid contention of the pleader for the prosecution is quite erroneous, because if his client were informed of anything of the hand-note, mention of it would, of course, have been made in the letter in question which was written at the word of Hurish Chunder Doctor who merely told of the existence of a debt, but not of any particular one, and hence it is apparent that he did not say anything of the hand-note; that as the letter contains no specification of the debt or the amount thereof, and as the defendant Woomesh Chunder did neither therein acknowledge the debt to be his own, nor did he promise to repay it himself, he cannot be held liable for the same, and that the meaning of the phrase in the letter "we shall repay the debt" appears to be this, that the debt was promised to be repaid by the representatives of Shib Chunder from the

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assets of the estate left by him; that, as Woomesh Chunder is neither an heir nor a representative of Shib Chunder in the presence of the deceased's widow, he is not liable for his debts; and that, as defendant Woomesh was not a party to the hand-note, he incurs no liability under the letter in question.

Defendant Woomesh Chunder Mojoomdar has made a special application, praying to obtain the opinion of the Honorable Judges of the High Court on the second issue only, and I accordingly, recording my decision of that issue, beg to trouble the Court with an opinion on that point simply.

In my opinion, defendant Woomesh Chunder is not liable under the letter cited by the plaintiff for the debt secured by the hand-note, because the letter now before me does not make out that it was written in acknowledgment of the debt covered by the hand-note. This letter appears to have been addressed to Geeree Lall Shaha and the present plaintiff Pearee Lall Shaha, and its language shows that its writer Woomesh Chunder wrote it merely to say that any debt due to the addressees by his elder brother would be liquidated by them; but it contains no mention of the hand-note, and the said defendant Woomesh Chunder now denies any knowledge of the hand-note, and admits the letter in question to have been written by him merely at the instance of Hurish Chunder Doctor, witness No. 1. From these circumstances and from the terms of the letter, I am not at all led to suppose that it was written in acknowledgment of the debt under suit. It is also to be remarked that the hand-note was in favor of Pearee Lall Shaha only; whereas the letter in question was addressed to the plaintiff, said Pearee Lall, and Geeree Lall Shaha, and that the letter does not contain specification of any particular debt or the amount thereof. This being the case, I am clearly of opinion that, under that letter, the defendant Woomesh Chunder is not liable for the claim. The wording of the letter leads me to suppose that the debt therein alluded to means no particular debt, but a general one; for, if that were not the case, I see no reason why it was written to the joint-address of the plaintiff and Geeree Lall who, plaintiff's vakeel admits, was brother of the plaintiff. Further, under the High Court's Ruling of the 23rd February 1866 on references from the Small Cause Courts, in the case* of Nobin Chunder Mojoomdar *versus* Mr. T. J. Kenny (*vide* Wyman and Company's Reports, page 15, Volume I.), a writing which does not specify the amount and the debt is no binding document at all; and, therefore, though the witness No. 1 has deposed that defendant Woomesh Chunder wrote the letter in question promising to repay the debt of the hand-note, the said defendant cannot, in my opinion, be held responsible for the claim under that letter, for oral evidence is not admissible to explain a written document. The copies of the hand-note and the letter, as well as the deposition of Hurish Chunder Doctor, witness No. 1, are herewith submitted.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—The defendant's brother borrowed Rupees 300 from the plaintiff, and gave a note of hand for it, dated 25th July 1864, and it does not appear that any other debt was owing to the plaintiff. After the death of the brother, the defendant, in answer to an application which the plaintiff made to him for payment, wrote the letter now submitted to us, saying: "I am told you are a little anxious for the debt due to you by my brother. You need not be in any anxiety for the recovery of the same, as we shall repay you."

It appears to me to be clear that the defendant included himself, at any rate, under the word "we," and that he did not by that word refer to his brother's widow.

He then says: "It is a matter of great difficulty to repay this money at the present moment in one lump sum, and I therefore desire to make payment of the same by instalments. If the said occurrence had not happened, there was no necessity for me to write for an instalment."

Taking the whole letter together, we think it is an acknowledgment that the defendant was liable to the plaintiff for the debt which the brother had contracted and asks for time to pay, excusing himself for making that request by the distress which his brother's death has caused to the family.

In this view of the case, the plaintiff was not legally bound to give time for payment by instalment, but he did in fact wait for payment for nearly six months.

* *See* 5 W. R., Small Cause Court References, page 3.

It is, therefore, unnecessary for us to decide whether in a Court which is to be guided by the rules of equity, justice, and good conscience, a man who promises to do a thing is not bound to perform that promise unless there is a consideration for it.

The case which has been referred to by the Judge of the Small Cause Court as an authority that a promise to pay a debt is not binding unless it specifies the amount, does not bear out the Judge as to the principle for which he cites it, and there must be many cases in which a promise to pay a debt would be binding, though the amount of it has not been ascertained at the time. In the case cited, the only question was, whether a writing which the defendant had given was a sufficient acknowledgment by him in writing of a debt due by him to take the case out of the Statute of Limitation under Section 4 of Act XIV. of 1859.

The case should be returned to the Small Cause Court with an opinion that the defendant is liable under his letter to pay the debt.

The 12th January 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Suit by Mahomedan widow—Deed conveying away property to other than legal heir—Onus probandi.

Case No. 118 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 25th March 1867.

Saduk Ali Khan (Defendant), *Appellant,*

versus

Bibee Pearee and others (Plaintiffs), *Respondents.*

Messrs. R. V. Doyne, R. E. Twidale, and *C. Gregory, Moonshee Ameer' Ali,* and *Baboo Unnoda Pershad Banerjee* for Appellant.

Messrs. A. T. T. Peterson and *R. T. Allan* and *Baboos Debendro Narain Bose* and *Nil Monee Sein* for Respondents.

In a suit by a Mahomedan widow against the brother of her deceased husband for her share of the property of her husband, the defendant set up a Tumliknamah by which the deceased conveyed the property away to the son of the defendant. HELD that the burden of proof was on the defendant, and that he was bound to adduce the very strictest proof of the conveyance, as it cut away property from the natural heir. The Tumliknamah was rejected, having regard to its terms and to the probabilities and facts of the case.

Hobhouse, J.—THE principal plaintiff, respondent in this case, is the widow of one Mehdee Ali Khan, and is the natural heir to a 4-annas share of the property of that person, and she sued to recover this share.

The principal defendant, appellant, is the brother of the said Mehdee Ali, and he sought to retain possession of the said property by virtue of a Tumliknamah alleged to have been executed by the said Mehdee Ali in favor of his (appellant's) minor son, Altaf Ali, on the 11th Falgoon 1271.

The appeal has been argued before us for three whole days by learned Counsel on either side, *viz.*, Mr. Doyne for appellant, and Mr. Peterson for respondent, and many collateral points of law and of fact have been opened out, but the main fact is this, *viz.*, whether Mehdee Ali did or did not execute the Tumliknamah of date the 11th Falgoon 1271?

The burden of proof is on appellant, and where, as in this case, property, and that of considerable value, is purported to have been conveyed away from the natural heir, no doubt the very strictest proof of such conveyance is required.

In my judgment, I have rarely seen a case in which the proof attempted to be set up has so completely broken down under examination.

I will take, first of all, the document itself, the Tumliknamah, and I find in some of its very provisions that which seems to me to be strong presumptive evidence that it is not genuine.

It recites that the executor is in a dying state; that he has now no hope of offspring, though he had at one time had such hopes; and that he had from his very birth always considered Altaf, his nephew, as his son;

and, therefore, the document goes on to say, he, the executor, conveys to the said Altaf the whole of his property, burdened only with maintenance allowances for life to him, the executor, of Rupees 50; to his wife, the plaintiff, of Rupees 25; and to three other certain persons of Rupees 20 a month.

Now, it is in evidence that at the time when Mehdee Ali died, he himself was only 35 years of age; that Altaf was a boy of 11; that the plaintiff was a young woman when she married; that Mehdee had been twice married; to the present plaintiff 5 years before his death; that the diseases of which Mehdee died was cough, spitting of blood, and fever; and that it was not until Agran 1271, or shortly before his death, that any physician was called in to minister to this disease; that Mehdee retained a considerable establishment even after the alleged execution of the Tumliknamah; and that his widow was a woman of rank.

When Altaf then was born, Mehdee Ali was a young man of 24 and married, and not afflicted with any disease precluding the generation of offspring, but rather, as he is made to recite, having hopes of offspring; why then should he from the time of Altaf's birth have always looked on Altaf as his son; or why, if he did always so look on Altaf, should he, 6 years after Altaf's birth, have married a second young wife?

Or again, is it reasonable to suppose that with himself and a large establishment to maintain, Mehdee Ali should have denuded himself of all his income save a miserable pittance of 50 rupees a month, or that he should have considered 25 a month a maintenance sufficient for a woman of the rank of his wife, the plaintiff.

I think these deductions from the very contents of the Tumliknamah point very strongly against its genuineness.

I turn now to the facts which must be presumed to have preceded the execution of such a document as the Tumliknamah. Mehdee Ali must have given instructions to have it drawn up; some body must have drafted it; some body must have written it out fair, and the original draft must be somewhere, or might have been accounted for.

Now, here is the account given of all these important and indispensable preliminary matters by appellant.

Anwar-ul-Huk says, he went to see Mehdee. He does not say why, and, if he can be said to have said when, it was in the month of *Choit*, (the Tumliknamah having been executed in the *Falgoon* previous), and Mehdee then told him to remind his, Anwar's, father Shumshere to make a draft of a Tumliknamah. Anwar did remind his father, and the next morning one Bisseshur Pershad, Mehdee's Mootsuddee, came and took such a draft from Shumshere and then copied it out fair.

This is all the account given of the circumstances which led to the execution of the Tumliknamah.

No one says when, and how, Mehdee instructed Shumshere to draft the document, yet it is a lengthy document purporting to convey away some 150 pieces of valuable property. No one even says that Mehdee did instruct Shumshere at all. The man who comes forward to say he reminded Shumshere of the instructions, tells what is at least a very doubtful story. Bisseshur, who is said to have had Shumshere's draft, which might have been proved by means of Shumshere's handwriting, does not produce it nor account for its non-production; nor does he, therefore, show on what it was that his own alleged fair copy was based.

Then, next, as to the alleged actual execution of the Tumliknamah, it is only reasonable to expect that when such a document, purporting to alter the succession to a large and valuable property, was being executed, all the parties most interested in such a document would be present, and specially all the immediate family of the executor, and the most respectable of the neighbours would be at least in a position to know and to say something of it.

If Saduk Ali's witnesses are to be credited, he was present when the Tumliknamah was executed, and Dildar and Bahadoor Ali knew all about it, but not one of these men was called even to depose to what they knew; and certain of Saduk's own witnesses admit that of the many respectable neighbours not one was present on the above occasion.

And of those who have deposed to the said execution, there was not one, except Bisseshur Pershad and Digumbur Singh, who gave a good reason for being there at all and witnessing the execution, and there are discrepancies in the statements of all, which, on comparison with the deed, are fatal to it.

For instance, all are unanimous in alleging two facts? *first*, that all the witnesses subscribed their names in the same ink; and *secondly*, that Mehdee Ali was one whole hour employed in subscribing his name, letter by letter.

Now, there were six documents, the subscriptions of which by Mehdee Ali are said to have occupied him one whole hour; and, no doubt, if a person was *in extremis*, or even very feeble, it would be reasonable that a long time should be occupied by him in subscribing six lengthy signatures.

But he was not *in extremis;* he is said not to have died until more than one month later; and he was not very feeble, for the signatures are not those of a feeble man, but on the contrary they are written in a firm running hand, not one bit less firm or less formed than the true signature on a pottah, dated years before.

It cannot, therefore, be believed that Mehdee Ali signed as alleged; and as to the ink used, it is at once apparent that it was not ink out of the same bottle, nor apparently ink used at the same time.

And when it comes to a comparison of signatures, it is quite clear that those on the several documents put forward are materially not alike to each other, nor to the one admitted signature on the pottah.

And on the other side, there are witnesses for the plaintiff, whom the Court below, which had them before it, the rather believed, and who—some of them—assigned good reasons for their presence, and who deposed that they must have known had any Tumliknamah been executed, and that none such was executed.

The evidence, then, for the appellant is unsatisfactory and unconvincing, and is, in fact, rebutted as well in regard to the circumstances which preceded, as in regard to those which accompanied, the execution of the alleged Tumliknamah; and it is equally unsatisfactory and unconvincing in regard to circumstances succeeding the said alleged execution.

The deed is said to have been executed on the 11th Falgoon. Altaf is said at once to have taken possession by virtue of the deed. The deed was registered on the 11th Choit. Mehdee Ali is said to have given a first receipt for his first monthly stipend of Rupees 50.

There was a Kazee's office close at hand. The notorious custom of the country then was to report at such offices every material change of hands in valuable property, yet no such report was ever made, nor was the deed ever there attested.

Muzufferpore, where the registry office is, was only 32 miles from Durbungah, where the deed is said to have been executed, yet there was a month's delay between execution and registry, and no sufficient cause established for the delay.

The witnesses who swore to the facts that the deed had been executed and that the executor was alive at the time of registration, were not produced, and their absence were not accounted for.

The Mookhtear (Juggodumba Sahoy) who registered the deed did not, as is usual, do so on the affirmation that, of his own knowledge, the executor was alive at the time of registration, but sheltered himself under the oaths of the witnesses just above alluded to, who were not produced; and this Mookhtear was discredited by the evidence of two pleaders, to whom he revealed the fact that the deed had been registered after the death of the alleged executor.

And, finally, the signature on the receipt for Rupees 50 as of Mehdee Ali and as under date the 12th Choit, is not the signature of a man who is described as "budhawas" one month before, and who is said to have died five days afterwards; neither does it correspond with Mehdee Ali's acknowledged signature, nor yet with the other signatures adduced as genuine by appellant.

Omitting, therefore, any allusion to any other points of law or fact raised by learned Counsel on either side, and making every allowance for errors apparent on the face of the judgment of the Lower Court, I would find as a fact, that the Tumliknamah was not established, and I would dismiss this appeal with costs.

Loch, J.—I concur in this judgment, and dismiss the appeal with costs.

The 20th January 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Civil Court—Suit for execution of a purchased decree under Act X. of 1859.

Case No. 2928 of 1866.

Special Appeal from a decision passed by the Judge of Sarun, dated the 20th August 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 20th February 1866.

Odhesh Coomar Singh (Defendant), *Appellant,*

versus

Ram Gobind Singh and others (Plaintiffs), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Mr. R. T. Allan and *Baboo Kalee Kishen Sein* for Respondents.

The Civil Court cannot entertain a suit for the issue of an order to grant execution on the strength of plaintiff's purchase, after the Collector has refused to allow plaintiff to execute a decree under Act X. of 1859, which he had purchased from the original judgment-creditor.

Bayley, J.—After hearing Counsel for both sides, it is clear that the only question now requiring our decision is whether, when the Collector refused to allow plaintiff to execute the decree under Act X. of 1859, which he had purchased from the original judgment-creditor, plaintiff can sue in a Civil Court "for the issue of an order to grant such execution on the strength of plaintiff's purchase."

We think that, under Section 151, Act X. of 1859, and under this Court's decision in page 147, Weekly Reporter, Special Number, and Full Bench decision, Volume V., Act X. Rulings, page 20, the plaintiff cannot so sue. It is not alleged that there was fraud as to the sale, or that, in fact, there was no sale, so as to bring the case within the Full Bench ruling cited. And, as to the plea pressed upon us that the suit is, in fact, one under Section 15, Act VIII. of 1859, we can but refer to the very terms we have cited from the plaint as showing that this is not so.

On the whole, then, we think the Civil Court had no jurisdiction to try the case as brought, and, reversing its order, we decree this special appeal with costs.

The 21st January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Enhancement—Butwarrah—Sections 9 and 19, Regulation XIX. of 1793.

Case No. 1435 of 1867.

Special Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Bhaugulpore, dated the 3rd April 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 10th December 1866.

Luleet Narain Singh (Plaintiff), *Appellant,*

versus

Gopal Singh and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Poorno Chunder Shome* for Appellant.

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Respondents.

Suit for khas possession of land made over to plaintiff on a butwarrah. The defendant pleaded 12 years' ad-

verse possession, and that he was entitled to retain possession on payment of rent, as the lands were occupied by gardens made by his ancestor.

HELD that Section 9, Regulation XIX. of 1814, does not apply to the lands made over to the plaintiff under the butwarrah, that Section referring to the dwelling-houses of co-sharers and to offices, buildings, and ground immediately attached to those dwelling-houses, which the lands in suit were not proved to be.

HELD also that, where the defendant does not hold the land as ryot, the mere fact of a division of the parent estate does not reduce him to the position of a ryot not liable to ejectment.

HELD, further, that the rate given in the butwarrah-papers is not the fair rate for these lands; for, under Section 19, Regulation XIX. of 1793, the gross produce of each village is calculated with the proportion of the public jumma assessed thereon.

Kemp, J.—THIS was a suit for khas possession of four plots of land, numbered 76, 103, 133, and 136, which fell to the plaintiff's share as per a butwarrah conducted under the provisions of Regulation XIX. of 1814, the said butwarrah having taken place in 1263 Fuslee. It is further alleged that the defendant, who is a co-sharer in the estate, has withheld possession from 1268. The defendant pleads adverse possession for more than 12 years, and on the merits that, as the lands claimed were occupied by gardens made by his ancestors, he was entitled to hold possession, paying a fair rent to the plaintiff, and was not liable to ejectment.

The first Court gave the plaintiff a decree, overruling the plea in bar.

The Principal Sudder Ameen reversed this decision, holding that Section 9, Regulation XIX. of 1814, applied to the case; and further that the butwarrah-proceedings changed the character of the holding of the defendant from that of Malik to that of a ryot, and that, consequently, the defendant being a ryot had a right of occupancy at a fair rate, which the Principal Sudder Ameen fixed at 4 annas per beegah, holding that that rate was fixed by the butwarrah-papers.

In special appeal, it is contended—

1st.—That, as the butwarrah allotted the four plots in contention to the plaintiff without reservation, he is entitled to direct possession, and that the Lower Court is wrong in holding that the defendant was not liable to be ejected.

2nd.—That the Principal Sudder Ameen has wrongly applied Section 9, Regulation XIX. of 1814, to this case.

3rd.—That the rate of four annas was not the fixed rate, but only a rate assumed for the purposes of the butwarrah, and to enable the Ameen to judge of the assets and to equalize the division.

4th.—That the defendant has no right of occupancy—not being a ryot.

It is clear that a butwarrah took place in 1263, and that these four plots were allotted to the share of the plaintiff. Section 9 of Regulation XIX. of 1814 does not in any way apply to these lands. That Section refers to the dwelling-houses of the co-sharers, and to the offices, buildings, and ground immediately attached to these dwelling-houses. It has not been shown that the lands in dispute were immediately attached to any dwelling-house belonging to any co-sharer.

It appears that from 1268, or five years after the butwarrah, the defendants withheld possession from the plaintiff. It is also alleged that the plaintiffs have been dispossessed of the garden lands which were occupied by their ancestors, but which have fallen within the share of the defendants as per butwarrah. The defendants never held the disputed lands as ryots, as supposed by the Principal Sudder Ameen, nor will the mere fact of a division of the parent estate reduce them to the position of mere ryots. They held the lands as the plaintiffs held the lands of a similar description until the butwarrah, which formally with the consent of both parties, and unreservedly, awarded the lands to the plaintiff's share; and he is clearly entitled to possession of them in ejectment of the defendant, whose occupancy is not that of a ryot.

The Principal Sudder Ameen was also clearly wrong in assuming the rate stated in the butwarrah-papers, *viz.*, 4 annas per beegah, as a fixed rate and, as such, fair; for, under Section 19, Regulation XIX. of 1814, the gross produce of each village is calculated with the proportion of the public jumma assessed thereon. The rate is not fixed by the butwarrah. The decision of the Principal Sudder Ameen is reversed, and the decree of first Court restored, with costs of all the Courts, including those of the special appeal in this Court, with interest payable by the special respondent.

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The 21st January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Enhancement—Presumption allowed by Section 4, Act X. of 1859—Dakhilahs—Evidence.

Cases Nos. 1533 and 1538 of 1867 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Purneah, dated the 29th March 1867, reversing a decision passed by the Assistant Collector of that District, dated the 22nd September 1866.

Luchmeeput Singh (Plaintiff), *Appellant,*

versus

Jungulee Kullyan Doss (Defendant), *Respondent.*

Mr. Mackenzie and *Baboos Bungshee Dhur Sein* and *Issur Chunder Chuckerbutty* for Appellant.

Mr. C. Gregory for Respondent.

Where a defendant, who claims to have held lands for more than 100 years, is able to prove that the rent has not changed for 20 years, he is entitled to the presumption allowed by Section 4, Act X. of 1859.

No dakhilah or document, unless of very old date, or for some other special reason, is admissible in evidence unless it is attested in some way.

Jackson, J.—THE points urged in both these appeals are that the defendants had not sufficiently claimed to hold from the Decennial Settlement, and that the Judge has held that the defendants have proved that the rent has not changed for more than twenty years on the evidence of the defendants' dakhilahs, which are no evidence, not having been in any way attested.

On the first point, we find that both the defendants have claimed that the land has been held, as now held, for more than 100 years. We think that, whatever conflicts of decision there may be on other points, if on such a plea the defendant can prove that the rent has not changed for 20 years, he is entitled to the presumption allowed by Section 4, Act X. of 1859.

But, on the second point, the Judge has committed the common error in Act X. suits of taking dakhilahs, &c., as proved, when there has not been any proof offered in support of them. Even the defendants have not deposed that these are the dakhilahs which they have received in return for their rents. No document, unless it is of very old date, or for some other special reason, is admissible in evidence unless it is attested in some way. In these cases the Assistant Collector appears to have omitted to lay down the issues on the points in dispute between the parties, and to have then allowed the parties to produce evidence in support of their respective averments on such issues.

The Judge's decisions are reversed as well as those of the first Court, and the Judge is directed to return these cases to the first Court to fix a day for the trial of the issues, and to hear the evidence of the parties upon them. The costs of these cases will be paid by the losing party.

The 22nd January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Lease (Joint)—Resignation of some of the lessees.

Case No. 1388 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 29th March 1867, affirming a decision passed by the Moonsiff of that District, dated the 28th May 1866.

Mohima Chunder Sein (Plaintiff), *Appellant,*

versus

Pitambur Shaha and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Gireeja Sunkur Mojoomdar* for Appellant.

Baboo Romanath Bose for Respondents.

Where a joint lease was given to many persons with an entirety and equality of interest among the tenants, the resignation of some of the joint lessees does not necessarily operate to void the lease.

A pottah, which provided that the grantor was not to alienate or lease the property to any other party during the term of the pottah, without giving the lessees under the pottah the refusal, was upheld.

Kemp, J.—THE plaintiff, special appellant before us, sued the defendants, special respondents, on the allegation that he obtained a mowrosee pottah of the disputed property from one Gunga Monee, a Hindoo widow, on the 2nd of Bhadro 1269 B. S.; that he sued the defendants for a kubooleut under Act X. of 1859, which suit was dismissed; that his title and possession have been prejudiced by this decision. He brings this suit for confirmation of title and possession.

The property in dispute is a bazar known by the name of Sen Hattee. The plaintiff files his pottah which is not registered.

Gunga Monee's answer is to this effect. She admits having granted a lease to the defendants of the disputed property for a term of 7 years from 1257 B. S., but avers that the pottah pleaded by the defendants for a term of 37 years is a forgery. She admitted having granted a mowrosee pottah of the disputed lands to the plaintiff, receiving a bonus of 6 rupees.

The defendants answered to the effect that they held the disputed lands under a registered lease granted to them by the malik Gunga Monee for a period of 37 years, and that the said lease contained a stipulation that the malik was not to alienate, or to lease the property to any other party without giving the defendants the first refusal.

The defendants filed a registered pottah, dated the 11th Bysack 1261, and other documents such as Collectorate Dakhilahs for a series of years, in support of their possession.

The Court of first instance, the Moonsiff, laid down one issue, *viz.:* "Is the pottah propounded by the defendants a genuine instrument?"

The Moonsiff found that the pottah was genuine. He observed that none of the witnesses for the plaintiff state definitely that the pottah is forged, but give hearsay evidence; that, on such evidence, an old pottah, which has been duly registered, and under which undisturbed possession has been held for several years, cannot be pronounced to be forged; that the pottah itself bore no inherent signs of being a forged one; that it was duly registered, and had been proved by certain witnesses. Further, that the malik Gunga Monee alleged that she gave the defendants a pottah for only 7 years, or from 1257, but that it was clear that she permitted the defendants to hold over for many years after the expiration of the term of the said lease.

The Moonsiff explains the reason for the malik giving a long lease in 1261 before the term of the first lease in 1257 had expired in this way—that the defendants had expended large sums in improving the bazar, and that, in consideration of their having done so, a long lease on very favorable terms was given to them.

The Moonsiff further stated that, though two of the lessees under the pottah of 1261 had resigned their rights under the lease, the terms of the lease were such that, on the resignation of one or more of the joint lessees, his or their rights devolved to the remaining lessees. The suit of the plaintiff was, therefore, dismissed, and, on appeal, this decision was confirmed.

In special appeal, it is contended—

1st.—That, as two of the lessees had resigned their rights and interests in the lease, the lease itself was void.

2nd.—That, if not wholly void, the plaintiff was entitled to a decree for a moiety, that being the extent of the rights and interests of the lessees who have resigned.

3rd.—That two material witnesses were not examined.

4th.—That the pottah propounded by the defendants has not been legally proved.

The pleader took his last point first. The pottah, we observe, is registered. The malik admits that in 1257 B. S. she gave a lease to the defendants for seven years. This pottah would expire in 1264 Bysack. It is admitted that the defendants have held for some years after that period, or from 1257 to 1272, when the present suit was brought; and, in the absence of any proof or averment that they were holding over wrongfully, it may be fairly presumed that they were holding under a fresh lease concluded in 1261 B. S. The witnesses who have been examined for the defendants, as also one witness cited by the plaintiff, depose to a pottah executed in 1261; and, though they are not asked whether the pottah produced is the very pottah which was executed in 1261, we can have no doubt that, taking the fact of registry years before the

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present suit, which registry gave notice both to the malik Gunga Monee, and to the plaintiff, her grantee, of the title under which the defendants claimed to hold, coupled with the fact of long possession with the permission of the malik under the pottah of the defendants, sufficiently establishes that the pottah is genuine. We, therefore, concur with the finding of both the Lower Courts to that effect.

The two witnesses said to be material were named in a petition. It appears they were not summoned, because the parties expressed themselves as about to come to a compromise. In appeal to the Principal Sudder Ameen from the Moonsiff's decision, the non-examination of these two witnesses could not have been pressed. The case was remanded, in the first instance, to the Moonsiff to examine certain witnesses; and, if the appellant deemed the evidence of these two witnesses so very important, he should have moved the Court to insist upon their attendance. It is too late at this stage of the case to raise this objection.

The first ground of special appeal is untenable. The lease was a joint one with an entirety and equality of interest among the tenants. The resignation of two of the joint lessees would not necessarily operate to void the lease. Moreover, this alleged resignation was not made to the lessor, the malik, but to the plaintiff. Such resignation is contrary to the terms of the pottah, and was doubtless collusive. This point, too, we may observe, was not raised in the appeal to the Principal Sudder Ameen from the decision of the Moonsiff.

The terms of the pottah are such as to preclude the grantor from alienating or leasing the property to any other party during the term of the lease, without giving the defendants the first refusal. These restrictions upon the malik's rights may be somewhat unusual; but holding, as we do, that the pottah is proved, we must accept them, however unusual as binding upon the malik.

The defendants spent large sums in improving the bazar during their former lease. They also fought the malik's battles, she being a woman, with a powerful rival who has a bazar in the neighbourhood. In consideration of all this expense and trouble, a long term of lease on very favorable terms, and with unusual restrictions on the malik, was granted.

As long as the co-lessees, the defendants, who have not resigned, are willing and able to pay the rent of the lease, the malik is not entitled, under the terms of the pottah, to alienate or to lease the disputed property, either as a whole or in part, to any other party.

We confirm the decision of the Lower Court, and dismiss this appeal with costs and interest.

The 22nd January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Enhancement—Pottah set up—Prevailing rates—Section 4, Act X. of 1859.

Case No. 1840 of 1867.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 9th of May 1867, reversing a decision of the Deputy Collector of that District, dated 25th February 1867.

Jaun Ali (Defendant), *Appellant*,

versus

Jan Ali (Plaintiff), *Respondent*.

Baboo Nullit Chunder Sein for Appellant.

Baboo Kishen Sukka Mookerjee for Respondent.

A defendant, who rested his defence in a suit for enhancement upon a pottah, which he set up as entitling him to hold free from enhancement under Section 4, Act X. of 1859, cannot plead that the tenure is protected from enhancement by reason of payment of rent at a uniform rent for 20 years.

Where the ground of enhancement was that defendant paid rent below the prevailing rate for land of similar description and with similar advantages in the places adjacent, and the plaintiff failed to prove the existence of any such ground, the plaintiff was not entitled

to a decree at the rates which the defendant's lands would bear, as Act X. of 1859 does not authorize enhancement of the rent of a ryot to the rates which the lands will bear.

Peacock, C. J.—THE first ground of appeal is, that the Lower Appellate Court has omitted to consider whether the tenure is protected from enhancement by reason of payment of rent at a uniform rate for 20 years next before the date of this suit.

That ground of appeal cannot be supported, as the defendant does not rest his defence upon that ground, but upon the ground that, as he had held under a pottah which he set up from 1222 Muggee, he was free from enhancement under Section 4, Act X. of 1859.

But we think that the judgment of the Judge must be reversed upon the second ground of appeal. The ground of enhancement was, that the rate paid by the defendant was below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent.

The plaintiff failed to prove the existence of any such ground for enhancement. The Judge says: "The plaintiff is entitled to a kubooleut at the neighbouring rates; but he has quite failed to prove by any trustworthy evidence what is the rate paid for neighbouring lands." Under these circumstances, the suit ought to have been dismissed, unless it was shown by evidence adduced on the part of the plaintiff what the rate paid for similar lands in the neighbourhood was. The Judge says: "I can only decree a kubooleut at the rate of Rupees 2-12 a kanee, which is that deposed to by the defendant's witnesses."

But the defendant's witnesses did not depose to the fact that Rupees 2-12 per kanee was the rate payable by the same class of ryots for land of a similar description and with similar advantages, but that it was the rate which the defendant's lands would bear. That fact, however, would not justify enhancement, as there is no authority under Act X. of 1859 to enhance the rents of a ryot to the rates which the land will bear.

There is no necessity, therefore, to remand this case, and the decision of the Lower Appellate Court must be reversed with the costs of this appeal, and the plaintiff must pay the costs in both the Lower Courts.

The 23rd January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mortgage—Money-decree.

Case No. 1446 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 11th March 1867, affirming a decision passed by the Moonsiff of that District, dated the 24th August 1866.

Gopee Muhtoon (Defendant), *Appellant,*

versus

Jhugoo Muhtoon (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Moulvie Syud Murhumut Hossein for Respondent.

The purchaser of the rights of a mortgagor who obtained possession of the property cannot be ousted summarily by a subsequent purchaser of a money-decree against the mortgagor.

Kemp, J.—WE think that the decision of the Principal Sudder Ameen is perfectly correct.

The special appellant purchased in execution of a money-decree, and if he has got possession of the disputed premises, it is clearly not under the bond by which the disputed premises are mortgaged, but in execution of a simple money-decree against the original mortgagors.

The mortgagors had, previous to this decree, sold their rights and interests to the special respondent who was in possession until ousted by the defendant, and, his prior possession and subsequent ouster having been found to be proved by both Courts, he is entitled to be restored to possession, and has been restored by the concurrent judgments of the two Courts.

The special appellant did not file the decree under which he purchased. It may be that, having purchased a simple money-decree, he is entitled to follow the properties into the hands of the plaintiff or any other party in possession. On this point we give no opinion, but it is clear that, without bringing a suit for that purpose, he cannot retain possession of the disputed property.

Appeal dismissed with costs and interest.

The 23rd January 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Right of Measurement—Section 9, Act VI. of 1862, B. C.

Case No. 1624 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Jessore, dated the 20th April 1867, reversing a decision passed by the Deputy Collector of that District, dated 20th July 1866.

Mr. J. Tweedie (Plaintiff), *Appellant,*

versus

Ram Narain Dass (Defendant), *Respondent.*

Mr. R. V. Doyne and *Baboo Woomesh Chunder Banerjee* for Appellant.

Baboos Sreenath Dass and *Issur Chunder Chuckerbutty* for Respondent.

The purchaser of a subordinate tenure who did not enter his name in the talookdar's sherishta, and whose tenure therefore was not wholly disconnected from the estate to which it had been joined, is liable to have his lands measured under Section 9, Act VI. of 1862, B. C.

Macpherson, J.—THE question in this case is as to the appellant's right to measure the respondent's lands under Section 9 of Act VI. of 1862 (of the Bengal Council).

One Dabee Pershad owned a talook of five mouzahs in turruf Ramchunderpore, the sudder jumma of which was Rupees 201. He sold his interest in two of these mouzahs (which two mouzahs are the subject of the present suit) to the respondent, the jumma upon them being fixed at Rupees 101. Dabee Pershad subsequently sold his Ramchunderpore talook to Obhoy Sunkar Chuckerbutty, who gave a mourossee lease of it to the appellant.

Dabee Pershad's kubalah to the respondent purported to transfer the two mouzahs to him out and out. The words used are to the following effect: "Having got your "name entered in the talookdar's sherishta, "according to demand you will pay your "rent at the above jumma of Rupees "101; I shall have nothing more to do "with it."

It is clear that, under this kubalah, if the respondent had got his name entered in the talookdar's sherishta, his estate would have been wholly disconnected from that of the appellant, and the present suit would not have lain. But he has never got his name entered in the talookdar's sherishta; and, as a matter of fact, he has paid his jumma of Rupees 101, not to the superior talookdar, but to Obhoy Sunkur Chuckerbutty, and after him to the appellant. Under such circumstances, the case appears to us to fall directly within the ruling of the majority of the Court (Peacock, C J., and Loch, J.) in the case of Baboo Ram Bahadoor Singh *versus* Mulooram Tewaree, VIII. Weekly Reporter 149—a case in which the Judge who was in a minority doubted rather than dissented; and we think the appellant has a right to measure the respondent's lands, and therefore that the decree of the Lower Appellate Court ought to be set aside, and the decree of the Court of first instance affirmed with costs.

The 23rd January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Evidence—Declarations of deceased persons—Section 47, Act II. of 1855.

Special Appeal from a decision passed by the Principal Sudder Ameen of Fureedpore in Dacca, dated the 23rd February 1867, reversing a decision passed by the Moonsiff of Bhangah, dated the 23rd August 1866.

Mohima Chunder Chund and others (Plaintiffs), *Appellants,*

versus

Mothoora Nath Ghose and others (Defendants), *Respondents.*

Baboo Tara Prosunno Mookerjee for Appellants.

Baboo Nilmonee Sein for Respondents.

Section 47, Act II. of 1855, does not refer to evidence of living witnesses, but to declarations of deceased persons in cases of pedigree, who, though not related by blood or marriage to the family, were intimately acquainted with its members and state. Such declara-

tions, after the death of the declarant, are admissible as evidence in the same manner and to the same extent as those of deceased members of the family.

Kemp, J.—THE points taken in special appeal are—

1st.—That the Principal Sudder Ameen was wrong in holding that the evidence adduced by the petitioners that they were the grandsons of Ram Keshub was not legal evidence. The pleader quoted Section 47, Act II. of 1855.

2nd.—That the Principal Sudder Ameen was wrong in concluding that, because in a petition presented by the plaintiffs, special appellants, they had styled themselves grandsons of Ramkisto, they were estopped from stating that they were the grandsons of Ram Keshub.

The plaintiffs had to prove that they were the grandsons of Ram Keshub; failing that, their suit must necessarily fail. They adduced some witnesses who gave hearsay evidence, and two witnesses, a Mahomedan and a servant, whom the Principal Sudder Ameen did not believe. The pleader quotes Section 47, Act II. of 1855, but that Section is wholly inapplicable.

That Section refers to declarations of deceased persons in cases of pedigree, who, though not related by blood or marriage to the family, were intimately acquainted with its members and state. Such declarations, after the death of the declarant, are admissible as evidence in the same manner and to the same extent as those of deceased members of the family.

But, in this case, we are treating of living witnesses who mostly speak from hearsay, and, where they speak of their personal knowledge, are not believed.

The Principal Sudder Ameen was wrong in laying any stress on the petition alluded to in his judgment; it was not before the Court of first instance. Moreover, it is of no great weight. The names of Ram Kisto and Ram Keshub are "eadem sonaus," and it is more than probable that the writing of the name of Ram Kisto, instead of Ram Keshub, was a clerical error. The plaintiffs having failed to prove that they were the grandsons of Ram Keshub, the founder of the family, their suit was properly dismissed.

Appeal dismissed with costs and interest.

The 23rd January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Hindoo widow—Maintenance.

Case No. 1112 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Fureedpore in Dacca, dated the 19th February 1867, affirming a decision passed by the Moonsiff of Muksoodpore, dated the 3rd August 1866.

Sreeram Buttacharjee and another (two of the Defendants), *Appellants,*

versus

Puddomookhee Debia (Plaintiff), *Respondent.*

Baboo Greeja Sunkur Mojoomdar for Appellants.

Baboo Womesh Chunder Banerjee for Respondents.

There is nothing in the law to prevent an increase or a decrease of the amount of maintenance allowed to a Hindoo widow, should sufficient cause be shown for either. The increase, if allowed, should be made from date of suit.

A widow's right to maintenance does not cease on her leaving her husband's house.

Jackson, J.—THIS was a suit for an increased amount of maintenance by a Hindoo widow against the members of the family in possession of the family-estate. It is admitted that she has, since her husband's death, received a maintenance of 3 rupees a month. But it appears that she left the house of her husband's family, and removed to her own father's house. Since then the family have refused to pay further maintenance. She now claims Rupees 4-8 per mensem, and has obtained a decree for that amount, looking to the family-assets and other circumstances.

On special appeal, it is said that the amount should not have been increased. We think that there is nothing in the law

to prevent an increase of the amount, as there is nothing to prevent a decrease, should sufficient cause be shown. But that increase should have been awarded by the Lower Court only from the date of suit, and not from the date on which the former payments ceased. We modify the decree of the Lower Court to that extent, and on the cross-appeal of the widow, we further modify it, and award her all arrears due to date of suit from last date of payment, Kartick 1270, at the old rate of three rupees a month, which the Lower Court refused to award on a mistaken rule of limitation.

Another question has been raised before us, *viz.*, whether the widow's right to maintenance does not cease on her leaving her husband's house. This question has been frequently decided. One of the last occasions in which the old authorities were alluded to is to be found at Volume VI., page 37, Weekly Reporter. We follow those rulings.

The decree of the Lower Court is modified as above stated. Interest will run from date of this decree. The costs of this appeal will be paid by appellants.

The 23rd January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Suit by Mahomedan wife against husband — Cause of action — Limitation — Onus Probandi — Presumption.

Case No. 1898 of 1867.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 20th of May 1867, affirming a decision of the Moonsiff of Raojan, dated 5th December 1866.

Abdool Ali *alias* Shoageea (one of the Defendants), *Appellant*,

versus

Kurrumnissa (Plaintiff), *Respondent*.

Baboo Bama Churn Banerjee for Appellant.

No one for Respondent.

In a suit by a Mahomedan lady against her husband, after divorce, for recovery of property belonging to her, which her husband held before divorce, the cause of action to the wife arose at the time of the separation, the possession of the husband being the possession of the wife: the *onus* lay on the husband to prove his right to the property; till that was done the presumption was, that the property so held by the husband was held by him on behalf of the wife.

Peacock, C. J.—The first Court found upon the evidence that it was manifest that the defendant's marriage with the plaintiff was the only cause of his holding possession of her property, and not that it was his own right. There was an appeal to the Judge upon the following ground, amongst others, that there was no evidence that the appellant only occupied the land on behalf of his wife. But when we look at the evidence, we think that there was evidence from which the Moonsiff was perfectly justified in drawing that conclusion. The main question in the cause was, whether the wife, who, after her divorce from her husband, had sued him to recover this property, was barred by limitation.

The Judge did not in so many words say that there was evidence that the husband occupied the land only in his wife's behalf; but he says that the divorce took place about 4 years before the institution of the suit, and that up to that date it was impossible to expect any proof of separate possession on the part of the plaintiff, and that the Lower Court was right in holding that the cause of action arose at the time of the separation; meaning that the wife was not bound to sue her husband to recover possession of the land so long as the marriage continued, and that the possession of the husband was the possession of the wife, and not an adverse possession on his own behalf until the time of separation.

One ground of appeal is that the Lower Court was wrong in considering the divorce to be the cause of action, the Judge having said nothing of the kind, but merely that the cause of action arose at the time of separation.

Another ground is, that the Court was wrong when trying the plea of limitation in not finding whether the plaintiff or her father had actual or constructive possession

within 12 years of the commencement of the suit. But the Judge found that the wife had constructive possession up to the time of divorce by means of her husband's holding.

A third ground is, that the Court was wrong in throwing the *onus* upon the defendant to prove his title, whilst it was for the plaintiff to prove that she was in possession within 12 years. We think that the Judge was right in throwing the *onus* upon the defendant of proving that the property belonged to him, and not to his wife, and that, until he proved such title, and thereby rebutted the title of the wife, it must be assumed that up to the time of the divorce his possession was her possession.

The remarks made by the Privy Council in the case of Ameeroonissa against Moradonissa, in the 6th Volume of Moore's Indian Appeals, p. 211, with reference to a case in which it was contended that it was necessary for the wife to demand lands which had been assigned to her as dower by her husband, are very applicable to this case, as showing that it could not be expected that, during the marriage and before divorce, the wife should sue the husband to compel him to relinquish to her the possession of the lands which belonged to her. The Lords of the Judicial Committee say: "It is important to consider how inconvenient it would be if a married woman was obliged to bring an action against her husband upon such an instrument. It would be full of danger to the happiness of married life." So we should say, it would be full of danger to the happiness of married life, if a wife could not allow her husband to be in possession of her property whilst they were living in terms of friendship, lest she should be barred by limitation in case a divorce should take place between them after the husband had held such possession for a period of 12 years.

The decision of the Lower Appellate Court is affirmed with costs, as the respondent has not appeared.

The 23rd January 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Onus Probandi—Declaratory Suit.

Case No. 1765 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 8th May 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 6th September 1866.

Royes Mollah and others (some of the Defendants), *Appellants,*

versus

Mudhoo Soodun Mundul (Plaintiff), *Respondent.*

Baboo Gopal Lall Mitter for Appellants.

Baboos Bungshee Dhur Sein and *Ashootosh Chatterjee* for Respondent.

The *onus* in a suit in which the plaintiff seeks to obtain a declaration that the defendants held a tenure under him lies on the plaintiff, who must prove strictly the title under which he seeks that declaration.

Seton-Karr, J.—In this case a very long argument from both sides has been heard by us as to whether or not the plaint disclosed any cause of action, and as to whether it should not, on its first appearance, have been put out of Court, and, consequently, whether we might not even now be asked to dismiss the suit altogether on that ground.

I think that the cause of action disclosed by the plaint itself is so confused, dark, and unintelligible, that a proper scrutiny by the first Court would have led the Moonsiff to the conclusion that no cause of action was shown. But as this point was not urged either in the first Court, or in the Appellate Court; as a cause of action was apparently disclosed from the written statement, and from the decision of the Deputy Collector, which is alleged in the plaint, though vaguely to form the cause of action, and as the case was allowed to go to trial, I am of opinion that it is too late now for the special

appellant to derive any advantage from what, undoubtedly, was the mismanagement of the plaintiff, and the obvious defect in the plaint.

But on the second objection, which is to the effect that the plaintiff has not been put, as he ought to have been, to a strict and proper proof of title, and that justice has thereby wholly miscarried, the appeal is good. The Principal Sudder Ameen has wholly lost sight of the *onus* of proof, and his judgment must be set aside.

The case must be remanded to the Judge, who will pass a fresh decision on the appeal.

The cause of action appears to me to arise out of a suit brought by the plaintiff, special respondent, for rents before the Deputy Collector. In that suit the plaintiff alleged that the defendants held a jumma of 52 rupees, some annas, on only 45 beegahs of land.

The defendants alleged, on the other hand, that their jumma had been one of 207 beegahs held at a rent of 259 rupees, but that they had been put out of possession, by the act of the plaintiff, of some 35½ beegahs.

The Deputy Collector, though he decreed a portion of the plaintiff's claim, or 35 rupees instead of 52 rupees, did certainly hold the version of the defendants, as to the extent of the jumma and apparently as to the nature of the plaintiff's interest in the land, to be the correct version, and it may, therefore, be said with truth by the plaintiff that his title as jotedar in a portion of the land is, by that decision, endangered or prejudiced. But, such being the cause of action, it will be for the Judge to require from the plaintiff strict proof of title and of that possession of the land, as jotedar, which he puts forward.

The Judge will require the plaintiff to account for the disappearance of two out of the four *kubalas* alleged to be his title-deeds; and he will also require and pronounce upon proof of the remaining two *kubalas* that have been put in. He will also look carefully to the possession alleged by the plaintiff as jotedar, and he will require strict proof of the documents by which that possession is supported. If he finds the plaintiff's title-deeds proved in whole, or in part, he must say by what particular title-deed particular spots of land, as claimed, are held. In short, he must put the plaintiff, who volunteers statements as to title and long possession, to strict proof of his claim; and, after considering any further evidence which either party may think necessary to adduce, he will decide the case on the merits, with as little delay as possible.

The case is remanded to the Judge accordingly, but the special respondent must pay the special appellant his costs of this appeal, independently of the ultimate result of the case after remand, inasmuch as the case was not properly put before the Court by the plaintiff.

Macpherson, J.—I concur in the proposed order.

The main object of the suit is to obtain a declaration that the appellants held under the plaintiff a tenure of 45 beegahs and no more, in respect of which a rent of 52 rupees and some annas is payable to the plaintiff. The plaintiff must prove strictly the title under which he seeks this declaration.

The 3rd January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Onus Probandi—Limitation—Possession—Oral evidence.

Case No. 2971 of 1866.

Special Appeal from a decision passed by the Judge of Purneah, dated the 2nd August 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 23rd March 1866.

Dinobundhoo Suhaye and others (Defendants), *Appellants,*

versus

Mr. James Furlong, general manager on behalf of the Rajah of Durbhangah (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboo Kishen Kishore Ghose for Respondent.

In deciding the plea of limitation, it is for the plaintiff to prove that he has been in possession within 12 years of date of suit, and not for the defendant to prove adverse possession for 12 years.

Oral evidence is alone sufficient to prove possession.

Jackson, J.—THIS case must be remanded. The Judge, in deciding the question of limitation, must find whether the plaintiff has proved that he has been in possession within 12 years of the date of suit. As it is, he has not found whether the plaintiff has proved anything, but he states that the defendant has not proved adverse possession for 12 years. And, even in deciding upon this question, he has stated that the defendant's adverse possession is not proved by the "*oral evidence alone*," as the witnesses have not produced documentary evidence in support of their depositions. It is not clear from this, whether the Judge intended to say that he disbelieved the witnesses because they did not produce their documentary evidence, or that he considered that such evidence was not legally sufficient to prove possession. If he meant the latter, he was in error. If he meant the former, his decision is sufficient in law.

As on the first point the case is remanded, the Judge is requested, in re-deciding the case, to record his judgment in distinct terms.

The 24th January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Damages—Tort.

Case No. 238 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 4th July 1867.

Sreehuree Roy and others (Defendants), *Appellants,*

versus

Mr. James Hill (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboo Rash Beharee Ghose* for Appellants.

Messrs. G. C. Paul and *J. S. Rochfort* for Respondent.

In a suit in which it is proved that defendants maliciously and from gross negligence allowed their cows to trespass on plaintiff's lands, and to destroy the indigo-plants thereon, knowing the value of the crops to the plaintiff, it was held that the case was one of tort in which, the wrong being deliberate and malicious, the plaintiff was entitled by way of damages, not to the mere value of the growing plants destroyed as the actual loss sustained, but to substantial damages sufficient to compensate the plaintiff the loss of profits which would have been obtained from the indigo-plant.

Jackson, J.—THIS is a suit to recover damages for the destruction of indigo-plant growing on 250 beegahs of neej-cultivation, belonging to the indigo-planter by the wrongful act of the defendants, in allowing their cattle to trespass upon the indigo-lands for several days. The evidence was to the effect that the defendants' cattle, several hundred in number, had either been driven into the indigo, or from gross negligence had been permitted to stray into it. The Principal Sudder Ameen, who first tried the case, dismissed the plaintiff's suit, distrusting the evidence. This Court on regular appeal held that, although the circumstances had been greatly exaggerated, the evidence proved that some damage had been incurred, and remanded the case to the Lower Court to ascertain the extent of injury, and award damages to that extent. The Principal Sudder Ameen then deputed an Ameen to the spot to report on the extent of injury and amount of damages. The Ameen appears to have acted upon the supposition that the whole of the indigo growing on the alleged 250 beegahs was completely destroyed. In the first place he measured the land, and found it to be 210 beegahs, and not 250 beegahs. Then he found upon the evidence that the average yield of indigo in that neighbourhood in that year had been 13 bundles the beegah. Then he calculated from the papers put in by the plaintiff and the account-sales of indigo of that year that this indigo would, if manufactured, have given to the plaintiff about 1 maund of indigo for 100 bundles of plant, and a profit of Rupees 5,176. He apportioned this among the defendants according to the number of cattle each was shown by the evidence to have allowed to go upon the land. The Principal Sudder Ameen adopted this report *in toto*, and decreed accordingly.

Mr. Doyne, for the defendants in appeal to this Court, has argued that the plaintiff cannot recover more than the actual value of the growing plant as it was when it was destroyed, and that all the damages resulting from what might have been the profits when the plant was manufactured into indigo should have been left out of consideration,

such damage being too remote, and not necessarily and immediately arising from the act of the defendants. Mr. Paul for the plaintiff, on the other hand, refers to a decision of the late Sudder Court dated the 26th April 1849, page 124 of the Reports for that year, showing that such damages are sometimes awarded, and contends upon the facts of this case that, although vindicative damages are not asked for, his client is entitled to substantial damages, and to have the point of the profit which he would have obtained from his indigo-plant taken into consideration.

I think, in the first place, that the Lower Court has altogether misconceived the remand-order. This Court did not find that the whole of the indigo growing on this land had been utterly destroyed, but that some damage had been done, although the facts were greatly exaggerated. The Ameen, as well as the Lower Court, has enquired into the amount of damages to be awarded, as if the whole of the evidence was true, and there had been no exaggeration at all in the depositions of the witnesses. Still I think that we ought not again to remand this case; and, looking to the acts of the parties, I would inflict such a penalty upon the defendants as would, to some extent, remunerate the plaintiff for his loss, and on the other hand would prevent the defendants from committing such injury upon him in future.

I am not prepared to hold with Mr. Doyne that, in such a case the acts of the defendants being, if not deliberately wilful, at least the result of gross negligence, no consideration should be given to the amount of profit which the plaintiff might have realised from his indigo-plants. One rule which is often laid down in assessing such damages is—What is the damage resulting from the acts of the defendants which might have been contemplated by the defendants as naturally arising from the acts done? Here the defendants knew perfectly with what intentions this indigo-plant had been raised. They knew its present value, at the time they injured it, did not in any way correspond with the value which it represented to its owner. The crop was nearly ripe for cutting and for manufacture, and could not at such a season be replaced. The defendants knew that they were allowing a valuable property to be injured. The penalty which they must be made to pay must, to some extent, be such as to compensate the plaintiff for the loss of that valuable article. It is very difficult to understand how the acts of the defendants can be held to come even within the hypothesis of gross negligence. Had the cattle strayed into the indigo on one day only, there might have been some excuse on the ground that their act resulted from the negligence of some one. But here the cattle were allowed to stray in day after day for several days, and the cattle were very numerous. There can be no doubt that the result was serious injury to the plaintiff, who is accordingly entitled to substantial damages.

The defendant Sreehuree Roy seems to have been the principal defendant, and his cattle seem to have been far more numerous than the cattle of the other defendants. I assess the damages against him at Rupees 1,000, and against the other defendants, except Ramjoy Ghose, at Rupees 100 each, and against Ramjoy Ghose I confirm the damages awarded against him in the Lower Court, *viz.*, Rupees 71-11-10. The defendants will pay all the costs of this action. The plaintiff will recover interest on the damages here awarded and on the costs of the suit from this date to date of payment.

Kemp, J.—I concur in this judgment, as also in the measure of damages.

I think that this is a case in which substantial damages should be awarded. The injury was wantonly caused. The trespass was not confined to one instance, but was continuous; and further the defendants, appellants, forcibly rescued the cattle which had been seized damage *feasant*, and for which they were fined by the Magistrate under Act III. of 1857.

In actions of tort where the wrong has been deliberate and malicious, as in the present instance, the Courts will give liberal damages, and it is well known that in cases of reckless or mischievous acts injurious to others, even where vindictive damages are not claimed, the party in the wrong is often made answerable for consequences very remote from the original act. Sedgwick on Damages, page 81, Chapter 3, marginal page 79.

In this case a large area of indigo was destroyed; the cultivation was neej; the crop was ripe; there can be no doubt that the value of the said produce would not adequately represent the value of

the crop to the planter, and though the planter is clearly not entitled to recover the full value of the indigo when manufactured, without deductions for manufacturing charges, risk, &c., he is entitled to recover substantial damages; and, therefore, without attempting to aim at a complete and accurate estimate of the compensation which would be adequate, I adopt the scale of damages assessed by my learned brother as under all the circumstances of the case fair and equitable, with this exception which I have no doubt Mr. Justice Jackson will concede, that, instead of awarding 100 rupees against the defendant Ramjoy Ghose, I would award Rupees 71-11-10, the amount awarded by the Lower Court.

The 24th January 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Enhancement—Presumption of uniform payment of rent.

Case No. 1628 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 9th April 1867, affirming a decision passed by the Deputy Collector of that District, dated the 31st December 1866.

Pearee Mohun Mookerjee (Plaintiff), *Appellant,*

versus

Anund Moyee Debia and others (Defendants), *Respondents.*

Baboo Mohendro Lall Shome for Appellant.

Baboo Otool Chunder Mookerjee for Respondents.

What is sufficient evidence to warrant a presumption that a tenure has been held at an uniform rate for 20 years will depend upon the circumstances of each case.

Macpherson, J.—As regards the objection that the defendant in one of his pleas disputed the plaintiff's title as landlord—this objection was never taken in either of the Lower Courts, and we shall not allow it to be taken now, as it never was a substantial issue in the case.

As regards the point that there was no evidence on which the Lower Courts could arrive at a presumption in favor of the defendant—it appears to us that there is evidence on the point quite sufficient to support the decisions, reading the judgment of the Judge.

In so finding, we in no way depart from the ruling in the case of Kunuck Monee Debia *versus* Gunga Ram Doss and others, reported at page 135 of the Weekly Reporter, Volume III., Act X. Rulings. All that was decided there was, that the mere fact of the rent being found to be the same in 1841 and in 1862 did not create necessarily a presumption that the rent remained the same between those years. In the present instance, the evidence is of a very different character: for a series of years between the date of the Moonsiff's decision in 1837 and the institution of the present suit the rent is proved to have been uniform, as alleged by defendant.

We dismiss the appeal with costs.

The 24th January 1868.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Issumnuvisee papers—Evidence—Ghatwals—Putneedar—Limitation—60 years' possession—Review—High Court—Defendants.

Cases Nos. 307 to 318 of 1867.

*Applications for Review of Judgment passed by the Hon'ble Justices H. V. Bayley and W. Markby, on the 23rd July 1867, in Regular Appeals Nos. 305 and 306 of 1865 and 13 to 22 of 1866.**

Nos. 307 to 318 of 1867.

Mr. W. Fergusson, Plaintiff, Appellant, *Petitioner,*

versus

The Government and others, Defendants, Respondents, *Opposite Party.*

Mr. R. T. Allan and *Baboos Tarucknath Sein* and *Bungshee Dhur Sein* for Petitioner.

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* *See* 8 W. R., p. 232.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Opposite Party.

Cases Nos. 339 to 350 of 1867.

The Government, Defendant, Respondent, *Petitioner*,

versus

Mr. W. Fergusson, Plaintiff, Appellant, *Opposite Party*.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Petitioner.

Mr. R. T. Allan and *Baboo Bungshee Dhur Sein* for Opposite Party.

Former decision rejecting issumnuvisee papers, which were not satisfactorily proved, as conclusive evidence of a putneedar's title to land, adhered to. If properly supported and proved, such papers are only *primâ-facie* evidence, until rebutted.

Where the defendant in a suit for ejectment, on refusal to give a kubooleut, pleaded limitation generally, and it was found that the defendant had been in possession from before the Decennial Settlement, the question of limitation by reason of 60 years' possession was substantially raised, and the plaintiff was declared barred under Clause 3, Section 3 of Regulation II. of 1805.

That there is a difference of opinion between two decisions of the High Court on questions of fact is no reason why, on review, a reference to a Full Bench shall be made.

Only persons, whose claims must necessarily be taken into consideration before deciding on the plaintiff's title, should be joined as defendants in a suit.

Markby, J.—In July last, we decided twelve cases as to the rights of a putneedar over certain ghatwals holding lands within his putnee-talook, in all of which suits the putneedar was plaintiff.

Mr. Allan, on behalf of the plaintiff, has now applied for a review in all these cases upon the following grounds:—

1st.—Because the issumnuvisee papers were prepared in the ordinary course of business under the provisions of Regulation XVII. of 10 or 12 of 1807, &c., and they were, therefore, always received by the Court of this country as good legal evidence of the ext nt of the ghatwalee tenure.

2nd.—Because the police-report shows that the preparation of the issumnuvisee papers was made according to law, and was a correct statement of facts.

3rd.—The finding of this Hon'ble Court of defendant's possession for more than 60 years is opposed to the actual state of things, as the lands in dispute were formerly jungle, and have been gradually cleared and cultivated by way of encroachment.

4th.—When the defendants have not produced their title-deeds, and have not proved their right to the disputed land, they are in no way entitled to the lands, which are still in jungle-state, and are not in actual possession of anybody.

5th.—If the issumnuvisee papers be accepted as good evidence, the allegation of defendant's possession before the Permanent Settlement, or of 60 years back, must fall to the ground.

It is not very easy to comprehend these grounds of review as they stand, still less are we able to see that they raise any point not fully disposed of at the hearing. Mr. Allan has attempted again to convince us that these issumnuvisee papers are binding and conclusive on the ghatwals. But he brings no authority for such a proposition, nor is it probable that he could do so, for it would be contrary to the principles of justice if a man's title to land were to be for ever barred by such records as these. Mr. Allan further contends that these papers are at least good *primâ-facie* evidence, until rebutted. But that is exactly how we have treated them. No question was raised on either side as to their admissibility, nor was it ever denied that they were entitled to some weight. The sole question was, how far they were outweighed by the evidence for the defendants.

Mr. Allan has brought to our notice a decision of Mr. Justice Glover of the 18th September last, from which it appears that a review was applied for in some similar cases, on the ground that we had held that the issumnuvisee papers were inadmissible in evidence. But our judgment was not then printed, and Mr. Justice Glover appears to have been misinformed as to the nature of it. To prevent any future misunderstanding, we repeat most distinctly that no question as to the admissibility of these documents was before us.

Another point raised on this review was, that the question of limitation by reason of 60 years' possession was not open in the two cases (Nos. 305 and 306), to which it has been applied by the Court. But we consider that it was. The plea of limitation was taken in the Lower Court *generally*. The Judge applies himself to the question of possession, and finds that the defendants

have been in possession from before the Decennial Settlement. Upon this, he holds that the plaintiff is barred by the 12 years' limitation. This view of the case would, as we have pointed out, have led us to consider a number of questions of law and fact, in all probability ultimately leading to a remand. But this was wholly unnecessary, for if the defendants have, as the Lower Court held, been in possession from before the Decennial Settlement, there seemed to us to be more than one complete answer to the plaintiff's case. One of these is under Clause 3, Section 3 of Bengal Regulation II. of 1805, making 60 years a complete bar; and this Regulation was distinctly relied on during the argument, without objection on the part of the plaintiff that the plea had not been taken below. Failing on these points, the plaintiff has now made an application of rather a novel kind. He says that he was taken by surprise by the view which this Court has taken of the issumnuvisee papers, which had been always treated as sufficient to prove the putneedar's right to assess, and he now applies to us to grant this review in order that we may remand these cases to obtain further and better evidence in support of the putneedar's right, or that we may take this evidence ourselves; and he supports this application by a statement that two hundred cases have been decided against him upon the authority of our decision. He does not state what the evidence is which he wishes to supply, nor that it was not within his knowledge, or could not have been adduced by him when the decree was passed. The argument on these appeals lasted three days, and we took some time to consider our judgment, and though it must have been pretty clear that the plaintiff stood in some peril of losing his case if he relied on these papers alone, no application was then made to us to admit this evidence, except that Mr. Allan asked leave to examine a ghatwal who happened to be present at the argument. This we rejected, because an inquiry of so very limited a nature, coming at that stage of the case, could not, we considered, be otherwise than unsatisfactory. The groundlessness of this application becomes further apparent, when it is recollected that about a year ago, in cases precisely similar to the present, in which the same plaintiff was appellant, the Court distinctly refused to receive these papers as evidence of anything more than the quantity of land then under cultivation. It is impossible to say after this that the appellant was taken by surprise by our decision.

Another application that has been made to us is, that we should admit the review in order that the case may be sent to be argued before a Full Bench on account of the conflict between our decision and that of the other decisions of this Court referred to in our judgment. But any difference that exists is not one of law, but of fact, and it is not the practice of this Court to refer questions of fact to the decision of the Full Bench.

In truth, moreover, this long series of cases, which have now been before this Court and the late Sudder Court for 8 or 9 years, though they have originally many features in common, have been so differently dealt by the parties themselves in their statements and admissions, have been brought up on appeal on such entirely different grounds, and have been supported by such varying evidence, that there is now no distinct identity between them. The conflict between the decisions of this Court is, therefore, more apparent than real, even upon the matter of fact. We, therefore, reject the several applications made on behalf of the plaintiff.

A counter-application for review has been made in all these cases by the Government Pleader, who complains of that part of the judgment by which the Government is deprived of costs. It was stated at the argument, and not denied, that the Government was originally made a party to these appeals on its own application. This appears now not to have been the case with regard to the suits actually before us, to which the Government was originally made a party by the plaintiff. The fact is that the Government was made a party to a set of similar suits in 1859 on its own application by an order of the late Sudder Court, and it was probably in consequence of that order that Government has been made a party by the plaintiff to the present suits also.

Under these circumstances, it can hardly be said that Government is to blame in having defended these suits. It is true that no relief or decree of any kind is asked against it, but it might not unnaturally be desirous to protect and defend the interests of the ghatwals, who are public servants, and not well able to defend themselves. Govern-

ment having, therefore, been made a party to these suits by the plaintiff, we think it ought not now to be altogether deprived of costs.

We, therefore, under the altered circumstances now before us, grant the review in order to correct this part of our judgment, and we direct the appeals to be dismissed as against Government, with costs.

At the same time, we desire to say that we adhere to our opinion that the Government ought not to have been made a party to these suits. Since the decision referred to of 1859, the Code of Civil Procedure has come into operation, and this Court has recently taken a stricter view of the provisions as to making persons having different interests parties to a suit. We find that precisely the same view was taken by the Chief Justice and Mr. Justice L. S. Jackson, in the case of Joy Gobind Doss *versus* Goureeproshad Shaha, reported in 7 Weekly Reporter 201. It was there laid down as a rule that those persons only should be joined as defendants in a suit, whose claims were necessary to be taken into consideration before deciding on the plaintiff's title. We think that the rule is there properly laid down, and that it is of the greatest importance that it should be strictly adhered to. If the Government is desirous of protecting its own interests, or those of the ghatwals, it is scarcely probable that it will find any difficulty in inducing the ghatwals to accept its assistance.

The 24th January 1868.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Review—High Court—Transfer of tenure—Registration.

Case No. 278 of 1867.

*Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and W. Markby, on the 25th June 1867, in special appeal No. 243 of 1867.**

Nobeen Kishen Mookerjee (Appellant), *Petitioner,*

versus

Shib Pershad Pattuck (Respondent), *Opposite Party.*

Baboo Umbika Churn Banerjee for Petitioner.

Baboos Nil Madhub Sein and *Kishen Succa Mookerjee* for Opposite Party.

That one Division Bench of the High Court has decided a point at variance with the decision of another Division Bench is no reason for applying for a review of judgment.

A zemindar has a perfect right to bring a tenure to sale for arrears of rent without regard to the rights of the new tenant, while he is yet unregistered.

Markby, J.—In this case, the pleader has applied for a review on the sole ground that the decision of Mr. Justice Bayley and myself in this case is at variance with the decision of Mr. Justice Kemp and myself in special appeal No. 2104 of 1866, delivered on the 14th of February 1867.

For my own part, I wish to say that I do not consider it any ground for re-opening a case, which has been fully argued, that the diligence of the pleader, which ought to be applied before the decision, has discovered, since the decision, an authority in his favor.

But it may be as well to point out that there is no conflict between the decisions. Both, it is true, are suits by a plaintiff, who has purchased a permanent transferable interest, to have his title declared as against the zemindar; and in both cases the transfer is unregistered in the zemindar's sherishta. But there is this important difference that, in the former case, the zemindar has, under Section 105 of Act X. of 1859, brought the tenure to sale for arrears of rent, and had himself become the purchaser; whereas in the latter case the tenure had *not* been brought to sale at all. This is the essential part of the transaction, because it is the necessity of that mode of proceeding which gives the transferee of the tenure his protection. If the zemindar proceeds to sell the tenure for arrears of rent, the tenant can deposit the rent and prevent a sale. On the other hand, the zemindar is fully protected, because, unless the rent be deposited in full, the sale will proceed.

This view of the Regulations and enactments of the Legislature is perfectly consistent with both decisions. The pleader has relied on one expression in the former judgment, in which it is said that "the plaintiff had at that time as against the zemindar no right whatever." The expression is a little too strong, but taken with what precedes and follows, the meaning is perfectly clear, that is to say, that a zemindar has a perfect right

* *See* 8 Weekly Reporter, page 96.

to bring a tenure to sale for arrears of rent without regard to the rights of the new tenant, while he is yet unregistered. But we never said in that judgment, or intended to say, that, *without bringing the tenure to sale*, the zemindar may, under all circumstances, treat the unregistered transfer as a nullity.

I think the application for a review ought to be dismissed with costs.

Bayley, J.—I concur.

The 24th January 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Admission—Relation of Landlord and Tenant.

Case No. 1559 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 11th April 1867, affirming a decision passed by the Collector of that District, dated the 15th January 1867.

Obhoy Gobind Chowdhry (Plaintiff), *Appellant,*

versus

Beejoy Gobind Chowdhry (Defendant), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Issur Chunder Chuckerbutty and *Sreenath Doss* for Respondent.

Where the defendant, in a former suit, admitted the relation of landlord and tenant between himself and the plaintiff, it was held that, in a subsequent suit for a kubooleut by the plaintiff, it was sufficient for the plaintiff to put in the defendant's deposition in the former case as proof of the relation of landlord and tenant.

Macpherson, J.—We think that this case ought to be remanded to the Judge for retrial, because it appears to us that the Judge has not fully appreciated the position of the parties.

The defendant in his deposition in the former suit for contribution did expressly admit the relation of landlord and tenant between himself and the present plaintiff, in respect of the one-anna share, of which the *kubooleut* is now sought. We think he has made this admission inasmuch as he says he has actually paid the jumma or malgoozaree of the one-anna share to plaintiff's mother, as mother and guardian of the plaintiff.

This being so, when the plaintiff put in evidence the defendant's deposition, he proved a sufficient and strong *primâ-facie* case against the defendant, and no further proof was necessary from the plaintiff as regards the relative position of himself and the defendant; and it then lay entirely on the defendant to rebut the case so made. We do not say that the defendant's admissions in his former deposition are absolutely conclusive against him; but they certainly are cogent evidence against him.

The only point on which it is still necessary for the plaintiff to give further evidence is as to the actual amount of rent to be fixed in the *kubooleut*, for on this point we do not find that the defendant made any admission.

The Judge will try the case himself, and take any further evidence which may be available and necessary.

The 25th January 1868.

Present:

The Hon'ble Sir Barnes Peacock *Kt.*, *Chief Justice*, and the Hon'ble C. Hobhouse, *Judge.*

Distraint—Jurisdiction—Small Cause Court—Sections 23, 139, 142, and 143, Act X. of 1859.

Reference to the High Court by Mr. R. Towers, Judge of the Small Cause Court at Santipore.

Joyloll Sheikh, *Plaintiff,*

versus

Brojonath Paul Chowdry, *Defendant.*

Baboo Tarucknath Dutt for Plaintiff.

Mr. G. A. Twidale for Defendant.

A distrained the paddy of *B*, alleging that it belonged to *C*, who was *A's* ryot. It was found that there was no relation of landlord and tenant between *A* and *B*, and that *C* was acting in collusion with *A*. *B*

attempted under Section 139, Act X. of 1859, to get possession of the distrained paddy from *D* and *E*, to whose custody it had been made over under Section 118 of Act X., but was unsuccessful. *B* now sues *A*, *C*, *D*, and *E* for damages in the Small Cause Court.

HELD that this suit is one falling either under Section 139 or Section 143 of Act X. of 1859, and comes under Section 23 of that Act, and is not cognizable in a Small Cause Court, but only by a Revenue Court.

All suits which are specially provided by Act X. of 1859, and which arise out of the exercise of the power of distraint, or out of any acts done under color of the exercise of the said power, are within the provisions of Section 23 of that Act.

The Sections of Act X. of 1859 (Sections 139, 142, and 143) which relate to distraint, and the power to distrain, discussed.

Case.—THE facts of case No. 482, to which No. 483 is analogous in every respect, are these. Defendant 1, between whom and plaintiff the relation of landlord and tenant does not exist, applied for assistance to the Collector under Section 119 of Act X. of 1859, and, having obtained it, distrained plaintiff's paddy, alleging that it was the property of defendant 4, who is defendant No. 1's ryot, and, in collusion with him, defendant 1 had the paddy cut and carried away on the 17th and 18th Aughran. On the 20th plaintiff filed a petition in the Deputy Collector's Court under Section 139 of Act X., stating that defendant 1 had cut, and was carrying off his paddy, and praying for its release and damages. The Deputy Collector directed plaintiff to furnish security to the value of the crop, ordered that it should be given up to him. and issued a summons to defendant 1. Meantime, plaintiff tried to get possession of the paddy (for which he had given security according to the Deputy Collector's order) from defendants 5, 6, and 7, in whose custody, as required by Section 118 of Act X., it was stated to have been deposited by defendant 1. Plaintiff was unable to get possession of the paddy, and his suit under Section 139 was subsequently heard by the Deputy Collector, and dismissed for two reasons: *first*, because the party whose paddy defendant alleged he was distraining was not made a co-defendant as required by Section 139; and, *secondly*, because no legal distraint had been proved.

The Deputy Collector observed that, had there been a legal distraint, plaintiff could have got the paddy from the parties in whose charge it was stated to have been placed. Plaintiff, having lost his suit in the Revenue Court, now sues for damages in this Court; and the question on which the opinion of the High Court is solicited is, whether on the above facts the case is cognizable by the Small Cause Court or not.

Clause 7, Section 23 of Act X. of 1859, lays down that "all suits arising out of the exercise of the power of distraint, conferred on zemindars and others under Sections 112 and 114 of this Act, or out of any acts done under color of the exercise of the said powers as hereinafter particularly provided," shall be cognizable by the Revenue Courts, and no other. The wording of this Clause is very comprehensive, and I confess that I was at first of opinion that it embraced cases like the present one. A more attentive examination, however, of the subsequent Sections relating to distraint has led me to doubt the correctness of that opinion.

The Sections particularizing the different circumstances under which suits relating to distraint may be instituted are Sections 124, 126, 139, 140, 141, 142, and 143. Of these Sections, 124 applies to cases in which applications for sale of the distraint-property has been made to the Civil Court Ameen, and in which that officer has served the defaulter with a notice either to pay the demand or institute a suit to contest it. This contemplates a more advanced stage of proceeding than was reached in the present case. Section 126 seems also to contemplate cases in which application for sale has already been made to the Ameen; it states that, "when such suit is instituted, the Collector shall proceed in the manner prescribed in the last preceding Section, *viz.*, that he shall transmit to the Civil Court Ameen or other officer, or, if so requested, shall deliver to the owner of the distrained property, a certificate of the institution of such suit, and on such certificate being received by, or presented to, the Ameen or other officer, he shall suspend proceedings relating to the sale of the distrained property.

Section 139 (under which plaintiff sued before the Deputy Collector) seems, at first sight, applicable to the present case; it supposes, however, that the distraint is being legally and regularly carried on, and that the crop is in the custody of a party who is in a position to deliver it up on security. Such was not the case here. The crop had been already carried away by defendant. Again, the relief prescribed in Section 139 is "the release of the distraint-property with costs and *such* damages as the circumstances of the case may seem to require."

The case of Sheikh Gurriboolah Sayafullah, 7 W. R. 41, indicates the construction to be put on this Section. It is there observed: "Section 139 provides for a suit by a third party, *not for damages*, but for the release of the property distrained." In plaintiff's suit before the Deputy Collector, a decree for the release of the distrained property would have been a dead letter, as that property had already been made away with by defendant.

Section 140 has evidently no bearing on a case like plaintiff's. Section 141 contemplates cases where there has been a sale. Section 142 is very comprehensively worded, and would seem to include all cases where the distrainer, by acting illegally, has caused any injury to the owner of the property distrained. On turning, however, to the ruling already quoted, I find the learned Judges observing that "Section 142 refers to a case where the property distrained is of a ryot, who does not deny that relation to exist between himself and the distrainer." In the present case that relation is denied by both parties.

Section 143 applies to cases where a person not empowered to distrain property under Section 112 or 114, nor employed for the purpose under a written authority by a person so empowered, distrains or sells, or causes to be sold, any property under color of the Act. Now, I take it that the words "empowered to distrain property" do not mean "empowered to distrain the particular property in question in a case about which a suit may have arisen," but that they are used to indicate persons who, from their position as zemindars, lakhirajdars, &c., are by law invested with the general power of distraint. In the present case defendant 1 is a zemindar, and carried on the distraint through defendant 2, his gomastah, and there is no allegation on the record that the latter was not duly empowered according to Section 114. I think, therefore, that defendants are persons empowered to distrain property, and that they do not therefore come within the purview of Section 143.

On the whole, I am of opinion that, inasmuch as the circumstances of the present case are such that none of the Sections of Act X. relating to distraints are applicable to it (Sections 139-142 being considered in connection with the dicta of the High Court in Gurriboolah's case above quoted), plaintiff was without a remedy under Act X., and that his suit is rightly brought in this Court.

The judgment of the High Court was delivered as follows by

Peacock, C. J.—The facts of the case are that the defendant No. 1 applied for assistance to the Collector under Section 119 of Act X. of 1859, and, having obtained it, distrained the plaintiff's paddy, alleging that it was the property of defendant No. 4, who is found to have been the ryot of defendant No. 1, and to have been in collusion with him.

It is found also that the relationship of landlord and tenant did not exist between the plaintiff and the defendant No. 1. It appears also from the finding of the Judge of the Small Cause Court that defendants Nos. 5, 6, and 7 took possession of the paddy, having been appointed under the provisions of Section 118 of Act X. of 1859 to take charge of the property.

The question is whether the suit is cognizable by the Small Cause Court or not.

It has been contended before us that defendants Nos. 5, 6, and 7 may be liable to be sued in the Small Cause Court for what they did subsequently to the distress, even if the defendant No. 1 is not liable to be sued in that Court for making the distress; but, as I understand the question, it is whether the Judge of the Small Cause Court has cognizance of the suit against all the defendants for all the acts complained of.

Now, with reference to defendant No. 1, the question is whether he is liable to be sued in the Small Cause Court for distraining the plaintiff's paddy, or whether the suit against him for making the distress was cognizable only by the Revenue Courts under the provisions of Section 23 of Act X. of 1859.

The Judge has found that the plaintiff's paddy was distrained as the property of the defendant No. 4, but he has not found whether the paddy, which was distrained whilst it was growing, grew on land which the defendant No. 4 held and occupied as the right of defendant No. 1, or upon lands occupied by, and belonging to, the plaintiff, with which the defendant No. 1 and defendant No. 4 had no concern. The paddy might be the plaintiff's property, because it grew upon his own land, or it might be his property even if it grew upon land held by defendant No. 4 as the ryot of defendant No. 1; for defendant No. 4 might have transferred it to the plaintiff by sale or mortgage. If it was growing upon land belonging to

plaintiff and in his occupation, with which neither defendant No. 4 nor defendant No. 1 had any concern or interest, a suit for distraining it would lie under Section 143 of Act X. But if the paddy was growing upon land held by defendant No. 4 as the ryot of defendant No. 1, it was liable to be distrained by defendant No. 1 for any rent due to him which had not been due for a longer period than one year, even though the defendant No. 4 had transferred it to the plaintiff by sale or mortgage (see Sections 112 and 113, Act X. of 1859).

If defendant No. 1 acted in collusion with defendant No. 4, under color that rent was due from defendant No. 4 to defendant No. 1 when no rent was due, the plaintiff would be entitled to sue the defendants for damages.

The question is whether a suit brought under Section 139 or under Section 143 can be brought in the Civil Courts, or only in the Court of the Collector.

If Section 23 applies to the case, the suit is not cognizable in any other Court than that of the Collector.

By Clause 4 of that Section, all suits for arrears of rent due on account of land are within its provisions; and by Clause 7, all suits arising out of the exercise of the powers of distraint conferred on zemindars and others by Sections 112 and 114 of Act X., or out of any acts done under color of the exercise of the said powers, as particularly provided in the said Act, are also within the provisions of that Section. It appears, therefore, to have been the intention of the Legislature, whether wisely or not it is not for us to say, to render suits for arrears of rent on account of land and suits arising out of the exercise of the powers of distraint conferred by that Act, or out of any acts done under color of the exercise of the said powers, cognizable only by the Collector.

It has been contended before us by the Vakeel for the plaintiff that the words "as hereinafter particularly provided," which are used in Clause 7, refer to the words "all suits," and not to the word "power;" and we think that he is right in that contention.

All suits, therefore, which are specially provided by Act X., and which arise out of the exercise of the power of distraint, or out of any acts done under color of the exercise of the said power, are within the provisions of Section 23.

Section 139 provides specially for a suit by a person who shall claim as his own property which has been distrained for arrears of rent alleged to be due from any other person, and authorizes the institution of a suit by the person claiming the property against the distrainer, and such other person, to try the right to the property. Such a suit appears to me to be clearly one of the suits which is referred to in Clause 7. Therefore, if this suit is brought by the plaintiff claiming as his own property that which was distrained by defendant No. 1 for arrears of rent alleged to be due from defendant No. 4 to try the right to the property, the suit was not cognizable by the Small Cause Court.

But it is said that, although the fact is not distinctly found by the Small Cause Court Judge, the suit was really brought by the plaintiff for a distraint made by defendant on the plaintiff's paddy growing upon his own land, with which neither defendant No. 1 nor defendant No. 4 had any concern.

If it were necessary, we should send this case back to the Small Cause Court for the purpose of amending its finding as to the facts; but, even if it should be found that the facts are as alleged by the plaintiff, we think it would make no difference.

Section 143, Act X., enacts that, if any person not empowered to distrain property under Sections 112 and 114 of this Act, nor employed for the purpose under a written authority by a person so empowered, should distrain or sell, or cause to be sold, any property under color of this Act, the owner of the property might institute a suit under this Act to recover damages from such person for any injury which he may have sustained from the distraint or sale. The Section further says that the said person should be held to have committed criminal trespass, and should be subject to the penalties for that offence, in addition to any damages which may be awarded against him in such suit.

It is clear that the Section refers to the case of a person distraining under color of the Act when he is not empowered to distrain, and it is clear that, by the use of the words "under color of the Act," the Legislature did not mean under circumstances which were sufficient to induce the distrainer honestly to believe that he was justified in making the distress; for, if that had been their intention, they would not have enacted

that the distrainer should be subject to the penalties for the offence of criminal trespass.

Section 142 gives an action against a person empowered to distrain who shall distrain otherwise than under the provisions of the Act. That is an example of a suit arising out of the exercise of the powers of distraint; whilst Section 143 furnishes an example of a suit arising out of an act done under color of the exercise of the said power. Both are suits within the provisions of Section 23, and the present suit is one which might be brought under Section 139 or Section 143, and consequently cannot be brought in any other Court than that of the Collector.

It is said that, if it be held that a suit is cognizable only in the Collector's Court against a person who, under color of the Act, distrains crops growing upon lands which are not held of him, and which belong to a person who is not his ryot, we shall be opening a wide door for the commission of such acts with impunity. But that is not the case, inasmuch as a person who commits such an act is liable to be punished criminally, as well as to a suit for damages in the Collector's Court.

If a person sues another as his ryot for rent, when there is no pretence or foundation whatever for the allegation that the land belongs to him, or that the defendant is his ryot, or that there is rent due, such suit is cognizable only by the Revenue Courts; and the Legislature seems to have intended to have left to the Collector the sole determination of suits arising out of acts done in the colorable exercise of the power of distress as well as suits for rent claimed to be due.

It is admitted by the plaintiff's pleader that such a suit as this is cognizable by the Collector, but he contends that the Civil Court has also jurisdiction. But we cannot see anything in the Act which gives the Collector jurisdiction at all, if it does not give him exclusive jurisdiction.

In this particular case, it cannot be contended that the defendant No. 1 was not distraining under color of the Act, for it is actually found as a fact that he applied for and obtained the assistance of the Collector under Section 119 of the Act, to support him in making the distress.

The case cited by the Judge of the Small Cause Court is not analogous, for there the dispute was between the claimant of the property and a ryot after a distress had been withdrawn by the landlord upon payment of the rent.

The cases cited in argument from the 6 Weekly Reporter 33, and 3 Wyman's Journal, are so shortly given that they are scarcely intelligible.

For these reasons, we are of opinion that the suit is not cognizable in the Small Cause Court, and an answer to this effect must be sent to the Judge of the Small Cause Court.

The Deputy Collector dismissed the suit when brought before him, upon the ground that no legal distraint had been made. The Judge has found that the distress was made with the assistance of the Collector. If the Deputy Collector dismissed the suit which was brought before him, on the ground that no distraint had been proved, we can understand it; but we cannot understand how he could dismiss the suit, if a distraint was made, merely because it was not legal. The illegality of the distress, if it was made, would have been a ground for decreeing for plaintiff, not for dismissing the suit.

It must not be supposed that a plaintiff has no remedy in such a case as this. In this case he seems to have mistaken his remedy, either in not appealing against the decision of the Deputy Collector, or in not having brought his suit against the proper parties. One of the reasons given by the Deputy Collector for dismissing the suit was, that the party whose paddy the defendant alleged he had been distraining was not made a co-defendant, as required by the Act.

It may be remarked that, as the power of distraint is given by the Act only for rent due from cultivators, the sole jurisdiction may have been given to the Revenue Courts by the Legislature in consequence of their considering that the amount at stake would generally be small.

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The 25th January 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Mortgage—Finding on the bona fides of a Mortgage-deed—Attachment prior to Mortgage.

Case No. 1032 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 27th February 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 31st July 1866.

Moorul Singh (Defendant), *Appellant,*]

versus

Mohun Kooer (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Nil Madhub Sein* for Appellant.

Messrs. R. E. Twidale and *C. Gregory* for Respondent.

A finding by a Court that a mortgage-deed has been attested by the Registrar of Deeds, and proved by witnesses, is a sufficiently distinct finding on the *bona fides* of the deed.

Where a mortgagee after foreclosure sued and ousted a third party found in possession as purchaser of the rights of the mortgagor sold in execution of a collectorate decree, and the said party urged in appeal that the mortgagor had no power to alienate the property as it was under attachment for debts, prior to date of mortgage, and Lower Appellate Court held that there was no sufficient evidence of the alleged attachment: held in special appeal that, as appellant had not been able to show that the attachment was made by himself or in execution of the decree under which he had purchased, the Lower Court's holding could not be pronounced wrong in law.

Hobhouse, J.—THE facts found are these:—

On the 5th December 1863, plaintiff, respondent, became mortgagee of certain properties of *one of the mortgagors,* respondent.

On the 5th December 1864, defendant, appellant, purchased the rights of the said mortgagor in the said property, in execution of a decree of a Collectorate Court.

Thereafter, plaintiff, the mortgagee, foreclosed, and finding appellant in possession sued to oust him, and the Lower Appellate Court has decreed the suit.

In special appeal it is urged, first, that the Lower Appellate Court has failed to arrive at a distinct finding on the *bona fides* of the mortgage-deed which appellant denied.

We are of opinion, however, that in the words, "the cross-appeal is not worthy of being attended to, inasmuch as the said deed has been attested by the Registrar of Deeds, and proved by the witnesses on the part of the plaintiff," the Court below has come to a finding sufficiently distinct on the *bona fides* of the mortgage-deed.

Secondly, it is urged that, when it appears from the record that the property in question was under attachment on 13th June, 4th July, 13th July, and 23rd July 1863, for debts due by the mortgagor, the said mortgagor had no power to alienate until it was shown by the mortgagee that the said attachments had been removed legally previous to alienation.

Had appellant been able to show us that the attachments in question were made by himself, or even in execution of the very decree under which he purchased, there might perhaps have been some force in this contention; but the facts are not so, and we cannot, therefore, say that the Court below was wrong in law when it held that there was "no," *i. e.*, no sufficient "evidence produced on behalf of defendant regarding the attachment of the property."

We think, therefore, that neither of the objections taken are good, and we dismiss this appeal with costs.

The 25th January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Ejectment.

Case No. 1392 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 7th May 1867, reversing a decision passed by the Moonsiff of that District, dated the 18th December 1866.

Indrabutty Koonwuree and others (Plaintiffs), *Appellants,*

versus

Mr. F. Holloway and others (Defendants), *Respondents.*

Baboos Gopal Lall Mitter and *Nil Madhub Sein* for Appellant.

Mr. R. E. Twidale for Respondents.

A party in legal possession under a lease from a lakherajdar cannot be summarily evicted by the zemindar without the intervention of the Court, even if the zemindar is entitled to resume the land as invalid lakheraj or as lands which have lapsed on non-performance of stipulated service.

Kemp, J.—THIS was a suit for recovery of possession of two beegahs and five cottahs, on the allegation that the plaintiffs held under a lease from Fukeer Misser and Gobin Misser, and had been forcibly ejected by the defendant, Mr. Holloway, who holds under an alleged lease, dated 3rd April 1863, from a third party who is made defendant.

The Court of first instance restored the plaintiff to possession, and awarded Rupees 49 as damages for crops destroyed.

In appeal, the Principal Sudder Ameen laid down the following issues :—

1st—Is the pottah genuine?

2nd.—Is the land in dispute valid lakheraj?

3rd.—Have the damages been properly assessed?

The Principal Sudder Ameen observed that the plaintiff and the parties through whom he claims, *i. e.*, his lessors, had failed to show when the land in dispute was granted as lakheraj, and that they had produced no sunnud; therefore, without going further into the facts of the case, he reversed the decision of the Court of first instance.

In special appeal, it is contended—

1st.—The Principal Sudder Ameen is wrong in law, in not trying the main issue in the suit, *viz.*, the possession and subsequent ouster of the plaintiffs; for, if these be proved, the *onus* would be upon the defendant Holloway and his alleged lessor to prove their title.

2nd.—Even if it be admitted that the plaintiffs' lessors held the lands in dispute as a service-tenure from generation to generation, they could not be summarily evicted without the intervention of the Court.

3rd.—The question of the validity or otherwise of the lakheraj title of the plaintiffs' lessors is not necessary to be tried in this case in order to entitle the plaintiffs to a decree for possession.

In this case, the plaintiffs aver that their lessors are the *birmottudars.* The defendant Holloway holds under a lease from the zemindar, who is also a defendant in the suit. The zemindar avers that the plaintiffs' lessors did not hold *birmottur* lands, but service-lands burthened with the discharge of certain duties in this case connected with the worship of the idol Hunooman; that the plaintiffs' lessors having ceased to discharge those duties, he, the zemindar, resumed the lands and let them out to the defendant Holloway.

We think that, in this suit, the question of the validity or otherwise of the lakheraj tenure of plaintiff's lessors could not be tried. The question of whether the plaintiffs were in possession and were illegally ousted by the defendant Holloway, under cover of a lease from the zemindar, must be tried. It may be that the zemindar is entitled to resume the lands either as invalid lakheraj lands or service-lands which have lapsed owing to the non-performance of the duties

for which they were originally granted; but clearly the plaintiffs, if in legal possession under their lease, cannot be summarily evicted without the intervention of the Court. It appears to us that this is an attempt on the part of the zemindar to take the possession of the lands forcibly through the intervention of an indigo-planter, thereby avoiding the burthen of proof which would otherwise lie upon him, were he to bring a suit to resume the lands as mal lands, held as a service-tenure by the plaintiffs' lessors. We remand the case for re-trial with reference to these remarks.

The 25th January 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Limitation—Long possession—Joint-property.

Case No. 1712 of 1867.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 21st May 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 27th November 1865.

Ramg Lall Misser and others (Defendants), *Appellants,*

versus

Roghoobur Singh and others (Plaintiffs), *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Baboo Unnoda Pershad Banerjee and *Shib Chunder Chatterjee* for Respondents.

In a suit for confirmation of title and possession, defendants cannot plead limitation, if they have completely failed to prove their allegation of joint-possession.

Plaintiffs in such a case cannot reasonably be required to prove the *specific source* (whether from their own funds or not) from which they acquired properties, which were admittedly acquired about a century ago; long possession being not only evidence of title, but a good and valid title by itself.

Mitter, J.—THIS was a suit instituted by the special respondents for the confirmation of their title and possession in certain villages mentioned in the plaint. Both the Lower Courts have given them a decree. The special appellants contend:—

1st.—That the plea of limitation raised by them has been overlooked by the Lower Appellate Court.

2nd.—That the respondents having failed to prove that the properties in dispute were acquired from their own exclusive funds, their claim for an exclusive title thereto ought to have been dismissed.

With reference to the first point, we are of opinion that it is of no force. The question of possession has been tried, and the Lower Appellate Court has distinctly found that the special appellants were never in possession. The parties to this litigation belong to two different branches of a Hindoo family sprung from one common ancestor, but very remote. It is admitted that the properties in dispute stand in the name of one Bhola Singh, sole ancestor of the respondents. It is admitted also that the two branches of the family have been separate from one another since a long time. So far back as 1830, the name of one of the ancestors of the respondents was recorded in the Collector's books, notwithstanding the protest of the ancestors of the special appellants, and these latter were referred to a regular suit. This suit has never been brought since. The title-deeds and documents relating to possession are all in favor of the respondents; and, under the circumstances of the case, there was no presumption of a joint undivided Hindoo family. The appellants did not even deny the possession of the respondents; but they pleaded that they were also jointly in possession with them. They were, therefore, bound to prove this allegation. The Lower Appellate Court has found that they have completely failed to do so, and upon this finding the question of limitation does not properly arise.

With reference to the second point, we observe that it is equally untenable. The properties in suit were admittedly acquired about a century ago. No one can be

reasonably expected to prove at this distance of time the *specific source* from which these acquisitions were made. The Lower Appellate Court has very properly observed that the question of possession was the only material point in the case, and we have seen already that this point has been determined against the special appellants. Long possession is not only evidence of title, but, in a case of this sort, it is a good and valid title by itself. We reject the special appeal with costs.

The 25th January 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Extra-judicial Decisions—Suits for rent—Act X. of 1859.

Case No. 989 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 1st February 1867, affirming a decision passed by the Assistant Collector of Durbhangah, dated the 30th December 1865.

Sreedhur Jha (Plaintiff), *Appellant,*

versus

Dabee Dutt Chowdhry and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Where questions are not before a Court judicially, its decision in regard to them is a nullity.

A suit to assess land and recover rents at an enhanced rate must be dismissed, if not brought under some Section of Act X. of 1859.

Hobhouse, J.—APPELLANT, who was plaintiff in the Court below, issued a notice of enhancement under Section 13, Act X. of 1859, and then sued to assess beegahs 93-11 of land in possession of defendant at 5 rupees per beegah, and to recover Rupees 514, rents at that rate for 1272.

The Lower Appellate Court held that beegahs 54 of the lands in suit were rent-paying lands as by a decree passed under Regulation XI. of 1819, but that, inasmuch as plaintiff had not sued to assess under Section 28, and inasmuch as, if he had sued, he would have been barred by limitation, the Court could not give him a decree for rents claimed on these 54 beegahs of land.

We are of opinion that the Court was in error in deciding, first, that the lands in question were, as against defendants, resumed, and therefore rent-paying lands; and, secondly, in deciding, as against plaintiff, that any suit to assess such lands was barred by limitation. These questions were not before the Court judicially, and we therefore set aside the Court's decision in regard to them, and declare it a nullity.

But we cannot say that the Court was in error in dismissing plaintiff's suit as laid.

It was not a suit either under Section 13, nor under Section 28, nor under Clause 1, Section 23, nor under any other Section of the Act, and the Court was, therefore, right in dismissing it.

In this view, we think the Court was right, and we dismiss the appeal with costs.

The 27th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble W. S. Seton-Karr, L. S. Jackson, A. G. Macpherson, and C. Hobhouse, *Judges.*

Simple Mortgage — Limitation — Clause 12, Section 1, Act XIV. of 1859.

Case No. 35 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Burdwan, dated the 26th September 1867.

Surwan Hossein and others (Defendants), *Appellants,*

versus

Shahazadah Golam Mahomed and others (Plaintiffs), *Respondents.*

b

Mr. C. Gregory and *Baboo Anodapershad Banerjee* for Appellants.

Mr. R. T. Allan, and *Baboo Mohendro Lall Shome* for Respondents.

When there is an unregistered bond to secure the payment of a sum of money with interest, by which bond also lands are charged (by way of simple mortgage) with the payment of the debt, a suit to have it declared that the lands are charged with the payment of the debt and for an order for the sale of the lands (as subject to the charge) in satisfaction of the debt falls within Clause 12, Section 1, Act XIV. of 1859, and must be brought within 12 years from the cause of action.

This case was referred to the Full Bench by Seton-Karr and Macpherson, JJ.:—

Macpherson, J.—On the 9th December 1855, Khajah Ali Hossein executed a *kistbundee* bond in favor of his daughter, the respondent Hazarah Begum, to secure the payment to her of Rupees 10,250. The bond says: "I have no means of discharging the "said debt by one payment. Therefore, "having paid Rupees 250 in cash, I execute a "deed of instalment for the payment of the "balance of Rupees 10,000 with the following "stipulation: that I shall pay from 1856 to "1861 at the rate of Rupees 1,500 annually, "and in the year 1862, I shall pay Rupees "1,000; and after having repaid the said "amount in full, I shall take back the deed "of instalment." And by way of further security, and "in order to ensure the payment of the said amount," the landed property, the subject of the present suit, was charged with the payment of the debt, by way of simple mortgage. It was further stated in the bond, "in default of payment "of the said amount, agreeably to the terms "of this deed of instalment, I shall pay interest at the rate of Rupees 10 per 1,000 "per mensem."

On the 2nd September 1862, Hazarah Begum instituted a suit for the recovery of the instalments which fell due in the years 1859, 1860, and 1861; and she obtained a decree on the 8th April 1863 against the representatives of Khajah Ali Hossein, who had died before the suit was commenced. On appeal, this decree was upheld by the High Court on the 4th of March 1864.

On the 28th July 1863, Hazarah Begum got a decree in another suit for the instalment which fell due in 1862. This decree was, on appeal, affirmed by the Zillah Judge on the 19th August 1864.

Both these decrees were simply decrees for the payment of a certain sum of money out of the estate of Khajah Ali Hossein, deceased. Neither of them alluded to the fact that by the bond the lands now in dispute were pledged to secure the money due; neither decree contained any declaration that the lands were subject to a charge for the payment of the instalments, or that they were to be sold in satisfaction of the decree.

In November 1864, Hazarah Begum, apparently after an ineffectual attempt to secure what was due to her under these decrees, assigned them both to Shahanee Begum, who has since died, and is now represented by the plaintiffs in the present suit.

In execution of the two decrees, the plaintiffs attached the mortgaged property, and were proceeding to have it put up for sale, when the appellant Nunnee Bebee, on behalf of her minor children (being the persons chiefly interested in the estate of Khajah Ali Hossein) claimed the property, alleging that the attachment was bad, as the decrees did not declare that the property which had been attached was charged with the debt, and as by a Towliutnama, dated the 27th December 1859, Khajah Ali Hossein had settled the property as *wuqf*, appointing his grandson, the minor appellant, Syed Ali Hossein, the mutwulli, of this endowment. The claim was considered to be good, and the property was released on the 5th September 1865.

On the 21st December 1865, the present suit was instituted. Its object is to obtain a declaration that the property mortgaged by the kistbundee bond is charged with the amount which is due under the two decrees; and that, being so charged, the plaintiffs are entitled to have it sold in execution of the decrees, notwithstanding the Towliutnama, or any other title which may be pleaded of dates subsequent to the kistbundee.

The Lower Court has held that there is no doubt as to the execution of the Towliutnama, or as to the property having become *wuqf*, by reason of it. But the Court held that the mortgage took precedence of the subsequent settlement, and ordered that the property should be sold in satisfaction of the decrees.

The defendants appeal. They do not deny now that the Towliutnama must be taken to be subject to the mortgage, so far as the mortgage can now be enforced; but it is contended—

Firstly, That as Hazarah Begum assigned merely her right and interest in the two decrees, the plaintiffs cannot proceed under the mortgage which was mentioned neither in the decrees, nor in the assignment under which the plaintiffs claim; and

Secondly, That the plaint is barred by limitation as regards the amount due under the first decree.

By way of cross-appeal, Mr. Allan for the plaintiffs has argued that the Towliutnama is void, absolutely, as against the plaintiffs, whether the mortgage is barred by limitation or not. He argues that, even supposing the plaintiffs are entitled to nothing more than what any person holding an ordinary decree against the estate of the deceased Khajah Ali Hossein is entitled to, this Towliutnama cannot prevent the property being sold to satisfy the decrees, inasmuch as, according to Mahomedan Law, all the property of the deceased is in the hands of his heirs, charged with the payment of his debts.

It is enough for me to say that this point never was raised in the Court below; and that, in the absence of any evidence as to Khajah Ali Hossein's position as regards his being in embarrassed circumstances or otherwise when he made this Towliutnama, I know of nothing in the Mahomedan Law, which would justify me in holding that the Towliutnama is not good against an ordinary creditor holding a summary decree.

As regards the first point raised by the pleader for the appellants, I think that the plaintiffs have a right to enforce all the securities to which Hazarah Begum herself could have had recourse in order to recover her money. Moreover, Hazarah Begum is a party to the present suit, and has filed a written statement disclaiming any title in herself, and stating that she transferred all her interests in the subject of the suit to Shahanee Begum, through whom the plaintiffs claim.

The second objection is less easily disposed of. All of the instalments which are included in the first decree fell due more than three years prior to the institution of the present suit. In other words, the cause of action in the present suit, so far as it relates to these instalments for 1859, 1860, and 1861, arose more than three years before the commencement of this suit.

The kistbundee not having been registered, the appellants contend that the case falls within Clause 10, Section 1 of Act XIV. of 1859; and that the period of limitation is three years.

There are two decisions of this Court which are directly in favor of this contention, see *Parushnath Misser* vs. *Shaik Bandah Ali*, 6 Weekly Reporter 132, and *Seetul Singh* vs. *Soorujbullub Singh*, 6 Weekly Reporter 318. But these decisions conflict with those of the Madras High Court. By that Court it has been ruled, in the case of Chetti Gaundan *versus* Sundaram Pillai, 2 Madras Reports 51 (per *Phillips* and *Holloway*, JJ.), and in the case of Kristna Row *versus* Hachapa Sugapa, 2 Madras Reports 307 (per *Scotland*, C. J., and *Frere*, J.), that a suit such as this is in the nature of a suit for the recovery of an interest in immoveable property within the meaning of Clause 12 of Section 1 of Act XIV. of 1859, and that the period of limitation is twelve years.

The point is one of some difficulty, and as it is one which frequently arises, and on which this Court is in direct conflict with the Madras High Court, I think that it ought to be referred to a Full Bench, that it may be finally set at rest.

The question is, whether, as regards the instalments of 1859, 1860, and 1861, included in the first decree (of April 8th, 1863, confirmed on appeal, March 4th, 1864), the present suit is barred by limitation. And in order to decide this point, the Court must decide whether, when there is an unregistered bond to secure the payment of a sum of money with interest, by which bond also lands are charged (by way of simple mortgage) with the payment of the debt, a suit to have it declared that the lands are charged with the payment of the debt, and for an order for the sale of the lands (as subject to the charge) in satisfaction of the debt, falls, as regards question of limitation, within the provisions of Clause 10 of Section 1 of Act XIV. of 1859, or within those of Clause 12 of that Section. In other words, must the suit be brought within three years from the origin of the cause of action, or is it in time if brought within twelve years.

Seton-Karr, J.—I concur in the propriety of making this reference, though I do not

think that we are bound to refer every case in which a Bench of our Court differs from the Courts of Madras, Bombay, or Agra; yet I think that, as the present question is an important one, and as it has been discussed before us several times lately, we require an authoritative ruling on the point.

The judgments of the Full Bench were delivered as follows :—

Peacock, C. J. (*Macpherson* and *Hobhouse, JJ., concurring*) —THE plaintiff is the assignee of Hazarah Begum who is the obligee of the bond given to secure to her the payment of 10,250 rupees. The bond was executed by Khajah Ali Hossein, and it stipulated for the payment of the balance specified in the bond by instalments. It is found in the case which is submitted for our opinion that, by way of further security and in order to ensure payment of the amount, the landed property, the subject of the present suit, was charged with the payment of the debt by way of simple mortgage.

Several suits were brought to recover the instalments; but in proceeding to enforce the decrees against the land in question a *wuqf* was set up as having been executed by Khajah Ali Hossein, by which the property was vested in a mutwulli free from the charge which had been created by the bond. In consequence, on the 21st December 1865, a new suit was brought for the purpose of declaring that the instalments which fell due upon the bond in 1859, 1860, and 1861, were included in the decree of 8th April 1863, which was affirmed on appeal, and that they were a charge upon the land in question as against the mutwulli. The question is whether that suit is barred by limitation or not.

The suit was brought, so far as it relates to the instalment of 1859, after the expiration of six years, as the instalment was payable on the 9th December 1859, and the suit was not brought until the 21st December 1865 —more than six years after the instalment became due. But it was brought within six years from the date on which the instalments for 1860 and 1861 became due; and we are now asked to decide whether the suit to have the lands charged with the payment of the debt and for an order for the sale of the lands in satisfaction of the debt falls, as regards limitation, within the provisions of Clause 10, or of Clause 12, Section 1, Act XIV. of 1859; in other words, whether the suit ought to be brought within 3 years from the accruing of the cause of action, or within 12 years.

It appears to me to be clear beyond doubt that this case cannot fall within Clause 10 of Section 1. The suit was brought against the mutwulli. The mutwulli never entered into any contract with the plaintiff, and was not liable for a breach of contract. The suit was brought against him to enforce payment of the instalments which had been charged upon the land conveyed to him as *wuqf*.

Clause 10 says: "To suits brought to "recover money lent on interest or for the "breach of any contract in cases in which "there is a written engagement." It appears to me clear that this is not a suit brought against the mutwulli for breach of contract, but that it is a suit to enforce a charge upon land. It does not fall within Clause 10.

The question then arises whether the suit falls within Clause 12, because, if it does not, it is a suit not otherwise provided for, and falls within Clause 16. It appears to me that this is a suit to enforce a charge upon immoveable property, and is a suit for the recovery of an interest in immoveable property within the meaning of Clause 12. I have no doubt that it falls within Clause 12, and not within Clause 16.

The only case which throws any doubt upon it, in my opinion, is the case which has been referred to in VI. Weekly Reporter 318. But I cannot concur in the view which was expressed in that decision. Mr. Justice Trevor, who delivered judgment, says: "The "words of the law refer, it appears to "us, to an interest *residing of right* in the "party suing, for which he may sue." It appears to me that a charge upon the land is an interest in the party in whose favor that charge is made. It is also an interest for which he may sue. Then is it an interest in land, or it is an interest in something else? Mr. Justice Trevor says: "In a suit "like that before us he has simply a lien "on the property for the amount of his debt; "but he has no interest of right in the pro-"perty, and in this view the Section of the "law cited does not apply. But again the "security is a mere incident to the bond. "The debt acknowledged in the deed signed "by the debtor, and to be payable at a certain "time, is the principal, and the collateral se-"curity an incident in the transaction; it "follows on legal principle that the latter "must follow the former, and not the reverse;

"in other words, the incident must be sued "for within the same time with the principal, "or the collateral security be declared en- "forceable against property pledged within "the same time as the date can be declared "due by a Court of Justice." I do not know where the legal principles to which Mr. Justice Trevor refers are to be found. There is no such principle in the English law. If land is mortgaged as security for a loan, in addition to a covenant for payment of the money, the mortgagee may sue the mortgagor for a breach of the covenant, and he may also bring an action of ejectment to recover the land mortgaged as a collateral security. It appears to me that the charge upon the land created an equitable interest in the land, and that a suit brought to enforce that charge is in substance and in effect a suit for the recovery of that interest.

There are decisions of the High Court at Madras in accordance with the view which I have now expressed, and I concur entirely in those cases.

The appeal will be dismissed with costs.

Seton-Karr, J.—In this case we have to decide whether the principle laid down by Mr. Justice Trevor in the judgment of the Court reported at page 318 of the Weekly Reporter, Vol. VI., or that laid down by the Chief Justice of the Madras High Court, in page 308, Vol. II. of Stokes's Reports, is the correct principle. I concurred, at the time, in the judgment delivered by Mr. Justice Trevor, and thought that the enforcement of a lien on the property by the sale of it in satisfaction of a debt for which it was pledged could not strictly be termed "an "interest in immoveable property to which "no other provision of the Act applies." Mr. Justice Trevor laid it down that the suit was not one for an interest as of right in the property, but one to enforce a mere lien on a property pledged, and to have a sale thereof carried out.

I am further of opinion that nothing that I have heard to-day, in the course of argument or otherwise, satisfactorily explains the inconsistency so forcibly pointed out by Mr. Justice Trevor in that decision, if a suit for a debt due had to be instituted within one certain and a defined period, and a suit for enforcing the security of that debt, arising out of the same circumstances, had to be instituted within another period. The anomaly and inconsistency still remain as pointed out. On considering the Sections of the Law of Limitation which are properly applicable to the case before us, I am clearly of opinion, as shown by the learned Chief Justice, that Clause 10, Section 1, is not applicable to the present case. It cannot, by any possibility, be termed a suit for the "breach of contract," as there was no contract between the plaintiff and the *mutwulli* into whose hands the property hypothecated had subsequently passed.

There remains, then, the only doubt in my mind as to whether it would be correct to say that the case fell under Clause 16, Section 1, and not under Clause 12 of the same Section of the same Act.

It seems clear that, if the present suit had been one, not for the sale of the property as merely hypothecated, but for entering on the same property as held under a conditional mortgage, the words of Clause 12 would have been strictly applicable; and looking to the difficulty of drawing a very clear distinction between a suit for entering on a conditional mortgage and a suit to enforce the mere sale of the property hypothecated; looking also to the opinion which I understand to be that of the majority of the Bench now sitting, I am not prepared to dissent from the principle laid down by the learned Chief Justice on the present occasion, which principle has been also expounded and adopted by the learned Chief Justice of the High Court of Madras, and has been enforced by another Bench of that same Court. I think that, if it can be fairly said that the suit is one to enforce any kind of interest in immoveable property, to which no other provision of the Act applies, if that can be fairly stated in interpreting the Act, we need not, and ought not to, have recourse to Section 16, as for a case for which no other limitation is expressly provided; and that we may say that the case is one to which the period of 12 years from the time of the cause of action applies under Clause 12, Section 1.

For all these reasons, I am therefore prepared to record my opinion in accordance with that which I understand to be that of all my learned brothers now sitting at this Bench.

Jackson, J.—I concur in the judgment of the Chief Justice.

I am not clear that, if the lender of the money in this case had sued to recover the principal money and interest, and at the same time to enforce his lien upon property pledged after the expiration of 3 years or 6 years, and before the end of 12 years, he would have been barred.

The 29th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble W. S. Seton-Karr, L. S. Jackson, A. G. Macpherson, and C. Hobhouse, *Judges*.

Small Cause Court — Execution in another district—Sections 19 and 20, Act XI. of 1865—Section 286, Act VIII. of 1859.

Reference to the High Court by Mr. C. D. Field, Judge of the Principal Court of Small Causes at Kishnaghur.

Anonymous.

Section 19, Act XI. of 1865, provides merely for cases in which the decree-holder wishes to have immediate execution, and makes an application for it either against the person or against the moveable property of the judgment-debtor.

Notwithstanding Sections 19 and 20, Act XI. of 1865, the provisions of Section 286, Act VIII. of 1859, apply to Small Cause Courts. A decree of a Small Cause Court may be sent to another Court for execution, if no property is found within the jurisdiction of the Court passing the decree; and, if the Court to which the decree is sent be in another Zillah, the decree must be sent to the principal Court of original jurisdiction in such district.

Case.—THE following point arises in execution-proceedings, and is referred under Section 1, Act X. of 1867. The decree-holder obtained a decree in the Jessore Court of Small Causes, and being unable to satisfy it, as the debtor has no moveable property within the jurisdiction of that Court, he applied for and obtained a certificate under Section 20, Act XI. of 1865. That certificate he filed in this, the Kishnaghur, Court, and the Clerk, as a matter of course, issued execution, and attached the moveable property of the judgment-debtor, within the limits of the latter Court. Now, there cannot be the smallest doubt that such attachment was wholly illegal, and that, under the above certificate, no action whatsoever could have been taken by this Court, inasmuch as immoveable property alone could have been taken in attachment according to the express provisions of Section 20, Act XI. of 1865. I therefore directed the immediate withdrawal of the attachment, and released the property.

It is now urged that the decree-holder is subjected to great hardship, inasmuch as the debtor has no immoveable property, and the moveable property within the jurisdiction of this Court is the only means whereby the decree can be satisfied. Now, it has been twice remarked (*vide* Sutherland's Small Cause Court References, pages 121-137) that *moveable property outside the jurisdiction of the Court of Small Causes which passed the decree is not liable to be taken in execution.* The opinion expressed on each of these occasions was contained in a letter of the High Court, and was in the nature of an *obiter dictum*. Before the passing of the recent Act (X. of 1867), it was not possible to obtain a binding decision of the High Court on the point, and such a decision I am now desirous of obtaining, inasmuch as, though I have hitherto acted on the above expressed opinions of the High Court, it is a considerable hardship to decree-holders not to be able to seize in execution moveable property outside the local limits of the Small Cause Court which passed the decree. It may be remarked that, in Nuddea and Jessore, such local limits are comparatively small, being conterminous with the confines of the sub-divisions. As the jurisdiction of Courts of Small Causes is *exclusive*, and not *concurrent*, it appears hard that judgment-creditors should be limited to the moveable property to be found within such small boundaries. I am well aware that these are rather arguments for changing the law than for putting an interpretation upon it; but, on the present occasion, I mean them as my apology for raising a point that might seem settled by the two extra-judicial opinions above referred to.

These opinions would seem correct, if we look only to the wording of Section 19, Act XI. of 1865, which speaks merely of "moveable property within the jurisdiction of the Court passing the decree." Before the

promulgation of the above remarks, as Judge of the principal Court of Small Causes at Jessore, I had followed the procedure laid down in Sections 284, 285, 286, 287, 288, &c., of Act VIII. of 1859. Under this procedure, the Court to which the application for execution was transferred could clearly take in execution moveable property within its own limits and outside the jurisdiction of the Court of Small Causes, which passed the decree. As Judge of the principal Court of Small Causes at Jessore, I now beg to solicit the opinion of the High Court as to whether I can follow this procedure, and so enable the decree-holder to take in execution property within the local limits of the Kishnaghur Court.

Sections 284, 285, &c., Act VIII. of 1859, correspond with Sections 454, 455, &c., of the "Amended Code of Civil Procedure" published in the *Gazette* extraordinary of India of the 28th April 1865, which latter Sections are expressly made applicable to Courts of Small Causes. In the statement of "objects and reasons" appended to this Bill, it was remarked by a learned Counsellor that the affixing of the letters S. C. C. (Small Cause Court) to the Sections of the published Bill might, until the Bill became law, be some guide to the Judges of these Courts in deciding how far the procedure of the regular Courts was applicable thereto. The above letters, being affixed to the Sections in question, will show that I am not wholly unsupported in the view which I have taken, and which derives considerable force from the reflection, that it could scarcely have been the intention of the Legislature to afford less facilities for satisfying the decrees of Courts of Small Causes, than are under existing procedure afforded for the execution of the decrees of the ordinary Civil Courts. I may be permitted to remark, in conclusion, that, under the Procedure of the English County Courts, personal property in a foreign district can be taken in execution (*see* Broom's Practice of the County Courts, page 234; or Davis's ditto, page 138; or Pollock and Nicol's ditto, page 133).

The case was referred to the Full Bench by Peacock, C.J., and Hobhouse, J.:—

In the first letter referred to by the Small Cause Court Judge (reported at page 120 of Sutherland's Small Cause Court rulings) it was stated that "moveable property, beyond the local limits of a Small Cause Court, seems not to be liable to be taken in execution." That was a mere dictum, for the real question propounded had reference, as far as we can collect, not to moveable property, but to immoveable property.

In the second letter referred to by the Judge (*Ibid*, page 135) it is stated, "I am "to add for your information and that of the "Moonsiff that it has been ruled that *moveable* "property beyond the local limits of a Small "Cause Court is not liable to be taken "in execution." That also was a mere dictum; the real question being whether a Clerk of a Small Cause Court could sign a decree-certificate to be sent to a Moonsiff for execution, and that dictum appears to have originated from the dictum in the former case.

In the former case, the question before the Court arose upon the construction of Section 20, Act XI. of 1865, which enacted that, if, after the sale of the moveable property of a judgment-debtor, any portion of the judgment-debt should remain due, and the holder of the judgment should desire to issue execution upon any immoveable property belonging to the judgment-debtor, the Court, on the application of the holder of such judgment, should grant him a copy of the judgment and a certificate of any sum remaining due under it; and that, upon the presentation of such copy and certificate to any Court of Civil Judicature, having *general jurisdiction* in the place in which the immoveable property of the judgment-debtor was situate, such Court should proceed to enforce such judgment according to its own rules and mode of procedure in like cases.

That Section did not take away any right, if such right existed, of sending a decree from one Court of Small Causes for execution by another Court.

By Section 47 of the same Act, it was enacted that, except as thereinbefore provided, the provisions of the Code of Civil Procedure should, so far as the same are or may be applicable, extend to all suits and proceedings under the Act.

There was nothing in Section 20 to prevent the applicability of the Code of Civil Procedure to the execution of decrees, so far as moveable property was concerned.

Under these circumstances, it would appear that Section 286 of Act VIII. of 1859 is applicable to Courts of Small Causes, at

least as to moveable property. But if the Court of Small Causes, to which a judgment is sent for execution by another Court of Small Causes, is not in the same district, meaning (according to the definition in Section 286) the same zillah, the judgment must be sent to the principal Civil Court of Original Jurisdiction in the district in which the applicant may wish the decree to be executed, *i. e.*, to the Zillah Court. The principal Court of Small Causes is not a principal Court of Original Civil Jurisdiction within the meaning of that Section.

Considering the two letters above referred to, we think that this case ought to be sent for the decision of a Full Bench as to whether moveable property in another district can, under Section 286, be seized in execution of a judgment of a Small Cause Court in another district, and whether the judgment of a Small Cause Court can be executed against moveable property by another Court within the same district; and, if so, whether it can be executed by another Small Cause Court, or only by some other Court having general jurisdiction.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—It appears to us that Section 19 of Act XI. of 1865 provides merely for cases in which the party in whose favor the decree is given wishes to have immediate execution, and makes an application to the Court for it, either against the person or against the moveable property of the debtor. The Judge of a Small Cause Court, as regards immoveable property, has not the same power as the ordinary Courts. He is not authorized to seize or sell, or to deal with immoveable property in execution as the other Courts are. But if there is immoveable property within the district, and the moveable property within his district is not sufficient to satisfy the decree, then he may send a copy of the judgment, with a certificate of the amount which remains due under it, to any Court of Civil Judicature having general jurisdiction in the place in which the immoveable property of the judgment-debtor is situate, in order that it may be executed by that Court.

By Section 47 of Act XI. of 1865 the provisions of the Code of Civil Procedure are, so far as they are applicable, extended to all suits and proceedings in the Small Cause Courts in the mofussil. Therefore, notwithstanding Sections 19 and 20, the provisions of Section 286 of Act VIII. of 1859 apply to these Courts; and by virtue of that Section, if there is no sufficient property within the jurisdiction of the Small Cause Court to satisfy the decree, the judgment may be sent by the Small Cause Court to any other Court indicated by the applicant for execution if such Court be within the same district. If the Court to which the execution is sent is not within the same district, that is not within the same zillah, then the Court of Small Causes is to send its judgment to the principal Civil Court of Original Jurisdiction in the district in which the applicant may wish to have his decree executed.

In this case, the decree was sent for execution from the Small Cause Court of Jessore to the Small Cause Court of Kishnaghur. The Judge of the latter Court was very right in not executing the decree, inasmuch as the two Courts of Small Causes were not within the same district. The decree ought to have been sent to the principal Court of Original Jurisdiction of the district in which the property intended to be seized in execution was to be found, and that was the Court of the Civil Judge of Zillah Nuddea.

We think that the Judge of a Small Cause Court may send a decree to another Court for execution, if no property is to be found within the jurisdiction of his own Court sufficient to satisfy it. If the Court to which it is sent be not a Court in the same district, the decree must be sent to the principal Court of Original Jurisdiction in the district in which it is intended to be executed.

An expression of this opinion may be sent to the Judge of the Small Cause Court; but this decision will not be binding upon any individual party, as the case has been referred without giving the Court the names of the parties.

The Judges for the future should be careful in sending up references to this Court in Small Cause Court cases to give the names of the parties, so that, by giving notice, they may have an opportunity of appearing and arguing the case before this Court.

The 30th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble W. S. Seton-Karr, L. S. Jackson, A. G. Macpherson, and C. Hobhouse, *Judges*.

Execution of decree—Liability of personal property after discharge of debtor.

Reference from Mr. C. D. Linton, Judge of the Court of Small Causes at Meherpore.

Janokee Sing Roy, *Plaintiff*,

versus

Kaloo Mundle, *Defendant*.

After a debtor has been arrested in execution of a decree and discharged at the request of the creditor, his personal property may be taken in execution under the same decree.

Case.—In this case the plaintiff, in pursuance of the provisions of Section 201, Act VIII. of 1859, applied that the decree be enforced by the imprisonment of the defendant, and the defendant was accordingly arrested and imprisoned for a period of 4 months and 25 days, when he was, *at the request of the plaintiff*, released; and the plaintiff now applies *for an attachment of his moveable property*, and his pleader argues that, as the decree is for more than 50 rupees, and the defendant was not imprisoned for the full term mentioned in Section 278 of Act VIII. of 1859, *viz.*, 6 months, his client is entitled to the attachment asked for, notwithstanding the defendant was released at his request after being imprisoned for the period above stated.

In the matter of Dwarkalal Mitter, page 109, Bourke's Reports, it was held that a prisoner, once *discharged* on non-payment of his subsistence-money, cannot be re-arrested; nor can a new writ be issued against him for the former debt—the Chief Justice, Sir Barnes Peacock, remarking "the principle "applying here, that no man should be twice "vexed on the same charge, is a proper one, "and the rule must be refused;" and from the remarks made by the Hon'ble Mr. Justice Morgan (now Chief Justice of the Agra High Court), it might be inferred that a release amounts to a renunciation of the cause of action against a prisoner, and a discharge merely to a liberation from custody, subject to the plaintiff's claim; and I am of this opinion as the defendant was discharged from the custody at the request of the plaintiff, and not on failure of payment of diet-money, *see* also Shillock *vs.* Passmore, 7 C. and P. 289-293, where the Jury were told that, in estimating the damages, they might take into consideration that, as the plaintiff was finally released by consent, he gained the advantage of having his goods no longer liable, which they would have been if he had been discharged by the Court as he had himself desired. However, on the pleader's application, I beg to solicit the opinion of the High Court, whether the attachment applied for may issue.

This case was referred to the Full Bench by L. S. Jackson and Markby, JJ.

Markby, J.—In this case the plaintiff, having obtained a decree for a sum exceeding Rupees 50 in the Small Cause Court of Meherpore, applied to the Judge to enforce the decree by imprisonment of the defendant, and the defendant was accordingly arrested and imprisoned for a period of four months and twenty-five days, when he was, at the request of the plaintiff, set at liberty. The plaintiff then applied to the Judge for an attachment of the defendant's moveable property in execution of the same decree.

The Judge of the Small Cause Court has, on the authority of a decision, *In the Matter of Dwarkalal Mitter*, Bourke's Reports, p. 109, refused the application, being of opinion that a release, at the request of the creditor, amounted to a renunciation of the cause of action, whereas a discharge was merely liberation from custody. He has, however, under Act X. of 1867, asked our opinion whether, under the above circumstances, the attachment ought to issue.

The question turns entirely upon the meaning to be given to the word "discharged" in Section 282 of Act VIII. of 1859. That Section provides that a defendant once "discharged shall not again be "imprisoned on account of the same decree, "but his property shall continue liable.

"under the ordinary rules, to attachment "and sale, until the decree shall be fully "satisfied."

The case has not been argued before us, but we have considered it with reference to the decision quoted from Bourke's Reports and the language of the Act.

We are by no means sure (the report being somewhat obscure) what was precisely the nature of the application or the decision in Dwarkalal Mitter's case. But from the observations of Morgan, J., the application would seem to have been treated as having been substantially for an attachment of the debtor's property, and to have been refused on the ground of a distinction between a "release" under Section 278, and such a "discharge" as is referred to in Section 282.

By Section 278 it is provided that "a "defendant shall be *released* at any time on "the decree being fully satisfied, or at the "request of the person at whose instance he "may have been imprisoned, or on such "person omitting to pay the allowance as "above directed."

The debtor in that case had been released on account of the non-payment, by the creditor, of his subsistence-money, and the learned Judges who decided it seem to have considered that Section 282 did not apply to debtors, who had been released under Section 278, who must be considered to be absolved from all further liability, both of person and property, under the decree.

If that be the decision of those learned Judges, we feel bound, with the greatest respect for their opinion, to dissent from it. In the first place, such a construction would be a complete inversion of the ordinary force of the words "release" and "discharge." Whether these words be used as legal terms or not, the word "discharge" has a more general signification than the word "release." The ordinary meaning of the word "release," when used with reference to a person, is to "set at liberty," whereas the meaning of the word "discharge" is ordinarily "to absolve from liability." In the second place, if we refer to the preceding Sections of the Act, we find the words "release" and "discharge" used without reference to any such distinction. Thus, when a creditor applies for his discharge under Section 273, the Court may, under Section 274, call upon the creditor to show cause why he should not be discharged, and pending "any enquiry" which the Court may consider it necessary "to make, the Court may either leave the debtor in custody," or if he furnish good and sufficient security, "the Court may *release* the defendant on such security." It is impossible to say that a release upon security, pending an enquiry, can be anything more than a release from custody only.

It has been said, if the word "released" be not so construed in Section 278 as to absolve the debtor from all further liability, it would lead to great injustice and oppression. By this I understand that it is considered that it would give the creditor greater power over his debtor than the Legislature intended he should have. That can only be judged by comparing the powers which would result from this construction with the powers expressly conferred upon the creditor. They are very wide. He may seize the person of his creditor, and keep him in prison for two years if the amount of the decree exceed Rupees 500; for six months if the amount of the decree exceed Rupees 50; and for 3 months if it be for any lesser sum, and concurrently with the imprisonment, as well as after the term of imprisonment has expired, the debtor's property may from time to time be attached until the decree is satisfied.

These are remedies not considered to be oppressive on the debtor, but they are obviously more severe than that which would result from allowing a creditor to execute his decree against the debtor's property after he has suffered a portion only of the imprisonment allowed by the law.

There is but little analogy between the English Law and the Law of this country upon this subject. Even in England, as is pointed out in the case of Thompson *versus* Parish, reported in the Law Journal Report, Volume 28, Common Pleas, 153, taking a debtor in execution is not an extinguishment of the debt, as has been sometimes said, but merely bars any other remedy against the debtor; or as it is put by Chief Justice Hobart at page 83 of his Reports, "the *Capias* executed and the body taken stops as against him all other execution but itself;" or as Mr. Justice Willes puts it in the case of Thompson *versus* Parish, "the creditor, having made his election "to proceed by writ of *Capias ad satis-* "*faciendum*, is bound by his election, and has "that remedy only." But the doctrine, that taking the body in execution is a final election to take that remedy only, has no application here, where execution against the

person and the property of the debtor are allowed to proceed concurrently.

It must also be remembered that the position of a creditor here, who, in execution of a decree, causes his debtor to be imprisoned, is very different from that of a creditor who takes the body of his debtor under a writ of *Capias ad satisfaciendum* in England. The creditor here can only retain his debtor in prison, upon condition of paying the cost of his maintenance whilst he remains in custody; there is, therefore, less reason than in England for holding that the arrest in execution, when once made, is the only satisfaction which the creditor is permitted to seek.

We are of opinion that the arrest of the debtor in execution, under the Code of Civil Procedure, was not intended by the Legislature to operate in any case, either as a satisfaction of the debt, or as a bar to any other remedy, but merely as a collateral means of compelling the debtor to make a full and fair disclosure of his property so as to enable his creditor to get his money. If he makes such a disclosure, he is at once entitled to be set at liberty.

We consider that the Legislature did not intend any distinction between a release and a discharge, but that throughout those Sections those words are to be considered as used in the sense of "set at liberty" only, without absolving the debtor from all further liability under the decree.

We, therefore, think that the application for an attachment in this case ought to have been granted; but, as our opinion is thus at variance with what we understand to have been the decision in the case referred to, we think it desirable that the question should be laid before a Full Bench whether, after a debtor has been arrested by his creditor and set at liberty at the request of the creditor, an attachment, in respect of the same debt, can be issued at the suit of the same creditor against the debtor's personal property.

The judgments of the Full Bench were delivered as follows:—

Peacock, C. J. (Macpherson and Hobhouse, JJ., concurring).—The question which is propounded for the opinion of the Full Bench is whether, after a debtor has been arrested by his creditor and set at liberty at the request of the creditor, an attachment in execution in respect of the same debt can be issued at the suit of the same creditor against the debtor's personal property.

The question seems to have been raised by the Judge of the Small Cause Court, and to have been referred to this Court for an opinion, in consequence of a decision in the case of Dwarkalal Mitter reported in Bourke's Reports, page 109.

I certainly was surprised to find that the question had been raised, for, so far as I was concerned, I never entertained a doubt upon the subject. The rule is very clearly laid down in Section 282 of the Code of Civil Procedure. It says that "a defendant once "discharged shall not again be imprisoned on "account of the same decree, except under "the operations of the last preceding Section, "but his property shall continue liable, under "the ordinary rules, to attachment and sale. "The decree shall be fully satisfied, unless the "decree shall be for a sum less than one "hundred rupees on account of a transaction "bearing date subsequently to the passing of "this Act."

In the case referred to, that of Dwarkalal, reported at page 109 of Bourke's Reports for 1865, the defendant in the suit had been arrested for non-payment of the amount of a decree; but in consequence of the creditor's not having deposited subsistence-money according to law, he was discharged, and the question was whether he could be re-taken. A rule issued, calling on the prisoner to show cause why he should not be re-arrested on the old writ, or why a new writ should not be issued in execution of that decree. It appeared to me that the prisoner, having once been discharged, came clearly within the rule laid down in Section 282, and that he could not be re-taken, and upon that question only I expressed my opinion. I said: "I am of opi-"nion that the rule ought to be refused. To "grant the application would necessarily lead "to great injustice and oppression. It would "enable a creditor to drag a debtor before the "Court as often as he pleased, simply for the "purpose of harassing him. In the Mofussil, "where the Courts are far apart and means of "access difficult, this would be an intolerable "hardship. The Legislature could never have "contemplated such a state of things. In "England, the discharge of a man's person "once from execution is a discharge for ever. "The principle applying here, that 'no man "should be twice vexed on the same charge, "is a very proper one, and the rule must be "refused.'" These remarks were applicable to the question then before the Court, namely, whether the prisoner could be re-taken and his person seized in execution, he having

been once discharged in consequence of the creditor not having deposited subsistence-money.

Mr. Justice Morgan seems to have had some doubts upon the question, and according to the report, as given in Mr. Bourke's Reports, he is made to say: "I am not quite "satisfied upon the point, and would like to "have further time to consider whether there "is any real distinction in the Act between "the words 'release' and 'discharge.' In "England, when a *capias* issued, the plaintiff "was supposed to be satisfied. That did not "seem to be so here. The terms of Act VIII. "of 1859 seem to imply the power to arrest "both person and property, and it seems to me "that the arrest of the person is not the full "satisfaction here that it is under English Law. "I have doubts upon the subject, but I do not "wish to oppose the judgment of my learned "brethren."

Mr. Justice Phear said: "I concur with the "Chief Justice. The rule, if granted, would "have, as already pointed out, only one result. "I think, therefore, it should be refused;" so that really the question turned simply upon the point whether a prisoner once discharged from custody for want of deposit of subsistence-money could be re-taken. If he could be taken once, he might be discharged again the next day, or the next week, and then taken a third time and let out, and so on interminably, just as his creditor might choose.

It appears to me that that does not affect this case, where the creditor simply seeks to have his decree satisfied by levying execution upon the property.

An answer will be sent to the Small Cause Court that, after a debtor has been arrested in execution of a decree, and discharged at the request of the creditor, his personal property may be taken in execution under the same decree.

Seton-Karr, J.—I am of the same opinion. As I understand the reference, the Sections of Act VIII. of 1859 applying to the case are 278 and 282. The debt is for money exceeding 50 rupees, and, consequently, the defendant was liable to be imprisoned for a period not exceeding 6 months.

He was released from imprisonment after four months and twenty-five days, and, as I read those Sections, this release of his person did not bar the attachment of his personal property to make good the debt.

Jackson, J.—I am of the same opinion as the Chief Justice.

I desire simply to add that I never should have entertained any doubts upon this point myself; but in consequence of the expression of opinion attributed to Mr. Justice Morgan and to the tenor of the decision, as we find it in the somewhat obscure report of Mr. Bourke, it appeared to me that some doubt had been thrown upon the ability of the Court to issue a warrant either against the person or the goods of the debtor under the circumstances stated.

I entirely concur in the opinion that has been expressed by the Chief Justice.

The 30th January 1868.*

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, L. S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges*.

Review beyond prescribed period—Appeal—Exposition of new Law governing Reviews—Sections 377 and 378, Code of Civil Procedure.

Case No. 1395 of 1866.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 27th of January 1866, reversing a decision of the Sudder Ameen of that District, dated the 28th August 1865.

Shama Churn Chuckerbutty and others (Defendants), *Appellants*,

versus

Bindabun Chunder Roy and another (Plaintiffs), *Respondents*.

Baboo Onookool Chunder Mookerjee for Appellants.

Baboo Romesh Chunder Mitter for Respondents.

An appeal lies from the order of a Lower Court deciding what is just and reasonable cause for admitting an application for review after the prescribed period of 90 days have elapsed, and an Appellate Court has power to look at the reasonableness or sufficiency of the cause assigned for admitting such review. Sections 377 and 378

* This case was heard on the 15th August 1867.

of Act VIII. of 1859 must be read separately, the words "whether for rejecting the application or granting the review shall be final" applying solely to the application under Section 378, and not to the application under Section 377; and the latter Section relates only to the question of the time at which the Court is first asked to review its judgment.

A new exposition of the law by the High Court is not a just and reasonable cause for not having applied for a review within the period of 90 days; but, when a review has been properly granted, the case should be governed by any new exposition of the law which may have been laid down since the date of the original decision.

This case was referred to the Full Bench by Kemp and Glover, JJ.

THIS was a suit for resumption, and was decided against the ryot, on his failing to establish his lakheraj title.

More than two years after (the Full Bench ruling of this Court in the case of Maharanee Dassee having in the interim explained the meaning of the law in resumption-suits), the ryot applied to the Sudder Ameen, not the same officer who had given the previous decision, for a review of judgment, and the Sudder Ameen, holding that there was good and sufficient cause shown for the delay, admitted the application, and on it reviewed and reversed his predecessor's judgment, following the precedent laid down in the Full Bench ruling above referred to.

On appeal, the Principal Sudder Ameen held that the mere fact of a new exposition of the law having been made by the High Court was no good reason for admitting an application for review after 90 days had elapsed from the date of the original judgment. He also held that the Lower Court was not justified in reversing the original decision on the strength of a ruling which was not in existence at the time that decision was passed.

This decision of the Principal Sudder Ameen is in accordance with one of a Divisional Bench of this Court, dated the 17th August 1866, Onoop Chunder Paul *versus* Ekkouree Sing (VI. W. R. 167); but, as we are not prepared to assent to the ruling there laid down, we refer the question for the authoritative opinion of a Full Bench.

There are two questions involved—

First.—Who is the authority to decide what is just and reasonable cause for admitting an application for review after the prescribed 90 days have elapsed? Section 377, Act VIII. of 1859.

Second.—The application being admitted, is not the case in all respects a new one, and liable to be governed by any exposition of the law by a Full Bench ruling of the High Court, which may have been published since the date of the original decision?

It appears to us that the Court passing the decree is the only authority to decide what is not just and reasonable cause for a delay of more than 90 days; and that, whether its reasons for allowing the indulgence be good or bad, there is no appeal from them; and this seems to follow from the wording of Section 378 of the Code; for, if an order of Court admitting or rejecting a review be not subject to appeal, there is no reason why the preliminary question of time should be so subject either. If the Court's order is final in the one case, it must be so in the other.

We think, therefore, that a Court of Appeal has no jurisdiction to interfere with a Lower Court's discretion in the matter of time.

On the second point, we are of opinion that, when a Lower Court has, for what it considers to be "good and sufficient" reasons, admitted a review, the case is to all intents and purposes re-tried, and that there is nothing to prevent the Court from applying to the case any precedent of authority which may have been promulgated since the date of the original decision. A Full Bench ruling does not make new law, but expounds the meaning of what is already existing.

No doubt, it may be objectionable that cases long ago decided should be liable to alteration or reversal in review; but there appears to us nothing in the law which forbids a Court passing a decree from afterwards reviewing its order at any subsequent time, on "just and reasonable cause" being shown for the delay in the first instance, and for "good and sufficient reason" on the merits of the decision itself; and in neither case does it appear to us that an Appellate Court has jurisdiction to interfere. The decision thus come to would, of course, be appealable, but not the grounds on which the case was allowed to be re-heard.

The judgments of the Full Bench were delivered as follows:—

Peacock, C. J. (Kemp, J., concurring).—In this case the plaintiff sued to resume invalid lakheraj granted subsequently to the 1st December 1790.

On the 28th of April 1863, he obtained a decree in his favor. No appeal was preferred against that decision, which was in

accordance with law as it had been expounded by the late Sudder Court. Some time after the decision of the 28th April 1863, a case was decided by a Full Bench of this Court (Sonatun Ghose *versus* Moulvie Abdool Furar, 2 Weekly Reporter, page 205), which expounded the law differently from the mode in which it had been laid down in previous decisions of the late Sudder Court. In consequence of that decision of the Full Bench, the defendant against whom the decree of the 28th April 1863 was passed applied to the Sudder Ameen to review his decision. The Sudder Ameen at that time was not the person who had decided the case originally, but was a new officer who had succeeded him. The application for review was made long after the expiration of 90 days from the date on which the decision had been given, the Full Bench decision not having been given within that period. The Sudder Ameen admitted the review, but it does not appear upon what ground he considered that the delay was excused. Having admitted the review, it appears to me that he very properly acted upon the exposition of the law by the Full Bench, because, at the time when he re-heard the case, he was bound to act upon the law as laid down by the Full Bench case, which did not alter the law as it existed at the time when the cause of suit arose, but amounted merely to a new exposition of the law itself. An appeal was preferred from the decision of the Sudder Ameen, and was heard by the Principal Sudder Ameen. He thought that the Sudder Ameen was wrong in applying the new exposition of the law to the old case, and that the new exposition of the law was prospective. He went further, and decided that the Sudder Ameen was wrong altogether in admitting the review after the expiration of 90 days without sufficient cause, and he held that the fact of the defendant not being aware of the law as newly expounded by the Full Bench was no excuse for the delay. A special appeal was preferred from the decision of the Principal Sudder Ameen, and upon that the case has been referred by a Division Bench to a Full Bench to decide two questions: *first*, who has the authority to decide what is a just and reasonable cause for admitting an application for review after the prescribed 90 days have elapsed under Section 377 of Act VIII. of 1859; and, *secondly*, the application being admitted, is not the case in all respects a new one and liable to be governed by any exposition of the law by a Full Bench ruling of the High Court, which may have been published since the original decision?

With regard to the second question, we have already expressed our opinion that, if the Sudder Ameen was right in admitting a review, he was right in acting upon the new exposition of the law.

The only remaining question, then, is whether the Sudder Ameen was right in admitting the review after the expiration of the 90 days, and if he was wrong whether the Principal Sudder Ameen or this Court can deal with this decision. That, as it appears to me, depends upon the construction of Act VIII. of 1859, Chapter 11. The Sections principally bearing on the case are 377 and 378.

Section 377 says: "The application shall be made within 90 days from the date of the decree, unless the party preferring the same shall be able to show just and reasonable cause, to the satisfaction of the Court, for not having preferred such application within the limited period." Section 378 says: "If the Court shall be of opinion that there are not any sufficient ground for a review, it shall reject the application, but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review, and its order in either case, whether for rejecting the application or granting the review, shall be final." Now, it appears to me that in substance there are two orders in this case: *first*, the order that the application should be received; *secondly*, the order granting the review.

We are not dealing with the first order which, although not formally drawn up, is substantially included in the case. Section 368 of the Act says that "no appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree; but, if the decree be appealed against, any error, defect, or irregularity in any such order, affecting the merits of the case or the jurisdiction of the Court, may be set forth as a ground of objection in the memorandum of appeal."

It appears to me that the order admitting the application after the 90 days was an order prior to the decree upon the re-hearing of the case upon review, and therefore that, under Section 363, that order was appealable, unless Section 377 has left it wholly to

the discretion of the Court to admit a review after the expiration of 90 days, whenever that Court shall think a reasonable excuse for the delay is made out.

It is suggested by my honorable colleague by my side that there was no ground of appeal before the Principal Sudder Ameen; that the Sudder Ameen was wrong in admitting the review after the expiration of 90 days, but the Principal Sudder Ameen, although there was not that ground of appeal, did expressly decide the case upon that point, as well as upon others. Sitting here upon appeal from the decision of the Principal Sudder Ameen and for the purpose of doing justice, we must deal with the case as if the Principal Sudder Ameen had allowed the grounds of appeal before him to be amended and an additional ground of appeal inserted, namely, that the Sudder Ameen was wrong in admitting the review after the expiration of 90 days without sufficient cause; and then his judgment would have been founded upon that ground of appeal. Therefore I think the case properly comes before us, although there was no special ground of appeal to the Principal Sudder Ameen that the decision of the Sudder Ameen was wrong in admitting the review.

Then come the questions:

1st.—Was there just and reasonable cause for not having preferred the application within the limited period?

2ndly.—Can this Court look to the reasonableness or sufficiency of the cause, or is that question left wholly and entirely to the discretion of the Court to which the application for review is made?

Now, it appears to me that it would be very dangerous to leave the justness and reasonableness of the excuse for the delay to the discretion of the Lower Court. It is a ground of the greatest importance that decisions which have been passed for many years should not be opened, unless some sufficient ground be shown for the delay in not having applied earlier. In a case before the Privy Council, reported in Vol. VII. of Moore's Indian Appeal, page 283 (Maharajah Moheshur Singh *versus* the Bengal Government),* one of the points was, whether the Commissioners of Revenue were right in admitting a review of a decision in a resumption-suit after the expiration of 90 days without sufficient cause. The Lords of the Judicial Committee treated the admission of a review after the expiration of three months, which was the time allowed by the Regulation XXVI. of 1814, as an interlocutory order. At page 302 they say: "Before we enter into particulars of that question we deem it right to notice an objection which "was taken at the bar on the part of the "respondents, that it was too late now to "impugn the regularity of the proceeding "to grant the review; that, if the appellant "deemed himself aggrieved by it, he ought "to have appealed at the time, and that he "was too late in doing so after a decision had "been pronounced against him.

"We are of opinion that this objection "cannot be sustained. We are not aware "of any law or regulation prevailing in "India which renders it imperative upon "the suitors to appeal from every interlocu-"tory order by which he may conceive "himself aggrieved under the penalty, if he "does not so do, of forfeiting for ever the "benefit of the consideration of the Appellate "Court."

The Judicial Committee thought that the appellant was in time, after the decree had been passed on the review, to take objection that the Court was wrong in admitting the review after the expiration of three months without reasonable cause. The words of Regulation XXVI. of 1814, so far as they refer to the admission of the review after the expiration of the time limited, are almost identical with those of Section 377 of the present Civil Procedure Code. The second Clause directs that the petition for review shall be presented within three calendar months. This provision, however, admits of an exception, by providing that, if the parties preferring the same shall be able to show just and reasonable cause to the satisfaction of the Court for not having preferred such application within the limited period, such review will be allowed. The Privy Council did not think that the words "to the satisfaction of the Court" would prevent them from looking into the grounds which were urged as an excuse for the delay. The Lords of the Judicial Committee say: "It necessarily follows that, if the "review was granted without due regard to "the regulations governing such proceedings, "it and all that has been done under it "must fall to the ground." That is at page 309. It appears to me that the case is similar to the present, and that the words to which our attention has been called in Section 378, *viz.*, "its order in either case, whether for rejecting the application or granting the

* *See* 3 W. R., Privy Council cases, page 45.

review, shall be final," are applicable only to the orders for rejecting the application or granting the review, and not to the decision as to whether there was just and reasonable cause for allowing the application to be made after the period of 90 days mentioned in Section 377.

Now, let us see what would be the consequence of holding that the new decision or the new exposition of the law by the Full Bench was a sufficient excuse for not having applied for the review of judgment within the period of 90 days. If it was a sufficient excuse for not having applied within the period of 90 days, it would be a sufficient excuse for applying to review every judgment which has been given on resumption-suits within the last fifty years, and consequently almost all the titles which depend upon decrees in resumption-suits would be altogether upset; because, if we hold that there were sufficient grounds to apply for a review of the judgment, in consequence of that decision we must also hold that there would be sufficient ground for applying for the review of every judgment of the same character which has been passed within the last fifty years. No title, therefore, would be safe which depends upon a decree in a resumption-suit.

The Judicial Committee of the Privy Council say upon that point: "Let us now address our "attention to the Regulations which have been "passed relative to the question of granting a "review. It must be borne in mind that a "review is perfectly distinct from an appeal; "it is quite clear from the Regulations that "the primary intention of granting a review "was a consideration of the same subject by "the same Judge, as contradistinguished to "an appeal, which is a hearing before another "tribunal. We do not say that there might not "be cases in which a review might take place "before another and a different Judge, because "death or some other unexpected and un-"avoidable cause might prevent the Judge "who made the decision from reviewing it; "but we do say that such exceptions are al-"lowable only *ex necessitate* In this case, "there was the exception, for the Sudder "Ameen who had passed the decision had left "the station, and a new Sudder Ameen had "been put in his place." The Judicial Committee go on to say: "We do say that in "all practicable cases the same Judge ought "to review; and that, for the attainment of "that object, expedition in presenting a peti-"tion for the review is indispensable, and "the only practicable course for attaining "that end by accelerating the hearing of the "review before accident or unexpected "events shall have removed the original "Judge. Looking at all these circumstances, "we should naturally expect to meet in the "Regulations upon this subject such pro-"visions as would prevent the evils neces-"sarily incidental to delay and procrasti-"nation" (*see* page 304). In another part of their judgment they say (page 308): "We "are of opinion that, for granting a review "in the cases we have just supposed to exist, "the causes, accounting for the delay and "intended to justify the grant of a review, "ought to be of grave importance."

At page 303 they say: "Before con-"sidering whether the review was granted "in conformity with the Regulations, "let us look a little to the principles "upon which we think lapse of time is a "most important consideration. In the pre-"sent case, five years and a half had passed "away since the original decision. Surely, "whatever may be the true import of the Re-"gulations, the parties interested in the de-"cision which had been made were entitled, "after the lapse of a sufficient period, no "appeal having been asserted or petition "for a review presented, to conclude that "the Government acquiesced in what had "been done by the Special Commissioners, "and, in that rational conviction, to deal "with the property upon the footing of the "past decision."

Now, it appears to me that all the principles to be deduced from the case to which I have referred are equally applicable to the present case, and that a new exposition of the law was not a just and reasonable cause for not having presented the review within the 90 days required by law. The new construction of the law might be a ground for review, but it was no excuse for not having applied before. If it was, cases which have been decided and acted upon for 50 years might be re-opened, which never could have been intended.

I think the review in this case ought not to have been admitted, and that we must follow the course which the Privy Council did in the case to which I have alluded, and hold that, if the review was granted without due regard to the provisions of Section 377, it and all that has been done under it must fall to the ground.

I am of opinion that there was no just and sufficient cause for not having preferred the

application for a review within the limited period, and that the Sudder Ameen, by hearing the review after the limited period, did not preclude a Court of Appeal from inquiring whether the excuse for the delay was sufficient.

There was a case* in this Court in which Mr. Justice Shumbhoonath Pundit and Mr. Justice Glover differed in opinion as to whether a decision which had been passed upon a re-hearing under a review (the review having been granted after the expiration of 90 days, and the Judge having given no reasons for the admission of the review) could be interfered with by this Court. Mr. Justice Shumbhoonath Pundit thought that, under Sections 377 and 378, the decision of the Court admitting the review was final, although it gave no reasons for admitting it after the expiration of the 90 days. On the other hand, Mr. Justice Glover thought that an appeal would lie from the decision which took place on the hearing on review, and that the question whether there was reasonable cause for the delay or not might be enquired into by this Court. The case was referred to a third Judge, and came before me, and I concurred with Mr. Justice Glover that the fact of the Judge's having admitted the review after the 90 days was not conclusive upon this Court that there was sufficient excuse for the delay.

I thought that the Principal Sudder Ameen was not authorized to enter into the ground for granting the review until he was satisfied that there was reasonable cause for the delay. If the Sudder Ameen had the power to admit a review in this case, his successor might review his judgment 20 years hence, and any Principal Sudder Ameen would have power to review a decision passed by his predecessor 20 years ago, without any cause for the delay in making the application being shown, and without pledging himself that the cause, if any, assigned for the delay is in his judgment sufficient. If such were the case, there would be an end to all finality in litigation. I am of opinion that an application for a review cannot be properly admitted after the limited period, unless there is just and reasonable cause for the delay, and that a decision as to what is just and reasonable cause for admitting an application for review after the prescribed period of 90 days is one upon which an appeal will lie.

As to the second ground, I have already stated that, in my opinion, when a review is properly granted, the case upon the re-hearing under the review ought to be decided according to the last exposition of the law by a Full Bench.

As nothing remains to be done by the Full Bench, I may state that my opinion now is that this appeal, which has been preferred against the decision of the Principal Sudder Ameen, must be dismissed upon the ground that the Principal Sudder Ameen was right in holding that there was no sufficient cause for admitting the review after the expiration of the 90 days. The appeal is accordingly dismissed with costs.

Jackson, J.—I entirely concur with the Chief Justice upon the two questions referred by the learned Judges of the Division Court.

The second of these questions is extremely simple, and for the reasons stated by the Chief Justice I am of opinion that, when the review had been once admitted by the Sudder Ameen (and the sufficiency of the cause for which he admitted the review is not a matter for the consideration of any Appellate Court), then undoubtedly he would be right in deciding the case that was again before him for decision according to the exposition of law then governing the Courts.

The first question is one of somewhat more difficulty. Applications for review presented to the Court after the expiration of 90 days stand upon wholly different grounds from applications presented within the 90 days. When presented within 90 days, they are presented as a right, and the Court has then to apply itself only to the reasons which the petition contains for review of judgment; but when presented after 90 days have expired, quite an independent question presents itself, in the first place, for the decision of the Court, namely, whether the parties have shown a just and sufficient cause to the satisfaction of the Court for the delay which has taken place. It appears to me that the decision of the Court upon that point stands quite apart from the decision under Section 378, and that it is a matter which is one for the consideration of an Appellate Court, if an appeal should be afterwards made from the decree. It seems to me that an order made upon that case comes clearly within the terms of Section 363 as an interlocutory order. It was so regarded by the Privy Council in the case to which my Lord has referred.

* Special Appeal No. 3160 of 1863—8 Weekly Reporter, page 184.

and is, therefore, clearly one to which objection may be taken on appeal against the final decree.

Then it is said that no ground of appeal upon this point was presented to the Principal Sudder Ameen. It appears to me that that is wholly immaterial, not only for the reasons given by the Chief Justice, but also because, by Section 324, it is provided "the appellant "shall not without the leave of the Court "urge or be heard in support of any other "ground of objection, *but the Court, in "deciding the appeal, shall not be confined to the grounds set forth by the "appellant.*" It is, therefore, entirely within the competency of the Court to take into its consideration anything in the case, which either affects the regularity of the proceedings of the Court below, or relates to the correctness of the decision upon the merits. It appears to me, therefore, that the Principal Sudder Ameen was entirely competent to take up this point, and to dispose of it on the appeal.

I am of opinion that, if the Sudder Ameen had entertained this petition of review presented after the expiration of 90 days, without stating that any just or sufficient cause had been shown to his satisfaction for the delay, the order would have been absolutely bad, and all that would have been done under it would fall to the ground.

I also think that, if good and sufficient reason had been shown, and that reason had been such as the Appellate Court could not approve, the Appellate Court would be justified in setting it aside. I further think that the reason assigned in this case, namely, the promulgation of a new interpretation of the law, was not a good and sufficient cause for admitting or entertaining the application for review after the lapse of 90 days.

Macpherson, J.—I think that Sections 377 and 378 of Act VIII. of 1859 must be read separately. The words in Section 378, which declare that the order, "whether for "rejecting the application or granting the "review, shall be final," must be read as applying solely to the application under Section 378, and not to the application under Section 377—which last Section relates only to the question of the time at which the Court is first asked to review its judgment.

I concur in the order dismissing the appeal.

Glover, J.—I concur generally in the judgment of the learned Chief Justice.

It appears to me, on further consideration, that Sections 377 and 378 of the Civil Procedure Code refer to different things, and ought not to be read together, and that an order passed under the first-named Section is an interlocutory order, which is subject to appeal (Moheshur Sing *vs.* Government of Bengal, 7 Moore 362); and, if this be so, the Principal Sudder Ameen's finding on the question as to whether there was just or reasonable cause for deciding the application for review after the 90 days had elapsed was a question of fact with which there would be no interference possible in special appeal.

It does not seem to me necessary to go further than to declare that the first Court's decision as to what is "just and reasonable cause" is open to appeal. This was the question referred to the Full Bench.

And I do not think that, under the circumstances of the case, we are called upon to say whether the Principal Sudder Ameen's opinion as to the sufficiency or otherwise of the Moonsiff's reasons was a good one or not.

As the 2nd point referred has been given in favor of the opinion expressed in the referring order, I have only to say that on this point I concur with the learned Chief Justice.

The 31st January 1868.*

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble F. B. Kemp, L. S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges.*

Mortgage—Limitation—Trustee—Clauses 15 and 16, Section 1, and Section 2, Act XIV. of 1859.

Case No. 29 of 1867.

Regular Appeal from a decision passed by the Judge of Tirhoot, dated the 20th of August 1866.

Baboo Lall Doss and others (Defendants), *Appellants,*

versus

Jamal Ally (Plaintiff), *Respondent.*

* The case was heard on the 20th August 1867.

Mr. C. Gregory and *Baboo Onookool Chunder Mookerjee* for Appellants.

Mr. R. E. Twidale and *Baboos Obhoy Churn Bose* and *Otool Chunder Mookerjee* for Respondent.

When a mortgagor, after a mortgage has been satisfied, sues for the recovery of the property mortgaged, the case comes within Clause 15, Section 1, Act XIV. of 1859; but, when he sues for surplus collections which have been received by the mortgagee, the case falls under Clause 16 of that Section.

A mortgagee, after the mortgage has been satisfied, is not a trustee for the mortgagor within the meaning of Section 2 of the Act cited.

This case was referred to a Full Bench by Peacock, C. J., and Loch, J.

We think that the Judge was right in coming to the conclusion that the principal and interest secured by this zur-i-peshgee lease has been paid off, and consequently that the plaintiff is entitled to restitution of his estate.

It was stated that the lease was from 1836 to 1860, at a rent of Rs. 692. We look upon the transaction as a mortgage, and not really as a lease. We are of opinion that the plaintiff is entitled to recover whatever may be found due to him, upon a balance of accounts, to be taken from the mortgagee, for the last six years before the commencement of the suit.

We will not express any opinion as to whether the plaintiff can go beyond six years or not. But in consequence of a decision to which we have been referred, in which it was held that limitation does not apply to a case of this kind, we shall refer the case to a Full Bench.

The case cited is Regular Appeal No. 233 of 1865, decided on review by Justices Morgan and Shumbhoonath Pundit.

The first question reserved is, whether a mortgagor is entitled to recover, as against a mortgagee, whatever may be found due upon a balance of accounts for a period further back than six years before the commencement of the suit.

Clause 15, Section 1, Act XIV. of 1859, limits the right of action to suits against a depositary, pawnee, or mortgagee of any property, moveable or immoveable, for the recovery of the same, to a period of 30 years, if the property be moveable, and 60 years if it be immoveable, from the time of the deposit, pawn, or mortgage. It must be remarked that Clause 15 does not say that all suits against a mortgagee are to be so limited; but only suits against a mortgagee of any property, moveable or immoveable, for the recovery of the same. The question is whether that applies merely to the matter which was pledged such as the land in this case, or to money, which may be found upon account to have been received by the mortgagee in excess of principal and interest. The Judge, on considering the question, has treated the mortgagee as a trustee for the mortgagor.

We will not express any opinion upon the subject until the question shall have been fully discussed and argued by a Full Bench. But we think that it is a fit question to be referred for the decision of a Full Bench, whether a mortgagee can be said to be a trustee for a mortgagor within the meaning of the Limitation Act.

We may as well determine the whole question now. If the Full Bench hold that the plaintiff is entitled to go back only for six years, we think that the amount which he is entitled to recover is Rs. 2,616.

The plaintiff has endeavoured to make out that the defendant, the mortgagee, is bound to account for the whole period from the commencement of the zur-i-peshgee down to the commencement of this suit, taking the collection of Rs. 3 a beegah; because he has proved that, in certain cases, he sued certain ryots for rents at that rate. It does not appear whether he recovered decrees in those cases, or whether he executed the decrees. But in one case he petitioned the Court, stating that the parties had compromised the suit.

The plaintiff says (and the Judge takes that as the basis of the accounts which he has taken) that that is sufficient to enable the Court to adjust the account upon the basis that the mortgagee collected rent at Rs. 3 a beegah for the whole land included in the zur-i-peshgee. The Judge disbelieved and rejected the accounts put in by the mortgagee. He also disbelieved the accounts taken by the Ameen on the local enquiry, and we see no reason to differ from the Judge in regard to his finding upon those two points.

Having rejected those accounts and disbelieved them, the only way is to take a settlement of the account of what the mortgagee received, and what he is accountable for.

Section 11, Regulation XV. of 1793, says in its last Clause that "the mortgagor is to "be permitted to examine the accounts; and "after hearing any objections he may have to "offer on any evidence that either party may "have to adduce respecting them, the Court "is to adjust the account." Disbelieving the mortgagee's account, the Court is to adjust the account upon the evidence given in the cause. The plaintiff says that the Court in adjusting the account ought to take Rs. 3 a beegah. If we believed the evidence, we should be bound to adjust the account upon that principle. But it is mere speculation to say that, because he brought suits against 15 ryots for rent at Rs. 3 a beegah, it necessarily follows that all the lands included in the zur-i-peshgee were of equal quality, and that every ryot in the estate actually paid Rs. 3 a beegah. Therefore, it is necessary to see whether there is any safer guide to go by. It appears to us that there is a safer guide to go by.

As we have before stated, if the Full Bench should determine that the plaintiff is only entitled to six years before the commencement of the suit, we think that the amount which he is entitled to recover is Rupees 2,616. The gross collections of the 8-annas share included in the mortgage may be taken at Rupees 1,087, *i. e.*, half of Rupees 2,174, being the amount of gross collections upon which the Government revenue was assessed in 1856, in the presence of all the parties. From that amount, Rupees 543, being half of the Government revenue upon the whole estate, will be deducted, which leaves a balance of Rupees 544. From this must be deducted Rupees 103, being 10 per cent. for the cost of collections of the Rupees 1,087, which leaves Rupees 436 for each year, or Rupees 2,616, as above mentioned, for the six years.

If the Full Bench should be of opinion that the plaintiff is entitled to whatever may be found due to him, on taking the account from the commencement of the zur-i-peshgee lease in 1838, we shall refer the calculations to Baboo Kedarnath, under Section 181, Act VIII. of 1859. His calculations will be made upon the following basis. From the commencement of the zur-i-peshgee lease to 1839, Rupees 914-8 will be taken as the gross collections of the 8-annas share included in the mortgage, being half of Rupees 1,829 which were taken as the gross collections of the whole in the Revenue Settlement of 1836, the last settlement before the zur-i-peshgee lease of 1838. Ten per cent. for collections of the Rupees 914-8 will be allowed to the mortgagee, and the Government revenue, taken at Rupees 457, from 1839 to June 1856, the gross collections of the 8-annas share included in the mortgage will be taken at Rupees 746, being double the amount of Rupees 373, assessed as Government revenue; 10 per cent. will be allowed for collections, and Rupees 3,773 will be taken as the amount of Government revenue upon that portion of the estate. From 1856 to the 19th September 1863 (the commencement of the suit) the gross collections of the 8-annas share will be taken at Rupees 1,087; 10 per cent. malikana thereon will be allowed, and the Government revenue taken at Rupees 543. The amount of mortgage-debt is to be taken at Rupees 1,961, and the amount of interest at 12 per cent. Interest will be allowed to the plaintiff at the rate of 12 per cent. per annum upon the amount of principal which, upon taking the accounts in the manner above mentioned, shall appear to be due from time to time. But compound interest is not to be allowed.

The pleaders on either side will be at liberty to attend before the officer in adjusting the accounts; and, if either party be dissatisfied with his decision upon any point, he may take exception to the report before this Court. The question of costs is reserved.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—It appears to us to be very clear that, when a mortgagor, after a mortgage has been satisfied, sues for the recovery of the property mortgaged, the case comes within Clause 15, Section 1, Act XIV. of 1859. But when he sues for surplus collections which have been received by the mortgagee, then the case falls under Clause 16. It has been said that a mortgagee, after the mortgage has been satisfied, is in the position of a trustee for the mortgagor. We think he is not a trustee within the meaning of Section 2 of the Act. But, even if he can be called a trustee, he is a trustee of the description falling within Clause 15, Section 1, and not a trustee of the description referred to in Section 2.

We do not think it likely that the Legislature could have intended that a mortgagor, whose case is provided for by Clause 15, Section 1, and who is thereby limited to 30 years, should have the election of treating the mortgagee as a trustee, and saying that

he comes within Section 2, and is barred by no length of time.

According to the decision of the Division Bench, the plaintiff will be entitled to a decree for Rupees 2,616 with costs in proportion. In other respects the decree of the Lower Court will stand.

The 31st January 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, W. S. Seton-Karr, J. B. Phear, and A. G. Macpherson, *Judges*.

Onus probandi — Enhancement — Increase of productiveness of land — Title — Written statement—Section 17, Act X. of 1859.

Case No. 76 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 14th December 1866, reversing a decision passed by the Deputy Collector of that District, dated the 24th July 1866.

Poolin Beharee Sein (Defendant), *Appellant*,

versus

Messrs. R. Watson and Co. (Plaintiffs), *Respondents*.

Baboos Kali Kishen Sein, Romanath Bose, Sreenath Doss, and *Ashootosh Chatterjee* for Appellant.

Messrs. R. T. Allan and *J. S. Rochfort* for Respondents.

The *onus* in a suit by a landlord for enhancement under Section 17, Act X. of 1859, on the ground that the productiveness of the land has increased, rests on the plaintiff who must prove that the productiveness was increased otherwise than by the agency or at the expense of the ryot.

The general rule of evidence is that if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove it.

A written statement put in by a defendant is not a plea by way of confession and avoidance, and the whole statement must be taken together.

This case was referred to the Full Bench on the 25th April 1867, by Bayley and Shumbhoonath Pundit, JJ.

Pundit, J.—THIS is a case for enhancement. Plaintiff sued on the ground of increase in the productive powers of th land, and excess of area, and increase c value of the produce. On the two lat points there was a remand; but this speci appeal is on the first point.

The special appellant, defendant, havin admitted the increase in productiveness, i was called upon to show that it had so i creased by his agency or at his expens and the defendant's proof on this point bein considered insufficient, a decree was give to the plaintiff declaring him entitled t enhance.

This view is in accordance with a dec sion of this Court reported in page 24 Vol. I. of the Weekly Reporter, 18th August 1864.

We, however, are not inclined to agree this view. We hold the landlord has prove that he is entitled to enhance o the ground or grounds for enhanceme enumerated in Section 17 of Act X. of 185 and mentioned in the notice served by hi Ground No. 2 is increase in productio otherwise than by the agency or at th expense of the ryot, and the landlord cou not be entitled to enhance by proving simpl an increase in production. What th landlord will have to prove is not a negativ but an affirmative, showing the cause of th increase, and further proving that the sam is unconnected with the agency or the ex pense on the part of the ryot. Upon thi view the case reported in page 155 of th same volume appears to have been decide The admission or denial by the ryot of th fact of increase does not make any diffe ence. Bare increase will not entitle a z mindar to enhance. If he had been entitle to enhance only on that proof, unless th ryot succeeds in proving that it is a his expense and by his agency, then th plea of the ryot that the increase is owin to him and to his expense may be a speci plea by him, which he must then have t prove.

The law would have been differentl worded if such a thing was intended Plaintiff cannot say that he cannot know th facts which he is required by us to prove because it is on the allegation of such fac having taken place that plaintiff, unde Section 17, acquires any right to serv notice to demand enhanced rents.

The two decisions appear to be inconsis ent with each other. Although the Lowe Appellate Court does not appear to hav

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ided against the defendant solely upon s question of *onus*, still this question st be settled before we can proceed fur-r.

On the *onus* being thrown upon the intiff, he may perhaps have it within his er to prove additional facts which are now before us, and which may bear n the present subject.

f the defendant, special appellant, has to e a plea which we think is not a special a of his, but a denial of the allegations he plaintiff, it is to be decided whether facts proved in this case are legally icient to exempt the ryot under cover of words "agency" and "expense."

We therefore refer this case to the Full ch to know on whom the *onus* to prove agency of, and expense by, the ryot in such a case, and also to try, if *onus* is upon the defendant, whether facts found are legally sufficient to mpt the ryot.

The Full Bench may decide only the ab-ct point of law, and remand the case to or try the whole case, just as it may that Bench.

Bayley, J.—I have doubts as to which the correct ruling on this point, whether *onus* is on plaintiff as of one continuous gation, *viz.*, "that the land is liable to hancement because of increase of produc-eness *not* the result of the ryot's agency," whether the plaintiff's allegation may be fined to this, *viz.*, "that there is such rease, and, on that being admitted or ved, defendant must show his special mption because that increase is the result his own agency." The first affirmative gation is, that there is an increase enti-g to enhancement; but is it sufficient, en proved, to obtain a decree, if proof not also given by the plaintiff that it is increase *not* the result of the ryot's agen-? The wording of Section 17 leaves s in doubt; and the point had better be cided by a Full Bench.

The judgments of the Full Bench were delivered as follows:—

Peacock, C. J. (Bayley and *Macpherson, J., concurring).*—The question which is bmitted for the opinion of the Bench is hether, when a landlord sues for enhance-ent on the ground that the productiveness f the land has increased, the *onus* is on he plaintiff to prove that the productiveness as increased otherwise than by the agency or at the expense of the ryot, or on the defendant to prove that the productiveness was the result of his agency, or to show what was the cause of it.

Mr. Rochfort has contended that it would be sufficient for the plaintiff to allege that there had been an increase in productiveness. But that, I apprehend, would not be a sufficient ground for enhancement. The title of the plaintiff to enhance depends upon the fact that the productiveness has increased otherwise than by the agency or at the expense of the ryot.

We cannot suppose that Messrs. Watson & Co. gave notice that they intended to enhance the rent, or came into Court to enforce their power to enhance, and made a declaration that the statement in their plaint was correct that the productiveness had increased otherwise than by the agency of the ryot, without knowing the facts upon which they grounded their notice, their assertion in the plaint, and their verification of it. If they did so, they did that which they ought not to have done, and therefore we must suppose that, when they gave a notice to enhance and claimed the enhancement by their plaint, they knew upon what ground they alleged that the productiveness had increased otherwise than by the agency of the ryot.

Mr. Rochfort also referred to the defendant's statement as what he called a confession and avoidance. What a defendant says either orally or by a written statement is not a plea in confession and avoidance.

I asked Mr. Allan whether there was a written statement put in, or whether what the defendant stated was stated verbally in Court. But I do not think it makes any difference in point of law, whether the statement is made by defendant verbally or in writing.

Suppose a defendant comes into Court, and the Court asks him, "What do you say to the plaintiff's claim?" and he says: "I admit that the productiveness has increased, but not otherwise than by my agency." Such an admission must be taken altogether. So it is in the case of a written statement. A written statement put in by a defendant is not a plea by way of confession and avoidance; it is a statement of the grounds of his defence, and he must verify the statement. It is like an answer in chancery. If you read a man's answer, you must take the whole admission together. Taking the

whole admission together in this case, the defendant says that "the productiveness has increased, but not otherwise than by my agency," and the plaintiff then has to prove his case.

The general rule of evidence is that, if, in order to make out a title, it is necessary to prove a negative, the party who avers a title must prove the title.

That was laid down by the Privy Council in the case (Khaja Mahomed Gowhur Ali Khan *versus* Ashrufoonissa) reported in II. Weekly Reporter, Privy Council Rulings, page 13. They say that "the plaintiffs "have not only to prove their relationship, "which is not disputed, but their heirship, "which depends upon the illegitimacy of "the appellant; and they must give suffi-"cient general evidence to throw upon him "the *onus* of proving his illegitimacy."

In Starkie, the rule is thus laid down at page 588: "It is to be carefully remark-"ed that, although, as a general rule, the law "neither presumes liability nor discharge from "liability, nor any fact or state of things es-"sential to such liability or discharge not "established by competent means, the law "does not in the absence of proof of a nega-"tive, where it is material to a right, assume "the affirmative to be true; it is, on the con-"trary, frequently essential to the establish-"ment of right to prove the negative of "facts."

The plaintiff alleged the right to enhance on the ground that the productiveness had increased otherwise than by the agency of the ryot.

I am of opinion, therefore, that the *onus* lay on the plaintiff to prove the ground of his right to enhance, namely, that the productiveness of the land had increased otherwise than by the agency of the ryot.

The case will be remanded to be determined upon the evidence as it stands. The appellant will have the costs of this appeal.

We see that the suit was brought in the name of Messrs. R. Watson & Co. This Court has determined in a case in which Messrs. Watson & Co. were parties that the names of the persons composing the firm must be given in the same manner as every firm is bound to give the names of its members. In future, the Judges are not to receive plaints at the suit of Messrs. Watson & Co., or of any other firm, but should, in all cases, require the names of the parties constituting the firm to be stated.

Selon-Karr, J.—I am of the same opinio

Two main points were urged on behalf the zemindar, with the view of casting t *onus* on the ryot.

Mr. Rochfort's argument was, that wh the fact of a positive increase was either a mitted or proved, this fact alone would e title the zemindar to the benefits of t increase, unless the defendant could pr the special plea of avoidance. But this gument, though at first sight it may app to deserve some consideration, seems to to have been completely disposed of by t remarks of the learned Chief Justice to t effect that, if you take the admission of defendant at all, you are bound to take all together and to its whole extent.

The other main argument was dwelt up by Mr. Allan to the effect that, in this cas the *onus* ought to be shifted according the means of facility of proof resides wi one party or the other, and that in suits f enhancement it is much more easy for th ryot to prove the special circumstance under which either the value of the produc or the productive powers of the land ha increased, than it would be for the zemindar that it is fairer, in short, to require the ry to prove his case with regard to his parti-cular plots which he is necessarily famili with from constant supervision and inspec tion, than to require the zemindar to prov his case with regard to the lands of score of ryots, scattered probably over sever villages, of which he or his agent can hav but a partial knowledge.

But there is nothing unreasonable in re-quiring the zemindar to prove his case. He has his gomashtah or his local agents. He can call the defendant himself into Court and examine him, and he can summon other ryots to prove facts which must be widely known; and he ought to have no difficulty in proving that the increase has result from additional productiveness in the so arising out of fertilising deposits, or fro increased facilities for disposing of the pr duce, arising out of the construction protecting embankments, or the introductio of Railways, or the rise of new markets, the generally increased facilities of commu nication which are caused by the constructio of ordinary metalled roads. Consequentl there is nothing which, in my opinion should exempt the zemindar in this cas from the ordinary liabilities which attac to all plaintiffs.

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The case reported at page 24, Volume I., Weekly Reporter, was never properly argued. No one appeared for the respondents, and it appears to have been assumed that, on the mere fact of increase being proved or admitted, the *onus* was necessarily shifted to the shoulders of the ryot.

The two other cases, as far as the facts can be gathered from the reports, appear to me to favor the contention of the appellant in this case. But on general grounds, and looking to the purely legal question of the *onus* of proof, I am quite prepared to hold that, in such a case, it is justly laid on the party seeking to enhance.

Phear, J.—This is a suit to recover rent at an enhanced rate. The party claiming this must have given notice under Section 3, Act X. of 1859, of his intention to claim an enhanced rent, and the ground upon which that claim is based; and under Section 17, if the claim be made upon the ground of increase of the productive powers of the land, or of the value of the produce, it must include this further condition also, namely, that these have been increased otherwise than by the agency or at the expense of the ryot. Consequently, it is the basis of the plaintiff's claim in this suit that either the value of the produce or the productive powers of the land have increased otherwise than by the agency or at the expense of the ryot.

It is admitted by the plaintiff's Counsel that ordinarily the rule of law is that the plaintiff must prove that which is the foundation of his right. But it is said that, in this particular case, the burden of proof is shifted from the plaintiff to the defendant for this single reason, that it is easier for the ryot to prove his exception than it is for the plaintiff to prove that the exception does not exist. To me, it is somewhat novel to hear this enunciated as a rule of law, although I am familiar with the phrase that, where the knowledge of the subject-matter of an allegation is peculiarly within the province of one party to a suit, the burden of proof must be there also. But that has a special meaning, and applies to a very limited class of cases—the class of cases to which I alluded during the argument. I do not know if any of that kind is to be found in this country, because they entirely depend upon the provisions of statute law. But the principle does not go further than those peculiar cases. Mr. Baron Alderson in Elkin *versus* Janom, 13 M. and W. 662, even qualified its applicability in regard to these; and it appears by the quotation which I made from a judgment delivered by Lord Denman in Doe *versus* Whitehead, 8 Adolphus and Ellis 571, that, according to English rules, the place of the knowledge does not affect the situation of the burden of proof. His words are: "The proof may be difficult where the matter is peculiarly within the defendant's "knowledge, but that does not vary the "rule of law."

I have thought it necessary to make these remarks, although I fully concur in the judgment which has been delivered by my Lord, for the reason that this is not the first time I have heard that principle attempted to be used which Mr. Allan has endeavoured to use to-day, and therefore I think it desirable to say, as far as I am concerned, that it appears to me an erroneous application, if it has been here attempted to be made.

For these reasons, I concur entirely with the Chief Justice that this is a case in which the plaintiff is bound to prove, not only that the value of the produce and the productive powers of the land have been increased, but also to go further and prove what is termed a negative, namely, that they have increased otherwise than in consequence of the exertion of the ryot himself.

The 31st January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble W. S. Seton-Karr, L. S. Jackson, A. G. Macpherson, and C. Hobhouse, *Judges*.

Sale of goods wholesale—Limitation.

Reference to the High Court from Mr. C. D. Field, Officiating Judge of the Court of Small Causes at Santipore.

Lall Mohun Haldar, *Plaintiff*,

versus

Mahadeb Katee, *Defendant*.

HELD *by a Division Bench (Peacock, C. J., and Hobhouse, J.)* that a sale of a quantity of mustard-seed, which was not required by the purchaser for his own private use, but with the object of making oil, which was sold, is a sale of goods wholesale.

HELD *by the Full Bench* that a suit for the price of goods sold wholesale, if there was no written agreements, must be brought within 3 years from the time the cause of action accrued under Clause 9, Section 1, Act XIV. of 1859.

Case.—THE plaintiff in this action sued to recover Rs. 64, being the price of mustard-seed, sold to the defendant for making oil. The sale was made in Assin 1270, and the plaint was not filed till Cheyt 1273. Is the action barred by limitation under the following circumstances?

I do not find that the parties are merchants or traders within the meaning of Section 8, Act XIV. of 1859, so as that the period of limitation should be computed from the end of 1270. There were no *mutual dealings* between them. It is, however, contended that the sale was a *wholesale transaction;* that six years is the proper period of limitation applicable; and that, therefore, the suit is within time. It is admitted that the mustard-seed was sold to make oil, which was sold again by the defendant. If the mustard-seed itself were sold again, there would be no doubt as to the transaction being a wholesale one. Does it make any difference that the mustard-seed was changed into oil, and that the oil was the article sold again? The meaning of the word "*retail*" in Wharton's Law Lexicon is given thus, "to sell goods in small parcels, and not in gross." In Richardson's Dictionary "*wholesale*" is defined to be "a sale of the gross as distinguished from retail;" and *retail* derived from the French *retailer* (to cut up) has reference to selling goods in small parts or quantities. I think, therefore, that it is clear that one of the most prominent features in the meaning of the word "*wholesale*" is the sale of a *large quantity*—such a quantity perhaps as no individual would require for his own private use. That such quantities are usually purchased by people who intend to sell again is, no doubt, the reason that a wholesale purchase has come to be regarded, in some measure, as a purchase by a person who intends to make a profit by selling again. In the present case, the quantity of mustard-seed is quite large enough to satisfy the idea of a sale in gross contained in the word "*wholesale.*"

It may, however, still be urged that the mustard-seed itself was not re-sold, but the oil manufactured therefrom. A merchant-tailor who purchases cloth in large quantities to sell again in coats, trowsers, and waistcoats; a baker who purchases large quantities of flour, to sell again in the shape of loaves of bread; a brewer who buys cwts. of hops and barley, to sell again in the shape of beer and porter, would, I think, according to the usage of trade, be regarded as wholesale purchasers. The transformation of the mustard-seed into oil is, to my mind, no greater change than the above wares undergo before being sold again. The pearls in the case of Buldeo Doss Jauharry and Sreenath Sein (Jurist 1-14) are also in point. I may add that wholesale houses do not limit their sales to those only who buy to sell again, but will sell to any one who will purchase a quantity sufficiently *large* to enable them to sell without breaking up, or dividing the bales, packages, casks, &c., in which they receive the goods. A cask of wine or beer, or a *whole* bale of cloth, will be sold, though a few bottles of the former, or a few yards of the latter, must be purchased at a retail establishment. Seeds from their nature do not permit of being packed in any large cases or quantities; or at least they are not packed in this country, and to them, therefore, this idea is not so applicable. Having, however, regard to the above considerations and the usages of trade, I am of opinion that the sale in the present case should be regarded as a whole transaction. The point is one upon which no evidence is available, and I have of necessity to fall back upon such general usages of trade as may be to some extent judicially noticed. (Taylor on Evidence, Vol. 1, p. 5.)

If, then, the sale is to be regarded as a wholesale transaction, the next question is, what period of limitation is applicable to the suit? Is it the period of six years contained in Clause 16, Section 1, Act XIV. of 1859?

Buldeo Doss Jauharry *versus* Sreenath Sein—Jurist 1-14.
Chundra Churn Paul *versus* Ram Narain Sein—1 Coryton's Reports 8.
Sonatun Goho *versus* Parbutee Churn Rai.

The cases noted in the margin have been collected in Mr. Thomson's little work on the limitation of suits. They were decided on the original side of the High Court, but are none the less applicable, as the law in this respect is the same on the original and appellate sides. These decisions are, to some extent, contradictory, but the balance of authority seems to be in favor of the six years' rule.

The case of Mothoora Lall Paul *versus* Cheenebash Dutt & others (Sutherland's Small Cause Court References, page 170) is not unlike the present case, unless it be held that the defendant was there merely the *agent* of

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the plaintiff. That case, however, decided nothing definitively as to the Law of Limitation applicable to wholesale transactions. My own opinion, which I am required by law (Section 22, Act XI. of 1865) to express, is in favor of the six years' rule.

I, therefore, solicit the decision of the High Court on the following points:—

First.—Am I correct in holding the sale of the mustard-seed for the manufacture of oil to be a wholesale transaction?

Second.—Is six years the period of limitation applicable to wholesale transactions?

This case was referred to a Full Bench by Peacock, C. J., and Hobhouse, J.

We are of opinion that, in this case, the Judge is right in his view that this was a purchase of goods wholesale, and not by retail. As there are conflicting decisions, as to whether the period of limitation for goods sold wholesale is 6 years or 3 years, we think that that question must be referred to a Full Bench. It will be important to consider, when that question comes to be decided, whether goods sold wholesale are not so far provided for by Clauses 9 and 10 of Section 1, Act XIV. of 1859, as to prevent them from falling within the general rule of Clause 16.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—Two questions were put to this Court by the Judge of the Small Cause Court: *first*, whether he was correct in holding the sale of certain mustard-seed for the manufacture of oil to be a wholesale transaction; and, *secondly*, is six years the period of limitation applicable to a wholesale transaction?

The Bench before which the case first came decided that the Judge was right in holding it to be a wholesale transaction; that the goods were not sold by retail, but were sold wholesale; and the question was referred to this Bench to know whether, if goods are sold wholesale and not retail, 6 years or 3 years is the period of limitation.

We are of opinion that 3 years, and not 6, is the period of limitation. Clause 8 of Section 1, Act XIV. of 1859, enacts that to suits to recover the price of any articles sold by retail the period of 3 years from the time the cause of action arose is the period of limitation. Suits, therefore, for articles sold by retail, whether in writing or not in writing, whether by contract registered or not registered, under the provisions of Clause 10, come within Section 1, Clause 8, and must be brought within the period of 3 years. Actions for goods sold wholesale do not come within Clause 8; and the question to be determined is whether they fall under Clause 16, as being suits for which no other limitation is expressly provided by the Act, or under Clauses 9 and 10 as being provided for by those Clauses. It is clear that a suit brought for non-payment of the price of goods sold by wholesale is a suit for breach of contract. A suit brought for the non-delivery of the very same goods under the very same contract would be a suit for the breach of contract. A suit for the non-acceptance of these same goods under the very same contract would be a suit brought for the breach of contract. Therefore it appears to me that, whether the suit is for the price of the goods or for the non-acceptance of the goods, or for the non-delivery, it is a suit for the breach of a contract, and falls within Clause 9 or 10, and not within Clause 16.

Clause 9 says:-"Suits brought for the breach of any contract, the period of three years from the time when the breach of contract in respect of which the suit is brought first took place, unless there is a contract, in writing, signed by the party to be bound thereby or by his duly authorized agent."

An action for the non-payment of the price of goods sold wholesale is within Clause 9, unless the contract is in writing, and the limitation is three years. If the contract is in writing, then we must go to see what is the period of limitation. Clause 10 provides that "to suits brought for the breach of any contract in cases in which there is a written engagement or contract, and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof, the period of three years from the time when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof." In this case, the Judge who referred the case has not found that there was any written contract; and consequently, assuming that there was no written contract, the case does not come within Clause 10 of the Act. Under these circumstances, the Judge must be informed that the limitation

in this case, provided there was no written contract, was three years from the time when the cause of action accrued.

The Judge of the Small Cause Court will be told that the Division Bench have decided that he was right in holding that it was a sale of goods wholesale, and that the Full Bench upon that finding have held that three years was the period of limitation under Clause 9, unless there was a written engagement.

The 31st January 1866.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, W. S. Seton-Karr, J. B. Phear, and A. G. Macpherson, *Judges*.

Bona-fide purchaser without notice—Cancelment of Sale.

Case No. 2362 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 15th May 1866, affirming a decision of the Moonsiff of Soorujgurrah, dated the 28th August 1865.

Abdool Hye and others (Plaintiffs), *Appellants*,

versus

Nawab Raj and others (Defendants), *Respondents*.

Mr. C. Gregory for Appellants.

Baboos Chunder Madhub Ghose and *Nil Madhub Sein* for Respondents.

Boná-fide purchasers for valuable consideration and without notice of a sale in execution of a decree are not in every case protected from having the sale set aside under the present or former law. It must be decided in each case in accordance with the principles of justice, equity, and good conscience, as to whether the sale ought to be set aside or not.

This case was referred to a Full Bench by Bayley and Shumbhoonath Pundit, JJ., on the 16th May 1867.

Pundit, J.—THIS is a suit for reversal of a sale held in execution of decree under the following circumstances:—

A decree was obtained against the special appellant in the Court of the Moonsiff of Behar in the district of Behar, and was sent, with a requisition for the sale of the property now in dispute, to the Moonsiff of Soorujgurrah in the district of Bhaugulpore.

The sum due, however, was paid in money by the judgment-debtor into the Court of the Moonsiff of Behar on the 14th of January 1851, and an order by that Moonsiff, informing the Moonsiff of Soorujgurrah that there was no longer any necessity to sell, was issued and reached the latter Moonsiff after the sale, which was held on the 3rd February 1851.

Both the Lower Courts have dismissed plaintiffs' suit.

The Court of first instance (the Moonsiff of Soorujgurrah) held that the money should have been deposited in his Court, and that, as the order to stay the sale passed by the Moonsiff of Behar reached Soorujgurrah after the sale, plaintiffs had no right to bring this action.

The Lower Appellate Court dismissed the appeal of the plaintiffs only on the latter ground.

It is not found below that the money was deposited too late, or that, under ordinary course of business, the intimation of its deposit could not reach the Court holding the sales before the sale.

When a sale is made in execution of a decree, there are certain rules according to which the sale can be set aside summarily, and the present law has definitely settled that, when the sale is so reversed, the purchaser, however innocent, or injured by the reversal of the sale, has no right to appeal against this reversal.

It is, however, provided that, when at such a stage a sale is ordered to be reversed, the purchaser is entitled to get back his purchase-money and (if the circumstances of the case justify it) also interest.

In these summary proceedings, the sale, however, cannot be reversed upon any other ground but of a material irregularity in carrying out the sale.

Besides these summary proceedings, all persons injured by a sale have a right to contest, by a regular suit, the validity of a sale.

In some cases, for instance, a debtor may sue upon the ground of having paid the debt before the sale, or of having been told by the decree-holder that he would not execute

the decree for some time; or on the ground of not being indebted for the sum for which the property was put up for sale, but for a smaller sum which he had offered to give; or upon the ground of the decree against him being reversed in appeal or review; and in every one of these cases there may be no irregularity in the sale itself.

We think that in such cases, where it is proved that the decree executed was set aside after sale, or the decree-holder had no right or had no occasion to cause the sale, when it was made, or the property was improperly sold, or *bonâ-fide* information of the necessity to postpone the sale had been given in due form at a reasonable period before the sale, then (irrespective of any accidental delay or fraud in the transmission of the proper instruction to the selling-officer) the sale should be set aside, and any objection on behalf of the purchaser, as a party separate from the decree-holder and ignorant of the proceedings of the decree-holder, should not be heard.

Again, besides those cases in which reversal of sale is asked, on the ground of the money having been paid by the debtor before the sale, there may be cases in which the debtor may ask for reversal, on the ground that the decree-holder promised to postpone the sale, and the debtor, relying upon this promise, took no steps, and the decree-holder, notwithstanding, fraudulently caused the sale of the property.

There may be a case in which payment may be made too late to justify the setting aside of a subsequent sale, which would not be prevented by such a deposit, and in such cases, as in many other regular suits to set aside sales, the question of the propriety or impropriety of reversing the sale will necessarily depend solely upon the consideration of the same circumstances, as is the case on the summary side. But in cases of fraud, like that noticed above, if the fraud of the decree-holder is not to affect the right of the purchasers also, the debtor will be left merely to a suit for damages against the decree-holder. If a purchaser acquires the rights of a decree-holder by purchase to contest invalid and fraudulent transfers by the debtor, he might equally be affected with the fraud of the decree-holder, when that has led to the sale asked to be reversed. If a sale took place owing to the neglect of others besides the purchaser, or owing to some accidental delay, why should not, in that case, a Court of Justice have power to reverse the sale, though the purchaser may be perfectly ignorant and innocent.

A purchaser in a sale in execution does not acquire any substantial rights which enable him to stay the reversal of the sale of the property, as between the decree-holder and the party asking the reversal of the sale. The latter proves that justice requires that the property unnecessarily and unjustly sold, though sold correctly as far as the procedure to sell is concerned, should be returned to the owner by such reversal of the sale. Equally, the purchaser has no right to plead his innocence and rights of purchase, when the decree, in execution of which the sale may have taken place, is set aside. In this case the purchaser has, correctly speaking, no ground to rest his innocence, for the probability of a decree being reversed by the appeal or review is a fact of which the purchaser is legally supposed to be aware.

In all these cases, the purchaser, of course, will get back his purchase-money, with or without interest, as the case may require, provided it be possible to get back the money from the decree-holder, to the extent that he may have taken in realization of his decree. Anything realized over and above that taken away by the decree-holder must always be available, even if taken away by the former proprietor.

By Act VIII. of 1859, discretion is given to the Courts executing a decree to decide how in each case of execution money due to the decree-holder should be ordered to be realized. It is, therefore, evident that the law does leave it absolutely to the decree-holder to decide whether the property of his debtor is to be sold or not; and we do not see why there should be any hesitation in holding that the purchaser, however innocent and ignorant of the facts not disclosed upon the execution-case up to the time of the sale, has no *better* right than the decree-holder.

Further, if this is not the correct law, it will follow that a decree-holder may cause property of great value to be sold away for a trifling price, or for a price that may not represent the *exact* value of the property to the proprietor himself according to *his* value of his own property, even though the consideration of the sale may represent the *market*-value of the thing itself; and when the decree, in execution of which the sale was made, is set aside by appeal or review, the only satisfaction which the successful appellant, who may have been a victim of

conspiracy supported by fraud and forgery, can obtain, would be to be told that he has a right to sue for damages against, perhaps, a man of straw; but that he cannot get back the property sold.

We do not attach any importance to any argument that may be used on the ground that, if sales in execution are held liable to be reversed for defaults unconnected with the proceedings of sale and within the knowledge of purchasers, few persons will venture to purchase; and the result will be a deterioration of price of property in execution. In many instances, the sale is even not reversed, notwithstanding it being all right in its proceedings, and Courts of Justice need not feel much sympathy for debtors who have property, and will not of themselves sell it to pay other debts due from them, but will try their utmost to see if they cannot, one way or another, defer payment till they find that they have been playing a losing game.

Proprietors holding estates, and who find it difficult to sell for defect of title, convert Collectors into their agents for sale by falling into arrears of revenue; but it is not all the policy of the law that Courts of Justice should become public agents for the sale of private properties which can be sold for better consideration and on better terms, without the intervention of the Courts, notwithstanding the fact that they are *attached* by orders of Courts.

A decree may be satisfied, and by an accident the order to stay the sale may not reach the officer conducting the sale in time to prevent the sale. It may happen that the debtor may settle with the decree-holder that he will not execute the decree at once; and, by a fraud of the decree-holder, any order to stay the sale may not be taken out in time. Now, is it justice to decide that, though in such cases the decree-holder had no occasion to sell, still the proprietor is to lose his property because it was sold, and has been purchased by a person who was not cognizant of the fact of the previous satisfaction of the decree?

In reversal of sales, when such reversal is sought by regular suits, it may sometimes be difficult to provide for the safe return of the purchase-money to the purchaser from the decree-holder; but it may be fairly provided that the debtor is to pay the whole or a portion of the purchase-money before he shall take back his property, and he may afterwards sue the decree-holder for the recovery of the same. Further, a purchaser in execution is always an adventurer, and knows that his purchase is attended with risk. Nothing is guaranteed to him by the sale but expressly rights and interests, whatever they may be, and in many cases, where the sale is not set aside, he may often find that he has purchased rights not existing to the extent, or of the kind, represented to him by the proclamation of sale, or rights which he finds to his loss are saddled with heavy liabilities. There will, therefore, be no great hardship or any injustice if the accident of the purchase-money not being recovered entirely, or in part, is added to the list of the numerous risks to which a purchaser in an execution-case is naturally liable.

The Lower Appellate Court quotes the decisions noted in the margin. But the power of the Civil Court to set aside a sale summarily is limited to irregularities in the proceeding of the sale. The power of the said Courts in regular suits is limited only by *justice* and *equity*. We are not inclined to adopt invariably in regular suits for reversal of sales the precedents and rulings applicable to summary cases. A purchaser in execution acquires no right and equities to oppose the reversal of the sale upon any grounds which the decree-holder cannot take, or to oppose, as a matter of right, the reversal of a sale when a Court of Justice may hold it proper to reverse it. I do not deny that the purchaser has a right to see that all possible precaution is taken to secure to him a return of his purchase-money, with or without interest. In some cases of reversal of sale, it may be proper to hold that the purchaser is not obliged to give mesne-profits. We think, however, that the purchaser is not entitled to plead a right to possession under his purchase, on the ground of innocence or ignorance of the previous proceedings of the debtor, and the decree-holders or of the Court executing the decree, preceding the date of his purchase.

17th March 1847, S. R., Page 171;
25th March 1841, " " " 39;
24th April 1842, " " " 74;
27th April 1842, " " " 71;
S. R. 11th of September 1843; S. R. 17th of November 1847 — Referred to in the Full Bench decision, dated 11th of July 1849, page 283.

Having seen some reason to doubt the correctness of the decisions quoted above, as far as they are supposed to decide that, in no case in a suit like the present, the sale can be reversed at all, I and my colleague

e of opinion that the decisions should not ind us. Having doubts as to their correctness, we refer this case to the Full Bench r a ruling as to whether, with reference to ijections urged by the purchaser, the sale hould or should not be set aside, or, in other ords, to determine whether, and how far, in regular suit, claims of a purchaser in ecution of decrees are to be respected nd protected on grounds of his innocence nd ignorance.

Bayley, J.—I have no objection to the ase being referred to a Full Bench, as it is matter of general importance to have a lear final ruling on it.

The judgment of the Full Bench was delivered as follows :—

Peacock, C. J.—The substantial question f law which has been referred for the decision of the Full Bench is whether, having eference to the cases mentioned in the order f reference, a *bonâ-fide* purchaser for valuable consideration, and without notice, at a ale in execution of a decree is protected rom having the sale set aside under the resent or former law.

We are of opinion that the decisions do not go to the extent of saying that, under no circumstances, can a sale be set aside as against a purchaser. In each case it will be for the Court which tries the case to determine whether it will be in accordance with the principle of justice, equity, and good conscience, that the sale ought to be set aside or not.

Each case must be determined by the Court upon its own merits.

This case will accordingly go back to the Division Bench which referred it, with our opinion that it is not bound by the decisions referred to.

The 31st January 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Sale of non-existent rights and interest—Purchaser obtaining nothing.

Case No. 949 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 26th November 1866, reversing a decision passed by the Deputy Collector of that District, dated 29th January 1866.

Radha Koonwar (Plaintiff), *Appellant,*

versus

Jankee Koonwar and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Hem Chunder Banerjee* for Appellant.

Baboo Romanath Bose for Respondents.

Where a plaintiff asked to have a sale, in execution, of her husband's rights and interests in certain landed property, set aside on the ground that those rights and interests had been previously transferred to herself—HELD that her suit was, in reality (and might be considered by the Court), to obtain a declaration that her husband had no rights and interests in the estate when it was sold, and that the purchaser obtained nothing.

Jackson, J.—THIS was a suit by a wife to set aside certain sales made by her husband directly, and also a sale in execution of decree of her husband's rights and interests in certain landed estate, on the allegation that the husband had previously transferred his rights by deed of gift to his wife.

The Lower Appellate Court has dismissed the suit as regards the landed property sold in execution of decree, on the ground that it is barred by the limitation laid down in Clause 3, Section 1, Act XIV. of 1859, not having been brought within one year from the date at which such sale was confirmed, or became final and conclusive. Against this portion of the Lower Appellate Court's judgment this appeal is preferred.

There is no doubt that the Judge has been misled by the terms in which the plaintiff stated her cause of action in the plaint. She asked to have the sale set aside; where-

as, in reality, her suit was not to set aside the sale, but to obtain a declaration that her husband had no rights and interests in the estate when it was sold, he having previously transferred his interest to her, and that consequently the purchaser obtained nothing by his purchase. There is a decision of this Court upon this question, raised on exactly the same circumstances as in this suit, Weekly Reporter, Volume IV., page 34, Kinoo Dass *versus* Roghoonath Dass, alluded to in Mr. Thomson's Treatise on the Law of Limitation, pages 35 and 36. The Court there held that, although the plaintiff sued to set aside a sale, his claim might he considered simply as one to recover immoveable property, and that the Law of Limitation applicable to it was Clause 12, Section 1, Act XIV. of 1859, *viz.*, 12 years from the date of dispossession. We concur in opinion with the Judges who recorded that decision, and, following it, we reverse the judgment of the Lower Appellate Court, and remand the case for trial of the remaining issues which were raised before that Court.

As the error in this case has arisen partly from the plaintiff's mistake in wording her plaint, we think that she ought to pay the costs of this appeal, and decree accordingly.

The 31st January 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Sale of Talook under Regulation VIII., 1835—Lapse of under-tenures.

Case No. 351 of 1866.

Regular Appeal from a decision passed by the Judge of Backergunge, dated the 29th June 1866.

Dwarkanath Doss Biswas and others (Defendants), *Appellants,*

versus

Manick Chunder Doss (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Sreenath Doss* for Appellants.

Baboos Romesh Chunder Mitter and *Greeja Sunkur Mojoomdar* for Respondent.

On the sale of a talook under the provisions of Regulation VIII., 1835, all subordinate tenures, such as ousut talooks, howalahs, neem-howalahs, do not necessarily lapse: it would depend very much upon the terms of the pottah or grant under which the original talook was created.

Kemp, J.—THIS was a suit to recover mesne-profits, laid at Rupees 25,000.

The plaint sets forth that the plaintiff is the purchaser at a public sale, under Regulation VIII. of 1835, of a zimma talook by name Prannath Indoo situated in hissa 5¾ annas, Pergunnah Selimabad, Zillah Backergunge; that the defendants, from the date of the plaintiff's purchase, or from the 13th Srabun 1262 B. S., have forcibly retained possession of the lands of kismuts kurfa Jotebaree, Brimunkatee, and Soobunkatee, comprised in the aforesaid talook; that the plaintiff instituted a suit to obtain possession of these kismuts, and obtained a decree in this Court on the 26th January 1865. The plaintiff abandons his claim to mesne-profits which have accrued for a period more than six years.

The defence was that the claim to mesne-profits for 1266 was barred by the Statute of Limitations, and that the defendants were liable for only so much as they had collected from the holders immediately subordinate to them, *i. e.*, the ousut talookdars.

The Judge held that the claim for the mesne-profits of the year 1266 B. S. was not barred on the principle laid down in the case of Maharaja Koer Ramaput Singh *versus* Mr. Furlong, Weekly Reporter, Volume III., page 38, Civil Rulings.

As to the principle upon which mesne-profits are to be awarded, the Judge makes the following observations: "The defendants "allege that they have never been in imme-"diate possession; that the whole lands are "let out in ousut talook; and that they have "only received the ousut talookdaree rent, "amounting to about Rupees 156-10-8 per "annum; and that, therefore, they cannot be "held liable for more than they have actual-"ly received. To prove their actual re-"ceipts, they file rent-accounts, together with "Chalans to prove them." Of these documents, the Judge observes that most of them have been spoken to by witnesses; that the

intiff alleges them to be forgeries; and that ey may have been prepared for the purses of this suit. "This may be so," says Judge, and further he remarks "that in some instances their appearance is against them. for the writing looks fresher than he paper, and fresher than the alleged age would warrant." He looked upon ese documents with considerable suspicion, t, even if they be admitted to be genuine, ey will not, thinks the Judge, assist e defendants, for the plaintiff has been any years out of possession, so long, inced, that he has been a great loser, having abandon a portion of his claim; the fendants cannot be permitted to profit y their own wrong, and the principle laid wn by a Full Bench of the High Court the case of Hunooman Doss* and others seemed applicable to the case, for it is there remarked that, "when a "party is declared entitled "to a decree for mesne-profits, such sums as "may have been collected and appropriated "by others in wrongful possession, or such "sums as he (the party ousted wrongfully) "would have collected, had he been in possession, and which he was prevented from "collecting by having been kept wrongfully "out of possession, ought to be awarded."

*Weekly Reporter, Special Nos., page 41; Hay's Decisions, Vol. I., page 265, &c.

The Judge then remarks that, if the plaintiff had not been kept wrongfully out of possession, he would have collected rents immediately from the ryots, inasmuch as he purchased the zimmah free of all incumbrances set up by the defendants. It is true, the Judge observes, that the plaintiff cannot show that the defendants have collected direct from the ryots, but that, nevertheless, the plaintiff was entitled to recover as mesne-profits what the defendants *might* have collected from the ryots. An Ameen was deputed to ascertain the rates paid by ordinary ryots in the neighbourhood of the disputed properties, and the rate so ascertained was assumed by the Judge to be a fair rate, and what the defendants ought to have collected.

Mesne-profits were awarded amounting to Rupees 16,558-15-9, with costs in proportion.

In appeal, the only contention has been as to the principle upon which the wasilat is to be awarded. We may premise by observing that the plaintiffs purchased the zimma-talook at a sale under the provisions of Regulation VIII. of 1835. This Court has held in reversal of the decision of the Zillah Judge that the plaintiffs acquired the zimma free of all encumbrances. The question is one that admits of much doubt. The decision of this Court is pending in appeal before their Lordships of the Privy Council, and we refrain from further remarks on the subject. The ousut talooks subordinate to the talooks of the defendants were created before their purchase of the parent zimma, and it appears to us very clear that the defendants could only have collected from them, and not from the immediate occupants of the soil. Indeed, we have been shown that the defendants, during their incumbency as zemindars, attempted to get rid of these ousut talookdars, and to collect the rents from the ryots, but were foiled after litigation.

The plaintiff, even if he had not been kept out of possession of the zimma-talook, would not have been entitled to collect from the ryots, but must have contented himself with receiving rent from the ousut talookdars, as the defendants have done.

The Judge is, in our opinion, wrong in law in holding that, on the sale of a talook under the provisions of Regulation VIII. of 1835, all subordinate tenures, such as ousut talooks, howalahs, neem-howalahs, necessarily lapse. It would depend very much upon the terms of the pottah or grant under which the original talook was created, and the reservations therein expressed or implied.

The defendants have put in their collection-papers and the chalans of the ousut talookdars for a series of years, which have been, as admitted by the Judge, supported by evidence. In the Court below, the plaintiff, as admitted by the Judge, could not show that the plaintiff had collected from the ryot, nor has the Pleader of the plaintiff, respondent before us, attempted to throw discredit upon these documents, which do not appear to us to be open to the suspicions hinted at by the Judge. The ousut talookdars, too, were examined by the defendants, who did all that was in their power to prove at what rate they collected during the period in dispute.

The ruling of the Full Bench quoted by the Judge, Sutherland's Special No., Weekly Reporter, page 41, is not applicable to this case, for it is clear that, if the defendants had at once given up possession of the zimma to the plaintiff on his purchase, the plaintiff would not have been entitled to collect direct from the ryots, ignoring all the

intermediate tenures between him and the actual occupants of the soil, commencing with the ousut talookdars, who had successfully resisted the attempts of the zemindars to pass them over.

We, therefore, amend the decision of the Judge, and decree wasilat from 1266 to 1272, at the rate of Rupees 156-10-8 per annum, with costs in proportion ; excess costs in the Lower Court payable by the respondent to the appellants, with interest ; the whole of the costs of this Court to be paid by the plaintiff, respondent, to the appellants, with interest.

The 31st January 1868.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Intervenor—Sale—Benamee—Onus Probandi.

Case No. 1711 of 1867.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 30th April 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 4th December 1866.

Kadernath Dutt and others (Defendants), *Appellants,*

versus

Okhoy Koomar Bhuttacharjee and others (Plaintiffs), *Respondents.*

Mr. R. V. Doyne and *Baboos Unnoda Pershad Banerjee, Romesh Chunder Mitter, Hem Chunder Banerjee,* and *Chunder Madhub Ghose* for Appellants.

Mr. G. C. Paul and *Baboos Onookool Chunder Mookerjee, Ashootosh Chatterjee* and *Ashootosh Dhur* for Respondents.

The decision of the Privy Council in the ca *Sreeman Chunder Dey* vs. *Gopal Chunder Chu butty* (7 Weekly Reporter, p. 10, *P. C.*) considere

Seton-Karr, J.—THE facts out of wh this appeal arises are clearly given in judgments of both the Courts.

Purno Prasad Roy and others held decree against Shushee Dhur Ghose, a in execution of the same, a one-anna sh of a zemindaree was sold on the 2nd August 1865, and purchased by Ok Koomar Bhuttacharjee, the plaintiff in suit, for Rupees 805.

The same property was again sold on 11th of September following, also in e cution of another decree against the sa debtor, and purchased for 5,000 rupees the defendants in this suit, after the plai iff, the first purchaser, had interven without success.

The plaintiff, dating his cause of act from the 9th of December 1865, when prayer to set aside the second sale was entertained, has now sued to set aside sale, and to establish his prior purchase.

A variety of issues were drawn which it is not necessary to specify, a the Principal Sudder Ameen, going fu into the case, and getting over certain iss of bar and limitation in the plaintif favor, directed his attention to what termed the simple issue in the case, *vi* whether the plaintiff had made the purcha with his own money and for his own ben fit, or whether the whole transaction w based on fraud and collusion.

On the whole facts and probabilities, t Principal Sudder Ameen recorded wh taking this issue as the correct issue in t case, appears to us a very clear judgment, the effect that the whole of the transactio on which the plaintiff relied, and to whi the ostensible decree-holder, the judgmen debtor, and the plaintiff were parties, w based on fraud and collusion, and that t judgment-debtor was in possession of t property, both before and after the sa contended for by the plaintiff, while t defendant had, in reality, subsequently pu chased the right, title, and interest of t debtor.

On appeal, the Judge reversed this decision, on the ground that, though the plaintiff's version of affairs was unsatisfactory, and though it was extremely probable that the transaction was *benamee,* there was no evi-

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ence of fraud, and no evidence that the property was the property of the debtor, Bungshee Dhur, at the time of the defendant's purchase on the 11th of September 1865.

In special appeal, two main points are urged by Mr. Doyne:—

1. That the suit will not lie, as the plaint discloses no cause of action.

2. That the Judge has lost sight of the real point at issue between the parties, and has gone off on the question of fraud, without finding whether the purchase was actually made for the plaintiff, or without saying who, in fact, was the purchaser at the first sale in August.

In regard to the first point urged by Mr. Doyne, I have to observe that it was never put forward in either of the Courts below, as it certainly might have been. Issues in bar and limitation were urged before the Principal Sudder Ameen, and were dropped before the Judge, but no plea in bar of the plaint as disclosing no cause of action was taken up; and, even if we could allow such a plea to be now taken as that the suit will not lie at all, we should be disposed to answer it by saying that, though the plaintiff was wrong in saying, in his plaint, that he brought his suit under Section 209 of Act VIII. of 1859, he ought certainly to be permitted to sue under either of Sections 246 or 247.

His objections to the sale were not entertained, but he would be at liberty to bring his suit within one year to establish his right, and to set aside the sale under one of those Sections last named.

Overruling the first objection, therefore, we come to the second main point, and here I am of opinion that the decision of the Judge is so wrong in law that it cannot be permitted to stand.

The Judge, after going through the very cogent arguments on which the Principal Sudder Ameen based his decision in the defendant's favor, does not refute any one of them, nor, as we read his decision, does he take a materially different view of the weight of the evidence. He begins by saying that "all the circumstances noted "(*i. e.*, by the Lower Court) are consonant "with an hypothesis that the judgment-"debtor's uncle, Bungshee Dhur, purchased "the estate in the name of the plaintiff, "and, if it was so, no great inference of "fraud can be drawn from them." The Judge then goes on to say that more collusion does not establish fraud; that it would have to be shown that the original decree was obtained collusively, which had not been attempted; and that there was nothing from which a legal inference of fraud could be drawn. The Judge admits that the plaintiff's account is unsatisfactory, and that it might justify the Court in finding that his name had been used by some one else, and that he was not the real purchaser. He also says that it appears probable on the evidence "that the plaintiff was put for-"ward to purchase, and his name was used "by some one else." He says that a certain portion of the record goes to prove that Bungshee Dhur, or some of the family, purchased, but it does not establish that for which the defendants contend, *viz.*, that the judgment-debtor was the real purchaser. Here obviously the Judge throws the *onus* on the defendants, as he again does in a subsequent part of his judgment, in discussing the connection between Bungshee Dhur and the debtor, and the question of payment of rents of the ryots.

The Judge also appears to me to have wrongly applied the case* lately decided by the Privy Council, Sreeman Chunder Dey *versus* Gopal Chunder Chuckerbutty, to the case before him.

* Weekly Reporter, Volume VII., page 10, Privy Council Rulings.

The facts in that case were different. It was not exactly a case between two rival purchasers at sales. It was a case in which a plaintiff sued as the assignee of a judgment-creditor, and he wished to have it declared that the defendant's purchase at a sale in execution of a previous judgment was bad. There he came forward to prove that the talook which he had purchased as assignee was not affected by the subsequent transfer, and that it was still the property of the judgment-debtor, and not that of the subsequent purchaser. To apply the principles in that case, as decided by their Lordships, to the case before us, we should require strict proof of his allegations from the plaintiff, respondent, and should not put the *onus* on the defendant, which is what the Judge has done. In fact, the principles of their Lordships, if applicable to the case before us, ought to have led the Judge on his own showing of facts to an opposite conclusion to that at which he has arrived.

On the whole case, I am of opinion that the Judge has put the *onus* far too heavily

on the defendants; that he has had his attention diverted from the main issue; that he has not required from the plaintiff strict proof of his allegations; that he has misapplied the decision of the Privy Council; that he has not found what he ought to have found before the plaintiff could be entitled to a decree; and that, on the Judge's own showing, the plaintiff should be put out of Court.

The plaintiff, coming in to reverse a sale in regard to which his objections had not been entertained, is bound to prove his title *and his purchase*, and cannot be allowed to derive any benefit from inferences of a *benamee* purchase, which was not the case disclosed in the plaint.

The Judge does not really displace the finding of the Principal Sudder Ameen, to the effect that, at the time of the second sale, the property was still that of the judgment-debtor. I am of opinion that, in a case like this, where the facts have been fully gone into in both Courts, where there has been no defective enquiry at all, and where the decision of the Lower Appellate Court is manifestly erroneous in law, it would be wrong and unnecessary to remand the case for any fresh decision, or to put the parties to further expense.

The conclusion which the Judge has formed being, on his showing, erroneous in law, and there being no finding that the plaintiff has himself purchased the property and made out his own title, we ought at once to reverse the decision of the Judge, and restore that of the Principal Sudder Ameen with all costs.

Macpherson, J.—Whatever force there might have been, if the point had been raised at the proper time, in Mr. Doyne's contention that the suit will not lie as seeking a merely declaratory decree, I think the objection cannot now be taken, as it never was taken until the case was before us in special appeal, after having been tried and decided by both of the Lower Courts upon that which is the real issue between the parties.

I agree with the Judge below in the opinion that the only true issue in the case was that which was raised by the Principal Sudder Ameen, whether, namely, the purchase at the first sale was really made by or on behalf of the judgment-debtor himself, so that the right of ownership never was transferred from the judgment-debtor to the plaintiff. It was wrong in the Lower Appellate Court to go into any question of fraud or collusion on the part of the holder of the decree under which the plaintiff purchased for, without any fraud or collusion on his part, it might well be that the sale did not transfer the ownership from the judgment-debtor.

But the error which seems to me of most importance, and which, I think, vitiates the judgment of the Lower Court, is this, that the Judge apparently considered himself bound by the decision of the Privy Council in the case of Sreeman Chunder Dey *versus* Gopal Chunder Chuckerbutty (VII Weekly Reporter, page 10, Privy Council) to hold that the facts did not amount to legal proof of that which the defendants had to prove. I think he was wrong in this and that there is nothing in their Lordships' judgment which leads to the conclusion that the proof for the defence is insufficient.

Sreeman Chunder's case has doubtless some points in which it resembles this case. But the position of the parties and the facts are very different—so different, indeed, that the decision in the one case does not necessarily lead to a similar decision in the other.

In Sreeman Chunder's case the plaintiff was not the purchaser at the first sale, but the assignee of another judgment, and he sued for a declaration that the purchase of a certain talook at a sale in execution of a decree did not effect a transfer of the ownership of the property. Of course, the plaintiff had throughout to maintain the affirmative that the talook remained the property of the judgment-debtors, and never became the property of the defendant.

In the present case, the plaintiff, having been declared the purchaser at the first sale, and being, as he alleges, in possession, sues substantially for a declaration that the subsequent purchase by the defendants is worthless, and passed nothing to them, as the ownership of the property had previously been transferred to the plaintiff. Here the *onus* is in the first instance on the plaintiff, who must prove that the right of ownership is in him—which he has no difficulty in doing, by proving his purchase and possession in the ordinary way. The plaintiff having proved this *primâ-facie* title, it lay on the defendants to rebut it, and show that the ownership was not transferred to the plaintiff. This, it appears to me, on the Judge's own statement of the facts proved, the defendants did very sufficiently; certainly they did so to such an

ent as to make it necessary for the plaintiff to prove distinctly that the ownership was really transferred to him so as to make it pass entirely from the judgment-debtor.

The facts found in Sreeman Chunder's case do not prove that the property never passed from the judgment-debtor at all, in the same degree that the facts found in the present case lead to that conclusion. The evidence in that case was weak in the extreme as compared with the evidence in this. And it is an entire misapprehension to suppose that, because the Privy Council held the evidence before them there was insufficient, their Lordships laid down, or meant to lay down, as a rule, that evidence so cogent as that found by the Judge in this case would also be insufficient. The Privy Council decided the case before them upon the special facts of that case (which were in many respects very peculiar), and it would be most dangerous to hold that observations made by their Lordships with reference to those special facts are to be read as general rules applicable to a wholly different state of facts.

It appears to me that the view which the Judge has taken of their Lordships' judgment is erroneous, and that the error pervades his whole decision, and is, in truth, the basis of it. The judgment of the Court of first instance is clear and good. The Judge does not differ substantially from the Principal Sudder Ameen as to what are the facts proved; but he differs in this, that he thinks these facts do not amount to legal proof that the property never passed, under the first sale, from the judgment-debtor.

I think that the judgment of the Principal Sudder Ameen was right, and that the Judge has given no good reason for reversing that judgment, and that the grounds upon which the Judge has reversed it are wrong in law.

For the reasons I have expressed, I think there has been a substantial error in the trial of the case in the Lower Appellate Court, which has produced error in the decision of the case upon the merits; and, therefore, that the judgment of the Lower Appellate Court ought to be set aside, and that the judgment of the Principal Sudder Ameen ought to be affirmed.

The respondent will pay all the costs, both here and in the Courts below.

The 31st January 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Execution-cases—Adjournment of sale at the request of debtor—Continuance of attachment.

Case No. 185 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Tirhoot, dated the 18th February 1867.

Chumun Lall Chowdhry and others (Decree-holders), *Appellants,*

versus

Domun Lall and others (Judgment-debtors), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

No one for Respondents.

Execution-cases in which a sale or other proceedings are stayed for a fixed period at the request of the debtor, and with the consent of the decree-holder, should not be struck off till that period has expired; and if struck off for the convenience of the Court by an order which provides for the continuance of the attachment, sale may follow within the said period without a fresh attachment.

Loch, J.—In this case, the special appellant, who is the decree-holder, attached the property of his judgment-debtor, and advertised it for sale. At the request of the debtor, who sought to make arrangements for the payment of his debt by a private sale of the property, the decree-holder consented to an adjournment of the auction-sale for a month, the attachment of the property holding good. On the application of the parties, the Court adjourned the sale, and struck off the execution-case from the file, directing, however, that the attachment should hold good according to the terms of the arrangement entered into between the parties. As the debtor failed to make good the money due, the decree-holder again applied for execution; but the Judge held that, as the case had been struck off the file, the whole of the

previous acts done in execution had become inoperative; that the attachment had been removed, and consequently the decree-holder has to commence the process of execution *de novo* against the property of his debtor. The consequences to the decree-holder may be very serious; for, as soon as the attachment is removed, the debtor may dispose of his property to a third person, or, as priority of attachment gives the creditor making the first attachment a right to recover the whole amount of his debt from the proceeds of sale before any payment is made to other creditors, it becomes a matter of considerable importance to the creditor that his attachment should not be declared null and void. When an execution-case is struck off for default, as happened in the cases quoted to us, we think that the whole of the proceedings taken in execution do determine and become of no avail to the creditor, and that, in taking out further execution, he must commence his proceedings from the beginning. But when, as in the present case, the creditor, at the instance and for the benefit of the debtor, agrees to adjourn the sale of the debtor's property for a certain period to enable the debtor to meet his liabilities, on condition that the attachment of the property is to hold good, and the Court, merely with the view of keeping its files clear, strikes off the case, providing in its order for the continuance of the attachment of the property, it would be very unjust to the creditor, when he next applied for execution, to tell him that all the steps he had previously taken were null and void, and that no proclamation of sale could take place without a fresh attachment; that the effect of striking off the case, which was done not because the decree-holder was not diligent, but for the convenience of the Court, that its files of execution-cases might be kept clear, was to render nugatory every thing the creditor had hitherto done, and to set aside the agreement with his debtor upon the strength of which alone he had consented to thea djournment of sale. We think that execution-cases, in which a sale or other proceedings are stayed for a fixed period at the request of the debtor, and with the consent of the decree-holder, should not be struck off till the periods mentioned therein have expired. And in the present case, looking to the order of the Court passed when it struck off the execution-case, which distinctly provided for the continuance of the attachment, we think that the attachment is still good and valid; and, under this view of the case, we reverse the order of the Judge with costs in both Courts.

The 1st February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Contract—Municipal Work—Amendment of plaint—Small Cause Courts.

Reference to the High Court by the Officiating Judge of the Court of Small Causes at Kishnaghur, dated the 30th July 1867.

Mohendronath Mookerjee, Overseer, *Defendant.*

Plaintiff sued one M. M., Overseer of or for the Municipal Office, for the recovery of money due on a contract under which plaintiff had done certain work, defendant contracting for the Municipality, and for the performance of work known by plaintiff to be Municipal work.

The Municipality having ignored the contract, it was held that the contract, being a *quasi* contract, defendant could not be held personally liable in the present action of contract.

Plaintiff could not be allowed to amend his plaint so as to make defendant liable in tort for misrepresentation of his authority.

Case.—THIS is an application by the plaintiff for a *new trial.* Whether the rule shall be discharged or made absolute must depend upon the opinion of the High Court on the points hereinafter submitted for decision.

The facts are as follows: The plaintiff sued one "*Mohendro Nath Mookhopadhya, Overseer of or for the Municipal Office*" (*sic* in plaint), for the recovery of Rupees 215-9-4, due on a contract, dated the 5th Choit 1273, under which plaintiff had done a quantity of earth-work at 4 rupees per 1,000 cubic feet. At the trial, the contract appeared to be a verbal one; at least neither plaintiff nor defendant made any allusion to a writing. On the motion for a new trial, it appeared that there was a *written agreement*, and this agreement has been now produced by the defendant under summons, pursuant to the provisions of Sections 40 and 153, Act VIII. of 1859. This document was unstamped, but the plaintiff,

who required its production, paid the necessary penalty in order to render it admissible in evidence (Section 130). This contract* professed to be made between the plaintiff and "*Mohendro Nath Mookhopadhya, Overseer.*" The plaintiff, in his deposition, admitted that he knew Mohendro Nath to be the paid servant of the Municipality; that he was well aware that the work done by him was work for the Municipality; that he believed he was to be paid out of Municipal funds; that Mohendro Nath was not a *Ticcadar* or person engaging with the Municipality to do the work by the job or by contract, who might thus let it out by sub-contract to a *sub ticcadar* or sub-contractor. Having regard to these admissions, and to the defendant being named as "Overseer" on the face of the contract, I found as a *fact* that the defendant (as he himself deposed on solemn affirmation) had contracted as an *agent*, and not as a *principal*; and that at the time the contract was made, the *intention* of the parties was that the Municipality should be liable. (See Broom's Common Law, pages 532 and 541, 3rd edition; and Smith's leading cases, Volume II., page 326). There was no evidence to show that the defendant had pledged his personal credit. All the circumstances of the case contradicted the supposition, and whether with or without authority, he clearly contracted for the Municipality, and for the performance of work well-known by the plaintiff to be Municipal work.

Such being my finding of fact, the first question I have to propose for the decision of the High Court is as follows: "Can the defendant Mohendro Nath Mookhopadhya be made personally liable in the present action, being an action brought on a *contract?*" If the case were to be decided in accordance with the principles of English Law, I think that the question must be answered in the negative. "It would seem," says Mr. Lush, referring to the case of Downman *versus* Williams, 7 Q. B. 103, "that, if the agreement imports to be made by the principal, and is such that it *cannot* be construed as the personal contract of the agent, *the agent cannot be sued thereon*, though he signs it without authority, and his want of authority is unknown to the party with whom he treats. The only remedy against him is an action for the fraudulent misrepresentation." (Stephen Lush's Common Law Practice, 2nd edition, page 63.) Now, in the present case, the defendant is called "Overseer." On the face of the contract, and even if the word "*Overseer*" be held to be merely descriptive, it would yet, looking to plaintiff's knowledge of the facts, be impossible to construe the agreement as the personal agreement of the defendant.

The question how far, and when, an agent can be made liable in an action of *contract* is discussed in the following authorities: Chitty on Contracts, 7th edition, pages 207 to 210; Smith's Mercantile Law, page 163, &c.; Broom's Common Law, 3rd edition. page 542; Stephen Lush's Common Law Practice, page 55; Smith's leading cases, 5th edition, Volume II., pages 322, 327, 328, 337, 338. If I might venture to condense these authorities, the cases might resolve themselves into the following:—

1st.—Where an agent contracts personally, or pledges his own credit.

2nd.—Where the agent makes a fraudulent representation of his authority, with intent to deceive.

3rd.—Where he has no authority, and knows it, but nevertheless makes the contract as having such authority.

4th.—Where, having in fact no authority, he *bonâ fide* believes he has such authority.

Now, my finding on the fact excludes the application of the first case. In cases II., III., and IV. Mr. Smith shows that the agent cannot be sued on the contract, unless it be shown that he is himself the principal, which is not the case in the present instance. "An action, however, on an *implied contract*," says he, Volume II., page 328, "for the existence of the authority each professed to have, would appear to include all three classes. See to the same effect Chitty on Contracts, page 210, and the cases cited in the note (per Jervis, C.J., &c.).

*To the Most Exalted Sreejoot Baboo Mohendronath Mookhopadhya, Overseer.

The instrument of contract is executed by Sree Modhoo Sudan Dey to the effect following: As the Unnujona Khal, or canal, in Kishennugger, has to be dug, I will do the work by digging earth, and removing it within (200) two hundred feet, at the rate of four rupees per (1,000) one thousand cubit feet, being the rate at which it was dug last year. I will do the work at the rate and on the terms aforesaid leaving off (100) one hundred feet towards the north, extending from the commencement to the Kamarpara "Bunder." I will finish the work within one month. Should I fail, I will pay fine at (2) two rupees a day. I will draw money by degrees. Whenever I take any money, I will take it on giving a receipt for it, and will never take any without receipt. To this purport I execute and deliver this instrument of contract—Dated the 27th Falgoon 1273.

In the present case, it was sought to show, on the motion for a new trial, that defendant had made a contract which the Municipality ignored, and, as I take it, that therefore he was liable under some one of the latter three cases put above. It is clear that, if the present action is to go on in its present shape, after my finding already mentioned, the defendant must be made liable on an "*implied contract.*" Now, I think, looking to the meaning of an "*implied contract,*" as defined in the late important decision on a reference from this Court, in the case noted in the margin, it cannot be said that the *implied contract* in the present instance is anything but a *quasi contract.* There was no *convention:* and the liability is a liability created by law or natural equity, according to which it is just that an agent falsely or carelessly holding forth an authority which he did not possess, should be liable for the consequences of his fraud or carelessness. "The word '*contract*' used in Section 6 of the Small Cause Court Act," said the Chief Justice in the above decision, "refers to true contracts, whether express or implied." The implied contract in the present case is not such a true contract, but is a *quasi* contract, and I am of opinion that the defendant cannot be made liable in the present *action of contract.*

Ram Buksh Chittangee and another *vs.* Modhoo Soodun Paul Chowdhry and others, VII. Weekly Reporter, Civil Rulings, page 383.

If the High Court support my finding on the above point, the next question I have to submit is—"Can the plaint be amended so as to make the defendant liable in *tort* for a misrepresentation of his authority?" That the defendant (supposing the facts proved) would be liable in this form, there is no doubt. (See Broom's Common Law, page 540: Smith's leading cases, II., page 322; Roscoe's Nise Prius, page 507; and Addison on Torts, pp. 751, 770, and 771); and this would, I think, be an action for damages triable in this Court.

The tendency of modern legislation has been to enable Courts to amend the record so as to try the substantial question at issue between the parties in every instance where such an amendment is consistent with the claim put forth, or the remedy sought. The Small Cause Court Act contains no special provisions on the subject of amendment, but there can be little doubt that the procedure of these Courts should conform to the spirit of the provisions contained in the Code of Civil Procedure. Before that Code became law, it was laid down as follows by the Privy Council in the case* of *Honooman Pershad Pandy* versus *Mussamat Babanee Mauraj Koer wari:* "It is of the utmost importance to the right administration of justice in the Courts that it should be constantly borne in mind by them that, by their very constitution, they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance, and not the mere literal wording of the issue is to be regarded; and that if, by inadvertence or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be, by adjournment, for the decision of the real points in disputes."

* Moore's Privy Council Appeals, Vol. VI., page 411.

In a recent decision of the High Court noted in the margin, the subject of amendment under the provisions of the Code of Civil Procedure underwent considerable discussion. The following passage occurs in the reported decision: "The Judge, on the representation of the plaintiff, *cannot alter the nature of the suit or change the cause of action.* This power (of amendment) extends by means of a *vivâ-voce* examination to the elucidation of what is ambiguous in the claims of the contending parties, to the amendment of what is erroneous, and the supplying what is defective, but not to the conversion of a suit of one character into another inconsistent with, and that may be opposed to it; and the issues, we apprehend, must be founded on the claim as brought in the plaint, and *not on something else, which plaintiff at some subsequent period may prefer to consider as his cause of action, but which is altogether at variance with the relief prayed for in the plaint.*"

No. 1553 of 1863, Gobindo Mohapattur and others, appellants *versus* Madhub Pershad Pundit Surburakar & others, 10th September 1866, Vol. VI., Weekly Reporter, Civil Rulings, p. 211.

There are no regular issues framed in Small Cause Court cases; but the points for decision are similar to issues, though not regularly recorded as such; and the spirit of the above decision should, I think, apply. The plaintiff (though the plaint was in some measure obscure) sued for money due under the contract by the defendant as the obligor of that contract. Nothing is said about the

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ndant having contracted as an agent d the scope of his authority, or without authority at all, and therefore being liafor misrepresentation. It is clear that plaintiff mistook his proper ground of , and that he only became aware of such er ground after the case had received siderable discussion in Court, and had at first dismissed, because he sought to e personally liable an individual who contracted as an agent for a known cipal, without alleging any facts which ld create such personal liability. There clearly a wide distinction between suing defendant as personally liable on the tract as a contracting party, and suing him damages for a misrepresentation, deceit, fraud. The issues and the evidence would very different in the two cases.

In Stephen Lush's Common Law Practice, page 309, it is remarked: "The tinction which has been drawn is between introduction of a *new cause of action*, and an amendment of the way of advancing claim, as while it furthers the purposes justice, leaves the demand essentially the me." I have carefully read through the s on amendment quoted in this work. have also read Mr. Taylor's able remarks the subject, and the instances given by in which amendment has been allowed. Taylor on Evidence, Volume 1, pages 208 230.) I have, moreover, consulted the thorities in the margin, and, as far as I can judge by analogy, I think that plaintiff ought not in the present instance to be allowed to amend his plaint. He has sought to make the defendant liable in contract, probably at first *bonf fide* believing that he could do so, and mistaking his remedy; and subsequently, when he discovered the mistake, endeavouring to color the transaction so as to show that he meant to contract with the defendant, and not with the Municipality. Having failed in proving this case, I do not think he can now ask to set up a case of misrepresentation and deceit, and recover on a ground of relief entirely different.

Bay's Common Law Practice, 2nd edition, pages 163-165; Pollock and Nicol's County Court Practice, pages 115 & 116; Davis's Practice and Evidence in the County Courts, pages 110-113.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the Judge's view is correct as to both points.

The 1st February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, *Judge.*

Limitation—Balance and advances on account of Indigo—Clause 9, Section 1, Act XIV., 1859.

Reference to the High Court by the Officiating Judge of the Court of Small Causes at Kishnaghur, dated the 6th September 1867.

Mr. H. D. Tripp, Manager for the Bengal Indigo Company, *Plaintiff*,

versus

Kubeer Mundul, *Defendant.*

An action for a balance on an indigo-account, comprising a balance found at close of 1859 and advances made in 1860, was held to be governed by the limitation of three years: *first*, as regards the *balance*, for defendant's presence and assent at the time of adjustment implied a contract to which Clause 9, Section 1, Act XIV., 1859, would apply; and, *secondly*, in respect to the advances, which were on account of goods to be supplied, where the same limitation would run from the time when the goods ought to have been delivered.

Case.—THIS is an action on the part of the Bengal Indigo Company against defendant for balance of an indigo-account.

The account is as follows:—

	Rs.	As.	P.
December 1859, account stated ...	31	10	6
„ Advance for cultivation in 1860.	12	0	0
„ Advance for weeding ...	1	0	0
Date uncertain, advance for seed ...	1	6	0
Total ...	46	0	6
Deduct Value of indigo supplied by defendant in 1860	2	0	0
Total ...	44	0	6

The plaint * * * states that the claim is for the balance of 1860. Defendant sowed some indigo in that year, and got credit for 2 rupees, as shown above. The plaint was filed on the 18th June 1864; it was decreed *ex parte*, but, on plaintiff proceeding to take out execution, it was rein-

stated on the file. Defendant now pleads limitation, and the question submitted to the High Court is, what period of limitation is applicable to the case? It is clearly not governed by Section 8 of Act XIV. of 1859; it must come either under Clause 9 or Clause 16 of Section 1. I am in doubt as to which Clause applies, as there are rulings on the subject which have been quoted by both parties in support of their respective views.

Defendant relies on the case of J. Doyle *versus* Khooseeal Khan, Sutherland's Small Cause Court References 121, a case very similar to the present one. This ruling is quoted and approved in J. Doyle *versus* Alum Biswas, 4 Weekly Reporter, page 1, Small Cause Court References.

On the other hand, in the case reported in Sutherland's Small Cause Court References, page 145, Doyle *versus* Edoo Gazee, it appears to have been the opinion of the High Court that a case like the present one would be governed by Clause 16.

I am myself of opinion that the weight of authority is in favor of a three, and not a six, years' limitation, as far as the first item, Rupees 31-10-6, comprising the account stated, is concerned. Defendant is proved to have been present and assenting to the balance struck. A contract to pay the money may, therefore, be implied (Macpherson on Contracts, page 27), and this implied contract is governed by Clause 9, Section 1 of the Limitation Act. The three years' limitation therein laid down, of course, runs from the date of the adjustment, *viz.*, December 1859.

The other items for which the suit is brought are advances made, with one exception, the advance for seed, which was made subsequently to the statement of account (but the date of which is not certain), on the same day that the account was stated. They were for cultivation in 1860. Defendant *did* cultivate something for that year, for he got credit for Rupees 2 worth indigo delivered in 1860. He did not cultivate after 1860. Plaintiff does not sue for damages on account of defendant not sowing subsequently to 1860. His suit is for balance of accounts. What limitation is applicable to those items?

There is a case reported, Boiddonath Shah *versus* Lalunnissa Bibee, VII. Weekly Reporter, page 164, which seems exactly in point. The High Court there held that, when money was advanced in payment of goods (partly crops) to be subsequently supplied, Clause 9 of Section 1 was applicable, and that limitation should run from the time when the goods ought to have been delivered. In the present case, as the advances were for indigo-cultivation in 1860, the indigo should have been delivered in the year. I think, therefore, that defendant's claim to these items is also barred by limitation, the plaint not having been filed in 1864.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that this is a suit for money lent, or upon contract, and that three years from the time when the cause of action accrued is the limitation. Under these circumstances, the Judge's opinion, as stated above, is correct.

The 1st February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, *Judge.*

Jurisdiction—Omission to certify payments made on a decree—Damages.

Reference to the High Court by the Officiating Judge of the Court of Small Causes at Kishnaghur, dated the 5th September 1867.

Bhugoban Tantee, *Plaintiff*,

versus

Gobind Chunder Roy, *Defendant.*

In a suit to recover money paid from time to time to defendant, a decree-holder, who entered the payments in a *hath-chittah* which he made over to plaintiff, promising to enter them on the back of the decree; but subsequently, ignoring the payments, executed the decree in full:

HELD that a suit will lie in the Small Cause Court for damages sustained in consequence of decree-holder fraudulently omitting to certify to the Court the payments made by plaintiff.

Case.—PLAINTIFF sues defendant for Rupees 23-5-6 alleged to have been paid by him in part-satisfaction of a decree of this Court obtained against him by defendant. I find, as a fact, that the sum which forms the subject of action was actually paid to defendant in several small payments made from time to time and entered by defendant in a *hath-*

ui, which he made over to plaintiff, pro-
g to take the decree out of Court,
e it was being executed, and enter the
nt paid on the back of it. Defendant
equently ignored the payments so made,
proceeded to execute the decree for the
amount specified in it. The question
h is submitted for the decision of the
Court is, whether plaintiff's claim is
d by Section 206 of Act VIII. of 1859
Section 11 of Act XXIII. of 1861.

here are several rulings of the High
t on the subject. In the case of
eer Mundul *versus* Brojonath Chucker-
, Sutherland's Small Cause Court
rences, page 73, which was a suit
ght for the value of goods delivered to a
ee-holder in satisfaction of his decree,
High Court held that, in a suit brought
damages for breach of an adjustment or
ement which was made out of Court, and
equently declared illegal by Section 206
ct VIII. of 1859, plaintiff could not re-
r—adding that, if such suits were enter-
d, the provisions of Section 11 of Act
III. of 1861 would be nullified.

the case of Rajah Shutto Churn Ghosal,
118 of the same work, it was held that a
by a judgment-debtor to recover money
by him, to be applied in satisfaction of a
ee under Act X. of 1859, but not so ap-
d by the decree-holder, would lie in the
ll Cause Court. Here, however, the de-
had been obtained under Act X. of 1859,
hich the procedure laid down in Section
of Act VIII. of 1859 and Section 11 of
XXIII. of 1861 is declared inappli-
le.

n Alumia Beebee *versus* Gooroo Churn
. Sutherland's Small Cause Court Re-
ences, page 126, the High Court, while
ding that plaintiff's suit for money
ged to have been paid in satisfaction of
decree would not lie, remark: "It may
e that a judgment-debtor might have a
ause of action against a judgment-credit-
r, when in making such a payment there
as an express contract that the latter
would certify the payment to the Court,
and the latter failed to act up to that
contract."

In Bhya Bhoopnath Sahee *versus* Kunwan,
II. Weekly Reporter, page 134, Civil Rul-
gs, it was held that, under Section 206
Act VIII., the Court could not recog-
e an adjustment not made through, or
certified to, the Court by the decree-holder.

In case No. 317 of 1866 (29th September), Sajan Mundul *versus* Uzir Mundul, a reference from the Meherpore Small Cause Court, plaintiff had sued to recover the value of paddy made over to the decree-holder in satisfaction of his decree (the adjustment not having been certified to the Court), the cost of execution of the decree and interest, &c. Plaintiff was prepared to prove that the decree-holder (plaintiff in the original suit) had made an express contract that he would certify the payment of the paddy to the Court, but there was no allegation of any express contract in the plaint. It was held by the High Court that plaintiff was entitled to sue defendant for damages *for breach of his contract to certify*, or for *fraudulently omitting to certify*, in consequence of which, on an execution fraudulently issued against him, his property was seized. This is the last recorded ruling on the subject on a Small Cause Court reference.

It would seem, therefore, that the judgment-debtor can sue for damages sustained by him in consequence of the decree-holder either breaking an express contract to certify, or fraudulently omitting to certify. The latter would seem to embrace nearly every case of an adjustment out of Court, when the decree-holder does not certify payments to the Court; for it is certainly fraudulent to accept a payment, and subsequently proceed with the execution, ignoring that payment.

In the present case, defendant (the decree-holder) made a memo. with his own hand of the payments made by plaintiff (judgment-debtor) in satisfaction of the decree, and verbally promised that he would take the decree out of Court, and enter the payments on the back of it. He subsequently ignored those payments, and took out execution for the full amount of the decree. I am therefore of opinion, according to the last quoted ruling, that plaintiff's suit will lie in the Small Cause Court, and I have given him a decree contingent on the opinion of the High Court.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the Judge is right, and that the suit will lie in the Small Cause Court.

The 1st February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Action on contract—Penalty—Damages.

Reference to the High Court by the Judge of the Courts of Small Causes at Hooghly and Serampore, dated the 17th December 1867.

Madhub Chunder Roy, *Plaintiff*,

versus

Lukhee Jellanee and others, *Defendants*.

No one for Plaintiff.

Baboo Poorno Chunder Shome for Defendants.

In a suit for (so-called) damages, on the ground that defendants, after executing an agreement, by which they stipulated to sell fish every day in plaintiff's bazaar, and to pay a fee *per diem*, and bound themselves to pay "damages" to a specified extent, in the event of their leaving his bazaar and resorting to any other bazaar, had left his for another bazaar, where they were vending fish:

HELD that the suit could be maintained, being an action upon a contract, in which there was nothing illegal; but that the sum stipulated to be paid was merely a penalty.

HELD also that plaintiff was not entitled to recover, as damages, anything beyond what he had actually sustained.

Case.—THE plaintiff sues for what he calls damages, on the ground that the defendants executed in his favor an *ekrar* (agreement), dated the 28th of October 1864, * * by which they stipulated each of them to sell fish in his newly-established bazaar at Chinsurah regularly every day, and to pay a *dhân* (fee) of two annas per diem, and bound themselves to pay each of them damages to the extent of Rupees 50 in the event of their leaving his bazaar and resorting to any other bazaar; that in the month of Assin 1273 B. S., defendants Nos. 1, 2, and 3, left his new bazaar aforesaid, and went over to the neighbouring old bazaar where they are now vending fish, and that they have thus rendered themselves liable, under the terms of the above *ekrar*, each of them for damages to the extent of Rupees 50, the suit being laid at Rupees 150, being the amount of damages demandable from the three defendants. The defendants deny the demand, and plead that a suit of this nature, being one for a penalty, cannot be maintained, and that the document upon which the plaintiff sues does not recite any consideration, without which no contract can be valid.

The question, therefore, on which the decision of the Court is solicited, is whether a suit of the nature described above can be maintained, and whether a contract of the nature mentioned above is valid.

It will appear from the agreement * * that the defendants bind themselves each of them to pay a penalty of Rupees 50 in the event of a breach of the terms thereof; and further stipulate that, if any of the joint contractors infringe the conditions of the instrument, he shall be liable for the entire amount payable by them all. Were I to confine my attention to that part of the instrument in which the above stipulation occurs, and to go no further, it would be quite clear that what the plaintiff claims as damages is, in reality, a *penalty*. But one of the cardinal rules for construing instruments is, that the whole instrument must be read together; and, if the rest of the instrument in question showed that the real intention of the parties was that the defendants should pay a certain sum agreed upon by mutual consent as the just amount of the damage which may be sustained in consequence of a breach of the contract, the Courts of Justice would consider what is *called* a *penalty* in the instrument in the light of liquidated damages. But the whole instrument shows that the sum which the defendants stipulate to pay is, in reality, a *penalty* or *forfeiture* inserted to secure the performance of certain acts. For, though the word "*damages*" occurs in certain parts of the document, and at the conclusion thereof, what the parties intended was that the defendants should attend the new bazaar established by the plaintiff, and vend fish therein regularly every day from 9 A.M. to 9 P.M.; and to secure the performance of these acts, the plaintiff has exacted from them a promise to pay a certain sum in the event of their omitting to do those acts, and not only that, but also a promise that, if any of the joint-contractors

neglected to do the acts aforesaid, each of them would be liable for the whole amount fixed as payable on breach of the contract.

This is clearly a case in which a *penalty* is sought to be recovered, and against such a penalty a Court of Equity will always relieve, and, if a compensation can be made for non-performance of the acts, decree only such compensation, in lieu of the penalty even against the express stipulation of the defendants, proportionate to the damage actually sustained (Story, Sections 1314 and 1320). In the case of Kemble *versus* Farrew (6 Bing. 141), the suit was for breach of an engagement by the defendant to perform, as an actor, at the plaintiff's theatre during several consecutive seasons. The agreement contained various clauses and stipulations between the parties, and each bound himself to pay the other the sum of £1,000 in the event of breach of any of them, and that sum was declared to be *liquidated and ascertained damages*, and not a *penalty*, or in the nature thereof. Notwithstanding this expression of the intention of the parties, the Court of Common Pleas held that the amount specified was to be regarded as a penalty only, and not as *liquidated damages*. The case now submitted is, if possible, much stronger than this, and the only relief which the plaintiff can claim is compensation for the actual damage sustained by him. The plaintiff does not allege in his plaint, and it is no part of his case, that he has sustained any *actual damage;* and, considering the circumstances of the case, it is not possible for him to show that he has sustained any actual damage; nor has he shown that he has sustained any such damage. I am therefore of opinion that the plaintiff's suit must be dismissed.

Judgment of the High Court.

Peacock, C. J.—This is an action upon contract. It is a suit which can be maintained. There is nothing illegal in the contract, but the sum stipulated to be paid is merely a penalty.

It is not for us to say whether the plaintiff has sustained any damages. That is a question of fact, and it has been determined by the Judge.

The plaintiff is not entitled to recover, as damages, anything beyond what he has actually sustained.

The 1st February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, *Judge.*

House-rent—Tenant's liability where he has agreed to vacate on 1st proximo.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Barrackpore, dated the 9th September 1867.

Mrs. C. Ruff, *Plaintiff,*

versus

Mr. H. W. Stokoe, Senior Overseer, P. W. Dept., *Defendant.*

In a suit to recover rent for a whole month (May), on account of a house which defendant had vacated on the 16th of that month—HELD that defendant, having stated that he would vacate on the 1st proximo (June), was liable for rent up to that date at the rate at which he was holding.

Case.—THIS is an action brought by the plaintiff to recover from the defendant Rupees 45, being the amount of house-rent from 1st to 30th May 1867.

The plaintiff's general attorney wrote to the defendant on the 11th May 1867 as follows:—

"Please let me know if you agree to give "me a written agreement of the house, at "the rate of Rupees 50 per month, from 1st "May 1867, and to occupy the said house "during and until your stay at Barrackpore; "if so, be good enough to inform me, and "I will send the agreement for your signa-"ture; otherwise please take notice that, from "and after the 1st June 1867, you will be "charged at the rate of Rupees 65 per "month."

The defendant, on the same day, the 11th May 1867, replied as follows:—

"I very much regret perusing over "your letter of this day's date. I have told "you in my letter of the 8th instant that "I will not give more than Rupees 45 per

"month as agreed and paid for the last three "months, and I will make no agreement "with you of any kind, but I have inform-"ed you in my letter of the above date that "I will vacate your house on the 1st "proximo."

The plaintiff relies on the defendant's letter, dated 11th May 1867. He wrote therein "that" he "will vacate" the "house on the 1st proximo" (June), whereby he, the defendant, has bound himself to pay the rent for the whole month.

The defendant only admits liability up to the date he occupied the house, as he vacated it on the 16th May 1867.

The Court holds that Mr. Stokoe, in his present appointment of Supervisor of *Military Works* under the orders of the Executive Engineer of this station, is, to all intents and purposes, in military employ; and, by reason of such, being liable at any moment to be ordered away from this station, the Court holds that he is only liable for rent for the days he occupied the house, *viz.*, 16 days, no agreement in writing being come to between the parties on first occupation of the house in January last.

The points which are now submitted, at the plaintiff's request, under Section 22, Act XI. of 1865, for the decision of the High Court, are the following:—

I. Was the Court right in holding the defendant Mr. Stokoe, an Overseer in the Public Works Department, in discharge of the new building barracks, to be in military employ?

II. Upon the facts as above stated, was the Court right in holding that the plaintiff could not receive from the defendant the full month's rent, because the defendant was considered to be in military employ?

Judgment of the High Court.

Peacock, C. J.—The facts are not sufficiently stated to enable us to answer the first question.

But, whether the Judge was right or wrong in his decision as to the first point, we are of opinion that the defendant, having stated that he would vacate on the 1st June, is liable for rent up to that date, at the rate of Rupees 45 per month, being the rate at which he was holding.

The 1st February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, *Judge.*

Jurisdiction—Widow's suit for maintenance under Civil Court's decree.

Reference to the High Court by the Judge of the Court of Smalls Causes at Dacca, dated the 26th September 1867.

Kaminee Dossee, widow of Chunder Mohun Shaha, *Plaintiff*,

versus

Bishonath Shaha, *Defendant.*

HELD that a suit by a widow for arrears of maintenance fixed by a Moonsiff's decree, where defendant urged non-liability on the ground that the property of plaintiff's husband was exhausted, and that defendant had already brought an action in the Moonsiff's Court for release from his liability, was not cognizable by the Small Cause Court.

Case.—PLAINTIFF sues for arrears of her maintenance fixed by a decree of the Moonsiff of Dacca. Defendant pleads non-jurisdiction, and also urges non-liability on the ground that the property of plaintiff's husband that was in defendant's hands, and which, in fact, was the cause of the decree for maintenance, is all exhausted, and that defendant has not personal means enough, and that he has already brought an action in the Court of the Moonsiff for release from his liability to support her, which suit is now pending in appeal before the District Judge.

The question for consideration is, is the case cognizable by a Small Cause Court? I am inclined to think it is not. Two rulings of the Hon'ble High Court may be referred to as bearing upon the point: one dated the* 23rd of February 1866, in the case of Nobin Kalee Debia *versus* Bindoo Bashinee Debia and others, given on a reference from the Small Cause Court of

* Sutherland's Weekly Reporter, Vol. V., Small Cause Court References, page 5.

Hooghly; and the other of * 4th December 1866, in the case of Bhugwan Chunder Bose and others, appellants, *versus* Bindoo Bashinee Dossee, respondent. The former supports the opinion I have ventured to express above. Plaintiff had first preferred her claim before the Moonsiff of Dacca, but the Moonsiff rejected the case, referring her to the Small Cause Court under the latter ruling.

* Sutherland's Weekly Reporter, Volume VI., Civil Rulings, page 285.

The case, though purely one for arrears of maintenance already determined, is one not founded upon any contract whatever, express or understood, nor does it fall within any other class specified in Section 6. Act XI. of 1865. Moreover, the manner of the defence set forth in this case, I beg to observe, is such as involves points connected with the continuance, or otherwise, of the obligation imposed by the decree alluded to above—points beyond the scope of this Court; and specially as a regular suit exactly in the tone of this defence is, as has already been stated, pending in appeal. I this day pass judgment for dismissal of the case for want of jurisdiction, contingent, however, upon the opinion and orders of the Hon'ble Judges of the High Court, for which I take the liberty thus to lay this case most respectfully before their Lordships.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the Judge of the Small Cause Court is right in his view, and that the case is not cognizable by the Small Cause Court.

The 1st February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Jurisdiction—Suit to enforce a judgment of Queen's Bench within jurisdiction of Recorder's Court, Rangoon.

Reference to the High Court by the Recorder of Rangoon, dated the 7th December 1867.

Sieveking Droop & Co., *Plaintiffs*,

versus

C. E. Focke, *Defendant*.

In a suit to make a judgment passed in the Court of Queen's Bench in London, a judgment of the Recorder's Court in Rangoon, and to enforce the said judgment in due form of law within the jurisdiction of Court last mentioned, it was

HELD, with reference to Section 11, Act XXI. of 1863, that the Recorder had no jurisdiction to entertain the suit, it not being a suit for land, and the defendant not dwelling, carrying on business, or personally working for gain within the local limits of the Court's jurisdiction, and the cause of action not having arisen within those limits.

Case.—SUIT to make a judgment passed against Carle Edward Focke at the instance and in favor of the plaintiffs in this cause in the Court of Queen's Bench in London, on or about the 27th June 1867, for £2,612-8 (true copy duly certified annexed hereunto, and marked A), and to enforce the said judgment in due form of law within the jurisdiction of this Court, by making the said judgment a judgment of this Court.

Plaintiffs pray:—

1st.—That Carle Edward Focke may be summoned to show cause why the judgment of the Court of Queen's Bench should not be made a judgment of this Court; and, failing to show cause, that the said judgment may be made a judgment of this Court against him.

2nd.—That the said judgment of the Court of Queen's Bench for £2,612-8 may be made a judgment of this Court for the equivalent, *viz.*, Rupees 27,865-9-7, for the purpose of execution within this jurisdiction, the defendant having a right, title, and interest in and to the property within this Court's jurisdiction, *viz.*, to 2nd-class Suburban allotment No. 17, and ship-building and timber-yard allotment No. 17, situated within this Court's jurisdiction.

3rd.—That the defendant be decreed to pay Rupees 27,865-9-7, with interest thereon, from date of institution of suit in this Court to date of decree of this Court, and with all costs of suit, and that the total amount of this decree may bear interest to date of realization in full.

As the judgment in the Court of Queen's Bench, on which it is proposed to found this suit, is for a sum of £2,612-8 Sterling, any appeal against an order rejecting the plaint would lie to the Privy Council, and not to the High Court of Calcutta; and it is to avoid the expense of such a proceeding that I am requested to make this reference.

It appears to me that I have no jurisdiction to entertain this suit, my jurisdiction

being conferred by Act XXI. of 1863, Section XI., which enacts—

"That Recorders appointed under this "Act shall receive, try, and determine suits "of every description, if, in the case of "suits for land or other immoveable pro-"perty, such land or property shall be "situate, or, if in all other cases, the cause "of action shall have arisen, or the defend-"ant at the time of the commencement of "the suit shall dwell, or carry on business, "or personally work for gain, within the "local limits of the ordinary jurisdiction of "their respective Courts. Provided that "the Recorders shall not take cognizance of "any suit, the cognizance of which, by the "ordinary Civil Courts in British India not "established by Royal Charter, is barred by "any Act of Parliament, or by any Regula-"tion or Act of the Governor-General of "India in Council."

This is not a suit for land, nor does the defendant now dwell, carry on business, or personally work for gain within the local limits of the jurisdiction of this Court, nor has the cause of action arisen within those limits.

I request the opinion of their Lordships as to whether I have jurisdiction to entertain this suit.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the learned Recorder is right, and that his Court has no jurisdiction to entertain the suit.

The 1st February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, *Judge*.

Jurisdiction—Withdrawal of suit on promise to pay—Suit to enforce promise.

Reference to the High Court by the Officiating Judge of the Court of Small Causes at Kishnaghur, dated the 1st August 1867.

Sreenath Banerjee, *Plaintiff*,

versus

Doorga Doss Nundy and others, *Defenda*

A withdraws a suit pending against *B* in the M siff's Court, on *B's* promising him Rupees 50, and to recover that sum from *B*, who denies that there valid consideration for the promise, inasmuch a suit before the Moonsiff was already barred by li tion.

HELD that plaintiff is entitled to recover in a S Cause Court, which cannot inquire into the questio limitation in the previous suit.

Case.—*A* HAS a suit pending against in the Moonsiff's Court. *B* verbally prom him Rupees 50 to withdraw it. *A* accordi ly withdraws it, and now sues *B* in Small Cause Court for the Rupees 50. admits the promise under the circumstan above stated, but denies that there wa valid consideration for the promise, in much as the suit before the Moonsiff already barred by limitation. He adm that *A* performed *his* part of the contr *viz.*, the withdrawal of the suit.

The questions which I have to propose the consideration of the High Court are—

1st.—Whether this Court can enquire i the question of limitation in the suit bef the Moonsiff, so as to come to a decisi on the point whether *A*'s suit was barr or not.

2nd.—Supposing this Court to have jur diction to make such enquiry, is the wit drawal of a suit barred by limitation binding consideration for a promise suc as *B's*?

The first question should, I think, be an swered in the negative. Such an enquir seems foreign to the functions of a Small Cause Court. Supposing the answer set up by *B* to have been that *A* would have lost his case on the merits, or that it was a fals claim, would this Court have been bound t investigate those pleas? Such a course would be virtually a trial by one Court of a case cognizable (perhaps exclusively) by another.

With regard to the second question, I think the promise a binding one. The maxim *ig norantia juris non excusat* seems applicable. Had *B* actually *paid* the Rupees 50, he would not be entitled to recover it, on the plea that it was paid under a mistake of law, *viz.*, that he did not know, when paying it, that the claim was barred by limitation.

have given plaintiff a decree contingent the opinion of the High Court.

Judgment of the High Court.

ock, C. J.—We are of opinion that Judge is right, and that plaintiff is enti- to recover.

The 1st February 1868.

Present:

Hon'ble F. B. Kemp and E. Jackson, *Judges.*

in execution of ryot's tenure—Purchaser not ryot's vendee.

Case No. 1393 of 1867.

l Appeal from a decision passed by Principal Sudder Ameen of East dwan, dated the 16th March 1867, rming a decision passed by the nsiff of that District, dated the 29th rch 1865.

umboo Chunder Singh (Plaintiff), *Appellant,*

versus

n Narain Doss and others (Defendants), *Respondents.*

boo Roopnath Banerjee for Appellant.

ondent Ram Narain Doss appeared in person.

ere a ryot's tenure is sold in execution of a decree Act X. obtained by the zemindar, the purchaser the ryot's vendee, nor bound by any decision to the ryot was a party, or by an allegation or ad- n of that party.

mp, J.—THE pleader, on rising to ess the Court, intimated that this appeal confined to a portion only of his claim, to the garden and tank. It is also admitted that Khetturnath, a defendant below, is not affected by this appeal, although made a respondent.

The only point taken by the special appellant in his grounds of appeal, though his pleader has attempted to travel out of it in his argument, is this—

That the decision to which respondent's alleged vendor, Zohoorooddeen, was a party, is binding upon the respondent, and that the Principal Sudder Ameen was wrong in law in not treating this decision as *res adjudicata.*

We think there is no ground whatever for this contention. The respondent is not Zohoorooddeen's vendee; he is the purchaser of the tenure held by Zohoorooddeen in execution of a decree under Act X. for rent obtained by the zemindar against the ryot registered in his serishtah, in this instance Zohoorooddeen.

The respondent is not bound by any decision to which Zohoorooddeen was a party, or by an allegation or admission of that party.

Appeal dismissed with costs and interest.

The 1st February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Mesne-profits—Decree-holder not concluded by his plaint—Interest prior to ascertainment.

Case No. 439 of 1867.

Miscellaneous Appeal from an order passed by the Additional Judge of Hooghly, dated the 28th May 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 17th September 1866.

Hurro Gobind Bhukut (one of the Judgment-debtors), *Appellant,*

versus

Digumburee Debia and another (Decree-holders), *Respondents.*

Baboo Nubo Kishen Mookerjee for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Where a decree provides for the ascertainment of mesne-profits at the time of execution, decree-holder is not concluded by what he may have said in his plaint as to the amount thereof.

Interest on the mesne-profits cannot be awarded for the period previous to such ascertainment, where the decree does not give interest on mesne-profits.

Loch, J.—WE reject the first ground taken in special appeal, as the decree provided for the ascertainment of the mesne-profits at the time of execution, and this Court has repeatedly held that, when such a decree is passed, the decree-holder is not concluded by what he may have said in his plaint as to the amount of mesne-profits.

We think the second objection must be admitted, and the Judge's order, awarding interest on mesne-profits for the period previous to the date when the mesne-profits were ascertained, must be set aside as the decree does not give interest on mesne-profits.

* * * * *

* * * * *

The 3rd February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble W. S. Seton-Karr, L. S. Jackson, A. G. Macpherson, and C. Hobhouse, *Judges.*

Special Appeal—Sale set aside for irregularity—Section 257, Act VIII. of 1859.

Case No. 177 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 22nd December 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 11th August 1866.

Kooldeep Narain Singh and others (Judgment-debtors), *Appellants*,

versus

Lukheen Singh (Decree-holder), *Respondent.*

Mr. C. Gregory and *Baboo Mohinee Mohun Roy* for Appellants.

Mr. R. T. Allan and *Baboos Kishen Sucai Mookerjee, Mohesh Chunder Chowdhry* and *Sreenath Doss* for Respondent.

HELD (*Jackson, J., dissenting*) that no special appeal will lie against an order of the Judge, on appeal, setting aside a sale for irregularity under Section 257 of the Code of Civil Procedure.

This case was referred to the Full Bench by the Hon'ble L. S. Jackson and Hobhouse, JJ.

Jackson, J.—THIS is an appeal against an order passed by the Zillah Judge, on appeal, under Section 257 of the Code of Civil Procedure.

A preliminary objection is taken to the hearing of this appeal on the ground that, under a ruling of a Full Bench found at page 83 of Sutherland's Full Bench Cases—a ruling which has since been followed in several instances by Division Benches of this Court—a special appeal on such ground will not lie. I was one of the Judges who formed the Full Bench on the occasion when the case referred to was decided, and undoubtedly the Court in that case expressed an opinion that Section 257 of the Procedure Code did not allow a special appeal. If that had been the point, or one of the points, referred for consideration to the Full Bench on that occasion, I should not be inclined to allow any present doubt of mine to influence me in referring this point for further consideration. But it is perfectly clear that this was not the point, or one of the points, referred for the consideration of the Full Bench, and that the opinion upon this point was expressed by the Court in answer to, or by way of observation upon, an argument addressed to it by some of the vakeels on either side. I confess that, if the matter were *res integra*—if I were looking at it now for the first time—I should be inclined to come to the conclusion that the words "shall be final" in the Section quoted indicate finally as barring other separate proceeding, that is to say, as barring a new suit for the

purpose of setting aside that which the Court had done in execution. The words are "such order, unless appealed from, and, if appealed from, then the order passed on the appeal shall be final."

It appears to me that nothing in that part of the Section indicates what the course of the appeal is to be, whether one appeal shall be allowed or two; but that the order passed on the appeal, to whatever Court the appeal may lie, or however far the appeal may go, shall be final, and shall not be afterwards questioned in a regular suit. That is the view I should be inclined to take of the Section. But as there is an opinion expressed by the Full Bench on that occasion, and as other Judges of this Court have followed that ruling, or have independently expressed an opinion to a contrary effect, I think that this matter ought to be referred for an authoritive ruling to the Full Bench.

Hobhouse, J.—I concur.

The judgments of the Full Bench were delivered as follows:—

Peacock, C. J.—It appears to me that the view which was expressed, with reference to Section 257, by the Full Bench in the case No. 300 of 1862 reported in Mr. Sutherland's Volume of the Full Bench Rulings, page 83, is correct. That decision has been followed at least in one case, if not in other cases. (*See* Special Appeal No. 414 of 1866, VI. Weekly Reporter, Miscellaneous Rulings, page 119)

Section 257 relates to applications for setting aside a sale under an execution, on the ground of some material irregularity in publishing or conducting the sale. Generally speaking, Courts of Justice have the sole control over the execution of their own process, and if any irregularity is committed in the execution of their process, and the Court upholds what has been done under the execution, no action can be brought in another Court to upset, on the ground of an irregularity, that which the Court itself, out of which the execution issued, has upheld. But in this country the Legislature appears to have thought it unsafe to leave the question as to whether there has been an irregularity in publishing or conducting a sale under an execution, to the final decision of the Court out of which the execution issued; and consequently an appeal was allowed from the decision of that Court. That was going one step beyond the ordinary course with reference to mere irregularities. Probably, the Legislature thought that there were already very considerable difficulties in an execution-creditor's obtaining the fruits of his judgment; that no very difficult point of law was likely to arise in deciding whether there was an irregularity in publishing or conducting a sale; and therefore that justice would be sufficiently protected by giving one regular appeal in such a case upon any question of fact or law.

If the objection be allowed, the order made to set aside the sale is final; that, as I understand it, means final for all purposes. This would cause no great hardship; for, if the objection were allowed, the only person likely to be affected by setting aside the sale would be the purchaser at the sale. But he could not be greatly injured; for when a sale is set aside, the purchaser is entitled by Section 258 to receive back his purchase-money, with or without interest.

But, if the objection be disallowed, the order confirming the sale is to be open to appeal, and such order, unless appealed from, and if appealed from, then the order passed in the appeal, is to be final.

Much injury might be done by confirming a sale where a material irregularity has been committed in publishing or conducting the sale; for, in consequence of such irregularity, the property might be sold much under its value. It was reasonable, therefore, to allow an appeal against the order, but as no difficult question of law could arise, and the question of regularity or irregularity would turn more upon fact than upon law, it seems to have been thought unnecessary to allow a special appeal. Consequently it was enacted that the order made on appeal should be final.

The Section, however, proceeds: "And the party against whom the same has been given shall be precluded from bringing a suit for establishing his claim." If the Legislature had merely said that the order shall be final, it might have been supposed that they meant final only as regards appeal; they, therefore, to make their meaning free from doubt, added the words which I have above quoted, and restrained the party from bringing an action for the purpose of establishing any claim arising out of mere irregularity.

It is contended that the word "final" is explained by the subsequent words, and that

it indicated finality, not as regards proceedings in appeal, but merely as regards a fresh suit. It appears to me, however, that, if the Legislature merely intended to preclude an action from being brought to try the question of irregularity, they would not have used the words "and the order passed on such appeal shall be final;" they would simply have stated that, if the objection be disallowed, the order confirming the sale shall be open to appeal, and that such order, unless appealed from, shall be final; and the party against whom the same should be given should be precluded from bringing a suit for establishing his claim. Then the word "appeal" would have left him open to appeal in the regular course. But when they said that the order for confirming the sale "shall be open to appeal, and such order, unless appealed from, and if appealed from, then the order passed on the appeal, shall be final," two different orders were declared to be final, *viz.*, the order for confirming the sale, and the order made on appeal against the order confirming the sale.

It appears to me that the Legislature intended to give some effect to the words "and the order passed on appeal shall be final;" and that, when they said that the order passed on appeal should be final, they meant that no special appeal should lie from such order, and thereby excluded the order passed on appeal from the general provisions of Section 372. The appeal is dimissed with costs.

Seton-Karr, J.—I am of the same opinion.

Baboo Mohinee Mohun Roy, who contended before us that a special appeal did lie, pressed upon us the general argument that it must have been the intention of the Legislature to provide a special appeal in these cases as in any others, in order to the correction of anything which might be unsound or vicious in the decisions of the Lower Courts on points of law. But, whatever weight this argument might appear to have, it is, to my thinking, wholly done away with by the fact that, at the time the Legislature enacted Act VIII. of 1859, it especially limited the privilege of appeal on other points, though it was afterwards found necessary to restore certain privileges of appeal by Act XXIII. of 1861.

Leaving the general argument, and coming to the special interpretation of the clause insisted on, I see no reason to think, from anything which I have heard in argument this day, that the opinion expressed by the Full Bench in the case reported at page 8 of the Special No. of the Weekly Reporter is, in any way, unsound or incorrect. That opinion was deliberately given, though it may not have been on the point expressly referred to the Full Bench on that occasion. But the same interpretation has been arrived at by a Divisional Bench in the case referred to by the learned Chief Justice, and that not by a mere blind adherence to a supposed decision of the Full Bench on a question referred to it. I was one of the Judges who came to the conclusion, but I am more pressed now by the argument of my colleague (Mr. Justice Loch) as used at that time, than by any argument of my own. I think that he shows conclusively that, by adopting the construction contended for by Baboo Mohinee Mohun Roy, we should be really giving a double interpretation to the word "final" in one and the same Section, *viz.*, 257. When a further appeal was intended in other cases, the Legislature made use of different terms, such, for instance, as those used in Section 231 of Act VIII., "the decision passed by "the Court shall be subject to appeal under "rules applicable to appeals for decrees."

In the case before us, the words are: "If "appealed from, then the order passed on "*the* appeal shall be final;" and the Section then goes on to provide further—"and "the party against whom the same has been "given shall be precluded from bringing a "suit for establishing his claim." Therefore, applying to the words of the Act in Section 257, the reasonable rules of grammatical interpretation, I can come to no other conclusion than that the privilege of special appeal, as thereby intended, *is* taken away.

Jackson, J.—I need hardly say that I feel great diffidence in retaining the opinion which I had formed, and in dissenting from the conclusion at which the Chief Justice and my other learned brethren have arrived; and if I entertained a less strong conviction upon the subject than I at present entertain, I should certainly refrain from the expression of my own opinion, and acquiesce in the judgment of the other members of the Court. But I am bound to say that, although I feel the very great weight of the observations and opinion of His Lordship the Chief Justice, I still do retain the view which I have deliberately formed from the construction of the words of the Section 257.

If I am right in my recollection of the terms of the Code, I think there is no mention, until we arrive at Section 372, of the limit to procedure on appeal. I find nothing in the Code until we arrive at that Section, which shows whether in any given case there shall be only one appeal or a second appeal also, unless, indeed, the very Section which we are now considering could be looked upon as a provision of that kind. Everywhere I think, until we arrive at Chapter X., the word "appeal" is used generally. As to proceedings in execution of decree, there was for a considerable time, both in the late Sudder Court and also in this Court, a difference of opinion as to whether a special appeal was allowed. That doubt arose both under the provisions of Act VIII. of 1859, and also those of Act XXIII. of 1861, which is to be read as part of the Civil Procedure Code. It was not until the determination by the Full Bench in the case which has been cited that a final decision was arrived at upon that point. Since that ruling, it has been understood that, in all cases, a special appeal would lie in cases of execution as well as in regular suits.

Section 372 says: "Unless otherwise provided by any law for the time being in force, a special appeal shall lie to the Sudder Court from all decisions passed in regular appeal by the Courts subordinate to the Sudder Courts."

There is no case in Act VIII. of 1859 itself, I think, in which a special appeal is expressly denied; but there is a case—a very familiar case—in Section 27, Act XXIII. of 1861. That is a law which is now in force, and by which a special appeal is denied, and it is denied in these words: "No special "appeal shall lie from any decision or "order which shall be passed on regular "appeal after the passing of this Act "by any Court, subordinate to the Sudder "Court, in any suit of the nature "cognizable in Courts of Small Causes, "under Act XLII. of 1860." Now, these are very explicit terms, and expressly take away a special appeal in cases where a first or regular appeal is allowed. It appears to me that that would be the mode in which the Legislature would express their intention to deny a special appeal where the law allows a regular appeal. There are several Sections in that part of the procedure which relates to the execution of decrees, in which the Court has to come to a decision upon some point in which the parties to the suit, and occasionally other parties, are interested.

Those orders—as to their issue—are divisible generally into two classes: there are the cases, such as those in Sections 246, 247, and 269, in which no appeal is allowed, but the party dissatisfied with the order is at liberty to bring a separate suit to establish his right. There are, again, the other class of cases which we find in Sections 231 and 257, in which an appeal is allowed, and in which the party is debarred from bringing a separate suit. Now, if Section 257 is to bear the construction which the Chief Justice and my learned brethren here put upon it, then that Section must stand in a class by itself. It must stand in the class in which no suit is allowed, and in which the right of appeal is restricted to a single appeal. Is there anything in the terms of the Section which forces upon us that conclusion? for I think that, unless it be forced upon us by the peremptory words of the Section, then we are bound to give effect to Section 372, and to allow a special appeal. The words are these: "If the objection be disallowed, the order "confirming the sale shall be open to appeal; "and such order, unless appealed from, and, "if appealed from, then the order passed on "the appeal shall be final; and the party "against whom the same has been given "shall be precluded from bringing a suit for "establishing his claim."

It appears to me that these words correspond, as nearly as possible, with the provision to be found in Section 231: the "decision passed by the Court under either "of the last two Sections shall be of the "same force as a decree in an ordinary "suit, and shall be subject to appeal under "the rules applicable to appeals from decrees, "and no fresh suit shall be entertained in any "Court between the same party or parties "claiming under them in respect of the same "cause of action." I do not mean to say that the words are precisely similar, but it appears to me that the Legislature, in framing these two Sections, which were very probably the work of different hands and put together at different times, had the same object in view, namely, that of declaring that the mode of deciding orders made under both Sections should be by appeal, and not by regular suit. Those words in Section 257, "shall be open to appeal," do not mean "shall be open to one appeal, but shall be open to appeal in the mode which the law generally allows appeals." According to my view, the last part of the

Section, if fully expanded, would read thus: "Such order, unless appealed from, shall be "final, and the party against whom the "same has been given shall be precluded "from bringing a suit for establishing his "claim; and if such order be appealed, then "the order passed in appeal shall be final, "and the party," &c.

In each case the words "and the party," meaning "*that is to say*, the party, &c.," thus indicating—this is the kind of finality intended.

It cannot, I think, be meant that the order is final as far as appeal goes, and *also* protected from being questioned by regular suit, because it is in terms pre-supposed that there is in the first case *no appeal* made, and consequently in respect of appeal it remains final by the omission of the party aggrieved.

I therefore look upon the words which follow as an explanation of the word "final." It appears to me that that is the construction which should be put upon those words, and it does not appear to me, also, that the grievances to be remedied in special appeal in such cases may be very considerable. I can easily conceive a case, in which the judgment-debtor should come to the Court and say: "I can show that my property has "been put up for sale without any notice of "attachment or proclamatiôn of sale having "been made. I am also prepared to show "that, by reason of such failure, my proper-"ty, worth one lakh of rupees, has been sold "for 50 rupees;" but the Court might choose to say that "the irregularity is not a ma-"terial irregularity, and I think fit to confirm "the sale." He might go to the Zillah Court in appeal, and there he might urge the same grievance, might show the loss which has been sustained, and he might prove the irregularity; and that Court might possibly concur with the Lower Court, and say: "The "irregularity complained of is not one which "would induce me to reverse the sale;" and it would then become necessary in special appeal for this Court to rule, as a matter of law, that it was an irregularity to sell a man's property where no proclamation of sale had taken place. The High Court, by exercising the function of special appeal in that case, would do an act of justice, and if it were debarred from acting in the function of special appeal, a very serious failure of justice would occur; for, in such cases, the party has no further remedy, as a suit is taken away from him, and his property is lost for ever.

From these considerations I must say with very great regret, I have felt unable to concur in the judgment which has been delivered.

Macpherson, J.—I also am of opinion that there is no special appeal in this case.

If the language of the Section is in itself distinct, it is unnecessary for the purpose of interpretation to travel beyond the words of the Section. In this case, the words of Section 257 of Act VIII. of 1859 seem to me to be perfectly clear and distinct, and to bar a special appeal. The words are: "If the objection be disallowed, the order "confirming the sale shall be open to appeal, "and such order, unless appealed from, and "if appealed from, then *the order passed on* "*the appeal*, shall be final." It appears to me that it is impossible to read these words as having reference to any order passed upon appeal excepting an order passed upon one appeal, that is to say, upon the first appeal. To read them otherwise is to ignore the existence of the word "the" before the words "appeal shall be final;" and no Court has any right to ignore the existence of a word when, by recognizing it, and putting upon it its ordinary and natural meaning, the construction of the clause in which it occurs becomes distinct and beyond all doubt. I rest my opinion upon the language of the clause itself. I think we need not look for assistance in the construction of it, either in the provisions made in other Sections of Act VIII. of 1859, or in the consideration of any questions as to the inconvenience which may result from the interpretation we put upon it. But, if the matter of inconvenience be referred to as an argument, the answer is that there are very many cases in which there is undoubtedly no appeal to this Court, and in which this Court has not the power to interfere, even although it may be clear that a great miscarriage of justice has taken place in the Courts below.

Hobhouse, J.—I was of the same opinion as my learned brother Jackson when this case was referred to a Full Bench. But, on considering the arguments addressed to us, and the provisions of the law more accurately, I concur with the learned Chief Justice and the other Judges that no special appeal will lie under this Section.

In the words of Section 372 of the Code of Civil Procedure, a special appeal will,

a rule, lie to this Court from all decisions used in regular appeal, unless otherwise provided for by any law in force. And it follows that, to bar the hearing of a special appeal, there must be some express provision of the law.

And it seems to me, on considering the words of Section 257, and of the Section which precedes it, that there is in the terms of these Sections an express provision barring a special appeal. The words in Section 257 are—"and such order, unless appealed from, and, if appealed from, then the order passed on the appeal, shall be final, and the party against whom the same has been given shall be precluded from bringing a suit for establishing his claim." If the words had been "and such order, unless appealed from, shall be final," then the words which follow immediately, "and such order, unless appealed from," would, it seems to me, mean "unless appealed from under the general provisions of the Code;" but when the words are added, "and if appealed from, then the order passed on the appeal shall be final," those words seem to me to express a distinct form of proceeding. They say that, "if appealed from, then the order passed on the appeal shall be final;" and when these Sections—256 and 257—are compared with Sections 230 and 231, there seems to me a manifest reason why there should have been a difference made in the proceeding under Section 257, and that under Section 231. Under Section 230, what is in dispute between the parties before the Court is the right to certain immoveable property. Therefore, it seems naturally to follow that, whatever appeal, whether in the way of regular appeal, or of special appeal, is provided by the Code generally in suits relating to immoveable property, would be provided for under Section 230; and thereupon follow the words in Section 231—"and the decision shall be subject to "appeal under the rules applicable to appeals "from decrees," that is, the rules generally applicable—those of special appeal as well as those of appeal. And then follow the words "and no fresh suit shall be entertained," &c.

Now, in Sections 256 and 257 the point ordinarily to be decided is a very simple one: Was there, as a matter of fact, any material irregularity in publishing or conducting the sale, such as had caused substantial injury? That point does not usually involve any intricate questions as of rights, such as are contemplated in Section 230, but questions of simple facts.

The questions, then, to be dealt with under Section 256 being usually questions of fact, and there being no special appeal allowed in the Code on such questions, it was to have been expected that one appeal, and one only, would be given against orders under the said Section.

And then follow the express words of Section 257, *viz.*, "and if such order is "appealed from, then the order passed on "the appeal shall be final."

I hold, then, that, looking as well to the general policy of the Code of Civil Procedure as applicable to the particular Sections in question (256 and 257), and to the express terms of Section 257, there is an express provision in these Sections barring a special appeal.

The 3rd February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble W. S. Seton-Karr, L. S. Jackson, A. G. Macpherson, and C. Hobhouse, *Judges*.

Attachment—Sections 237 and 242 of Act VIII. of 1859—Priority of decree-holder—Appeal.

Miscellaneous Appeals from an order passed by the Principal Sudder Ameen of Cuttack, dated the 23rd November 1866.

Case No. 44 of 1867.

Deen Dyal Sahoo (one of the Decree-holders), *Appellant*,

versus

Radha Muddun Mohun Doss (Judgment-debtor) and Kanya Lall Pundit and Deenonauth Sircar (Decree-holders), *Respondents*.

Cases Nos. 45 and 46 of 1867.

Hattee Lall Bhuggut and Dwarkanath Bhuggut (two of the Decree-holders), *Appellants*,

versus

Radha Muddun Mohun Doss (Judgment-debtor) and Kanya Lall Pundit and Deenonath Sircar (Decree-holders), *Respondents*.

Case No. 68 of 1867.

Kanya Lall Pundit (one of the Decree-holders), *Appellant*,

versus

Radha Muddun Mohun Doss (Judgment-debtor) and Hattee Lall Bhuggut, Dwarkanath Bhuggut, and Deenonauth Sircar (Decree-holders), *Respondents*.

Baboos Unnoda Pershad Banerjee, Obhoy Churn Bose, Dwarkanath Mookerjee, and *Tarucknath Sein* for the several Appellants.

Baboo Romesh Chunder Mitter for the Respondents.

A, a judgment-debtor, has funds in the hands of a public officer, which *B*, *C*, and *D* severally attached in execution of decrees obtained by them respectively in the same Court against *A*.

B attached before *C* and *D*, and applied by petition that his decree might be first satisfied. *C* and *D* put in similar petitions; the Court below took up all the petitions together, and ordered that *B*, *C*, and *D* should each receive, rateably, a part of the fund in question.

B, *C*, and *D* now appeal separately, each making *A*, the judgment-debtor, and the other decree-holders, respondents.

HELD, *nem. con.*, that the decree-holders, *B*, *C*, or *D*, had no right of appeal as against the rival decree-holders; that the order of the Lower Court, taking up all the cases together, practically made *B*, *C*, and *D* parties to the hearing; and that, having been made parties regularly, they could not be struck off by the Appellate Court, on the ground that they should not have been made parties.

HELD by the majority (*Macpherson, J., dissenting*) that *B*, *C*, or *D*, have no right of appeal even against the judgment-debtor.

These cases were referred to the Full Bench by the Hon'ble L. S. Jackson and Macpherson, JJ.

Macpherson, J.—THESE are appeals from orders passed by the Principal Sudder Ameen of Cuttack, as to the distribution of a sum of money attached, in the hands of the Collector, under Section 237 of Act VIII. of 1859, by the holders of several decrees.

Hattee Lall Bhuggut and Dwarkanath Bhuggut, the appellants in the appeals numbered 45 and 46, had two decrees against the judgment-debtor, and are said to have been the first to attach the fund in question, which was subsequently also attached by the other decree-holders now before us. Claiming to hold the first attachment, Hattee Lall and Dwarkanath Bhuggut presented petitions in their two suits to the Principal Sudder Ameen, praying that their decrees might be satisfied out of the money which they had attached. The other decree-holders presented similar petitions in their suits. The Principal Sudder Ameen directed that all the petitions should be brought up for hearing at the same time. This was accordingly done, and the Principal Sudder Ameen passed a separate order upon each petition—the effect of the orders being to declare that the appellants in the appeals Nos. 45 and 46 were entitled to the costs incurred by them in a suit which they had brought to establish that the fund in the Collectorate belonged to their judgment-debtor, but that, as regards the rate of their claims, they were entitled only to share in the fund rateably with the other decree-holders who had subsequently attached it.

The appellant thereupon petitioned this Court, stating the facts, contending that the orders of the Principal Sudder Ameen were illegal and made without jurisdiction, and praying that the High Court would reverse the orders, in the exercise of its general power of superintendence, under the 15th Section of the High Court's Act (24 and 25 Vic., C. 104).

Upon these petitions, the following orders were, on the 14th February last, passed by the Division Court (Norman and Seton-Karr, Justices), before whom they came on for hearing: "In this case, it seems tolerably "clear that the petitioner has a remedy by "appeal, and that remedy it is for him to "pursue. We therefore make no order upon "this application."

On this order being made, the present appeals were filed. In Nos. 45 and 46 the respondents are Radha Muddun Mohun Doss, who is the original judgment-debtor, and Deenonauth Sircar and Kanya Lall Pundit, who are two rival decree-holders. In appeal No. 44, a rival decree-holder, Deen Dyal, is appellant, and the judgment-debtor and Deenonauth Sircar and Kanya Lall Pundit, decree-holders, are respondents. In No. 68, Kanya Lall Pundit is appellant, while the judgment-debtor and Hattee Lall Bhuggut and Deenonauth Sircar are respondents.

If the appellants in the appeals Nos. 45 and 46 had the first attachment, it seems to me that the order of the Lower Court, putting them merely on the same footing with those who had subsequently attached the fund, was entirely wrong; and that the Court should have applied the fund attached, in satisfaction, in the first instance, of the decree under which it was first attached, before applying any portion of the fund in satisfying the decrees under which the subsequent attachments were made.

But it is contended that these appeals will not lie, as the question is not one arising between the parties in several suits, and therefore does not fall within the provisions of Section 11 of Act XXIII. of 1861; and the decision of the Full Bench in the case of Misree Konwur *versus* Mohessur Buksh Sing (Weekly Reporter, Special No., 116) referred to. In that case, the Full Bench held that, as between rival decree-holders, there is no appeal from an order made under Sections 270 and 271 of Act VIII. of 1859, as to the distribution of the proceeds of the sale of property which has been sold in execution, when there are attachments on it issued under several different decrees. It is not under these Sections that the orders complained of were made. For the attachment of the money in the hands of the Collector was made under Section 237, and the decree-holders applied under Section 242 to have their decrees satisfied. But, although Sections 270 and 271 apply only where property has been sold in execution, which is not the case now before us, still it appears to me that the principle of these Sections must guide us in dealing with moneys attached under Section 237. The decision of the Full Bench also must guide us so far as it goes. But it does not determine the question now before us.

In Misree Konwur's case, the appeal (so far as can be gathered from the published report of it) was by a rival decree-holder. In the present instance, however, there is this material difference, that the parties in the several suits are parties both to the proceedings in the Lower Court and to these appeals.

The applications made by the decree-holders to the Lower Court were simple applications made by them against their judgment-debtor. The original question was thus solely between the parties to each suit, and, as such, came within Section 11 of Act XXIII. of 1861. The Lower Court might have dealt with each application, especially with that of the decree-holders who held the first attachment on its own merits. It may be that in any suit a rival decree-holder claiming under a decree and attachment in another suit might have applied in order to ensure that such portion of the surplus proceeds as he was entitled to might not be paid away in that suit. But an order made on such an application would still be an order upon a question arising between the parties. How much of a fund which has been attached is to be applied in satisfaction of the plaintiff's decree is a question between the parties—a question between the judgment-debtor and judgment-creditor, even although the question may have been chiefly raised by a rival decree-holder. In the cases now before us, the Lower Court itself treated every one of these applications as made between the parties in the several suits, and between the parties only; and in no suit has it made any order except between the parties to it. Although the relative positions of the several decree-holders who have attachments may be involved in the orders made, each order is still in itself an order in its own suit, and is not made as among strangers.

The appellants have made, not only the judgment-debtors, but some of the rival decree-holders, respondents. The rival decree-holders not being parties to the suit, it may be wrong to make them parties to the appeal. But the appeals will, in my opinion, lie so far as they concern *parties*, although they may not lie as regards those who are not parties.

I express this opinion with considerable hesitation, because, although it is in accordance with the view of the question taken by Norman and Seton Karr, *JJ.*, as indicated in their order of the 14th of February last, I am not without doubt that it is in conflict with the spirit of the Full Bench decision, if not with the direct rule laid down in it.

I think that the question which has now arisen ought to be referred for the decision of a Full Bench. The question is, whether the appellants in these cases, or in any of them, have a right to appeal against the orders passed by the Lower Court; and, if so, whether against all or any of the persons whom they have made respondents respectively. In deciding this question, the Full Bench will, as it appears to me, have to decide what is the proper procedure in cases where rival decree-holders claim to be paid out of a fund which has been attached under Section 237 under several decrees.

Jackson, J.—I concur with my brother Macpherson in referring this case for the consideration of a Full Bench.

The question for decision, I think, will be this:—

A is entitled to a fund in the hands of a public officer (not a Court of Justice); *B*, *C*, and *D* all having decrees against *A* in the same Court; that Court, at the instance of

one of them, *B*, attaches the fund under Section 237, Code of Civil Procedure; the other creditors also obtain attachments.

The Court, taking up *seriatim* the execution-cases of these several creditors, records an order for the distribution of the fund rateably among the creditors, after payment of a sum allowed as costs to one of them who had brought a suit to try *A's* right to the fund.

Has *B* a right of appeal (on the ground that he was entitled to be paid in full), as having first attached—

1st.—Against *A*?

2nd.—Against the other creditors?

I myself do not think that he has the right of appeal.

First.—Against *A*, because there is really no contest between him and *A*. The fund is in the custody of the Court; whatever be the result, *A* cannot expect, nor does he seek, to get any part of it back; and it is quite immaterial to him whether *B* gets the whole of it, or it is distributed between *B*, *C*, and *D*.

Therefore, *A* has no interest in the dispute, and cannot be called on to pay costs; and to bring an appeal nominally against *A*, in order to determine a question really between *B* and *C*, appears to me absurd.

Second.—As against the other creditors, I think there is no appeal, because the principle, at least, of the Full Bench Ruling cited applies, and excludes an appeal against them.

I am not much pressed by the opinion of Norman and Seton-Karr, JJ., who thought an appeal would lie, because, with all respect for those learned Judges, I understand that opinion to have been given upon an *ex-parte* application, and therefore without hearing argument for the opposite view of the case.

It seems to me that some provision of the law is very much wanted, which would enable the Courts, in circumstances such as we have stated, to array the parties in one proceeding, and to decide actually and openly between them, and providing such appeal as may be thought necessary.

The judgments of the Full Bench were delivered as follows:—

Peacock, C. J.—It appears that there were several decrees against the judgment-debtor in this case, and that a sum of 29,000 and odd rupees had been paid into the Collector's hands as belonging to the judgment-debtor arising from a surplus upon a sale of an estate belonging to him for arrears of Government revenue. Section 270 of Act VIII. of 1859 directs that, whenever property is sold in execution of a decree, the person on whose application such property was attached shall be entitled to be first paid out of the proceeds thereof, notwithstanding any subsequent attachment of the same property by another party in execution of a prior decree. One of the judgment-creditors having attached, in execution of his decree, the money in the hands of the Collector for 12,000 rupees, contended that he was entitled to have his decree satisfied in preference to the other execution-creditors.

It was contended that, as the property was money in the Collector's hand, arising, not from the sale of property in execution of the decree, but from the surplus of the proceeds of a sale for arrears of Government revenue, the case did not fall within that Section, and that consequently the plaintiff, who first attached the money in the Collector's hands for the 12,000 rupees decreed to him, was not entitled to be satisfied out of it in preference to the other execution-creditors. The other decree-holders also applied to have their claims satisfied out of the 29,000 rupees, but there was not sufficient to satisfy them all. Before it was decided what amount each of the creditors was entitled to be paid out of the fund, a difficulty arose in consequence of its appearing that the estate, which had been sold for arrears of Government revenue, had stood in the name, not of the judgment-debtor, but in the name of a third person. The execution-creditor who had first attached the money was, therefore, directed to bring a suit to try whether the property which was in the hands of the Collector was or was not the property of the judgment-debtor. That suit was decided in favor of the plaintiff, and it was held that the property was liable to satisfy one or more of the decrees; but several applications having been made to the Judge by the several execution-creditors, the Judge directed the Principal Sudder Ameen to take up all the cases together. It appears to me that the object of that order was that, upon hearing all the parties, the Principal Sudder Ameen should decide whether the creditor, who had first attached the property, was entitled to have the whole amount of his decree satisfied in preference to the others, or whether al

e creditors were entitled to be paid *pari passu*. The Principal Sudder Ameen in ving judgment stated that, in his opion, the money not having arisen from the le of property in execution, the judgment-editor, who first made the attachment, was t entitled to have the whole amount of decree satisfied, but was only entitled be paid *pro rata;* thereby meaning that, ving regard to the other execution-creditors, he was to have only his fair proportion the property attached.

Now, it appears to me that all the execution-creditors were proper parties before the Court for the purpose of determining whether the first execution-creditor was entitled be paid the full amount of his 12,000 pees, or whether the other decree-holders ere entitled to be satisfied in proportion the amounts of their several decrees. here does not appear to be any express ovision in the Code of Civil Procedure to how several execution-creditors, who e separate claims to have their decrees isfied out of property which has been ached in execution, are to come in and e the matter decided between them. But re must be some mode of doing it. For tance, suppose all the execution-creditors, o claimed subsequently to that one who d first attached the property, had said: "It is true that you, the first execution-creditor, did attach the property first, but your judgment was a fraudulent one; it was a judgment in collusion with the judgment-debtor, and you attached the property under that decree, not for the purpose of satisfying a *bond-fide* debt due to you, but for the purpose of protecting the property from the other decree-holders for the benefit of the judgment-debtor;" there must be some mode of trying such a question between the several claimants in the Court out of which the execution issued. Such a question could not properly be tried merely between the execution-creditor who first attached the property and the judgment-debtor, without giving the other judgment-creditors the power of coming in and being heard upon the question of collusion.

The Judge, having directed the Principal Sudder Ameen to hear all the cases together, substantially made all the execution-creditors parties to the hearing. The question was not one to be determined in each of the suits between the parties to such suit alone, but it was a question between all the execution-creditors as to how the money attached in one of the suits was to be distributed. It was not, therefore, an appealable case within Section 11, Act XXIII. of 1861.

The Principal Sudder Ameen heard all the cases together, and made separate orders in each suit, in which he awarded the money attached to be paid to the several judgment-creditors in proportion of the amounts of their several decrees. If each of those orders was merely between the execution-creditor and the judgment-debtor in the particular suit, it was wrong, because as between them, if there had been no other execution-creditors, the judgment-creditor ought to have been paid the whole amount of his decree, the 29,000 rupees being more than sufficient to satisfy the whole of it. It was in consequence of the other execution-creditors having claimed to be paid that the claim of the creditor who first attached the money to be paid the whole amount of his decree was disputed. It appears to me that the Principal Sudder Ameen, whether he was right in his decision or not, which is a point not necessary to be decided now, was not correct in drawing up separate orders in the separate suits. He ought to have drawn up one order in all the suits which were heard together under the order of the Judge, and by that order to have adjudicated upon the several rights of the several execution-creditors to be paid out of the moneys attached. If the order had been drawn up in that manner, it would not have been appealable under Section 11 of Act XXIII. of 1861.

The Code of Civil Procedure enacted that there should not be any appeal from an order passed in execution of a decree, but that enactment was altered by Section 11 of Act XXIII. of 1861, which gives an appeal upon all questions relating to the execution of a decree arising between the parties to the suit in which the decree was passed.

Now, the several appellants and respondents were not parties to any one suit, but were severally parties to several suits, in which the separate decrees were obtained. Under the order of the Judge, they all became parties to one hearing as to the mode in which the funds attached should be distributed. The appeals are not appeals simply between the parties to the suit in which any of the decrees were obtained, but between those parties and the plaintiffs in other suits.

Can we, then, in each of these appeals order all the respondents who were not parties to the several suits to be struck out,

and try each of the appeals separately as an appeal between the execution-creditor and the judgment-debtor in the suit, omitting all the other parties? It appears to me that the Principal Sudder Ameen was right in hearing the case of all the claimants together, and that the several orders were substantially only one order made upon one hearing in one case, to which all the execution-creditors in the several suits were parties; and, consequently, that it was an order from which no appeal would lie. The respondents in each of these appeals having been properly made respondents, they cannot be struck out, upon the ground that they ought never to have been made respondents. It appears to me, therefore, that in these cases no appeal lies.

The whole of the appeals will be dismissed with costs.

Seton-Karr, J.—I am of the same opinion.

The learned Chief Justice has so clearly stated the facts that it is unnecessary for me to recapitulate them. I was one of the Division Court which refused to accede to the motion brought before us, praying that the Court would exercise its alleged power of interference under the 15th Section of the High Court Act. Nothing that I have heard to-day leads me to think that we were at all wrong in refusing so to exercise any interference. At that time we stated that it seemed tolerably clear that the petitioner had a remedy by appeal. I am still of opinion that, if the question had been confined to a simple question between the judgment-creditor and the original debtor, and if it had not embraced or affected the interests of other parties, there would have been an appeal to the High Court, whether the appeal had been brought by the judgment-debtor objecting to something as too favorable to the creditor, or by the judgment holder in respect to something which affected the judgment-debtor alone. But, after considering the various Sections of the Code applicable to such proceedings, I do not find that there is any power given to us to interfere in appeal between *rival decree-holders*. I think, with the learned Chief Justice, that it is not now competent to us to strike out the names of the rival decree-holders, who have been made respondents, and then to decide a question which, though apparently limited to one between the first decree-holder and the original debtor, in reality seriously affects and alters the position, rights, and claims of other rival decree holders.

The judgment of the Full Bench reporte at page 527 of Marshall's Reports rul that there is no appeal from an order mad under Sections 270 and 271 of Act VIII. 1859, as regards the application and distr bution of the proceeds of property sold execution under the decree of a rival decre holder. I do not lose sight of the fact th in this case, the property in deposit does n arise out of a sale made in execution of decree, but out of a sale for arrears Government revenue. But I think the sa analogy applies, and at any rate, as I am n able to find that there is any appeal given parties to this Court by any express ter or Section of the Code fairly construed, must come to the conclusion that there is n appeal.

I think it might possibly be convenient, stated by my learned brother Jackson wh referred this case for the decision of a Fu Bench, if the Courts were empowered array rival decree-holders, and to deci questions arising between them in executio of decrees. That, however, would be a que tion for the Legislature; and in these case the first decree holder (the appellant befo us) might have his remedy by includin all the rival decree-holders in a separate an regular suit to have his right declared th the property should remain in deposit in th Collectorate, or that he should be entitled be first paid off in full.

Jackson, J.—I am also of the sa opinion.

It appears to me quite impossible to r gard the question mooted in this appeal being in any sense a question between a decree-holder and the judgment-debtor; is, it seems to me, wholly a question betwee rival decree-holders. The appellant h come into this Court confessedly to endeavour to induce the Court to exercise its power, whether appellate or supervisory, to get rid of an order to his prejudice and in favor of other decree-holders. The Code of Civil Procedure, as pointed out by my Lord, does not contain any specific rules for bringing together into one cause and hearing the claims of several decree-holders, although it is manifest, from a consideration of the Sections—270, 271, and 272—that many questions between such parties must arise, and the Court is empowered to hear and determine them. And so, in like manner, in respect of questions arising under Section 237—questions arise, but no mode

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of procedure for determining them is laid down.

In the absence of any such definite procedure, the Principal Sudder Ameen, although he had first ordered that these several cases should be brought up at once and heard together, has followed no other course as to recording his decision but that of writing down a copy of the decision at which he arrived on each one of the cases between the several decree-holders and the judgment-debtor; and this accident of form, it seems to me, has probably suggested the notion that the cases may be looked upon and dealt with as isolated cases between each decree-holder and the judgment-debtor; but that, it seems to me, is a mere form, and we should be blinding ourselves to the substance if we attempted to deal with the case in that way. Whatever the advantages or disadvantages may be in the matter of taking up appeals, we are bound by the Letters Patent of our Court; and the 16th Section expressly provides that this Court shall exercise appellate jurisdiction in such cases as are subject to appeal to the High Court by virtue of any laws or regulations in force. We cannot go beyond that Clause.

Section 364 of the Code of Civil Procedure clearly provides that "no appeal shall lie "from any order passed after decree and "relating to the execution thereof, except as "is hereinbefore expressly provided;" and reference was there made to Section 283 of the Code. That Section 283, which gave the Courts in execution-proceedings power to determine certain questions between the parties to the suit, and which provided appeals in these cases, has been expanded into Section 11, Act XXIII. of 1861. By the terms of the latter Section, Courts in execution of decrees have received somewhat larger powers in the determination of questions between parties to the suit. Wherever the Courts have received extension of original powers, in those cases the appellate jurisdiction has also been extended. But as this is not, it seems to me, a question in any sense, between the parties to the suit, it is not a question under Section 11, and the appeal is consequently not allowed.

Macpherson, J.—I quite concur that, as regards the rival decree-holders in these cases, there is no appeal.

But, as regards the actual judgment-debtor, I still incline to the opinion which I expressed in referring the case, that the appeal lies in each case as against him alone, the order appealed from being solely between the parties to the suit in which the order was made.

Hobhouse, J.—I am of the same opinion as the learned Chief Justice and my learned brothers Seton-Karr and Louis Jackson.

The material facts are, that in the Court of the Principal Sudder Ameen there were several decree-holders holding decrees against one and the same judgment-debtor.

There was also a sum of money payable to the judgment-debtor in the hands of an officer of Government within the meaning of Section 237 of the Code of Civil Procedure.

Each of the decree-holders claimed a portion of that sum in satisfaction of his decree, and the aggregate of the claims of all the decree-holders was in excess of the sum in deposit.

The Principal Sudder Ameen lumped all the decrees together, and passed one and the same order on all of them, and by that order given, as I should suppose, under Section 342, declared that each decree-holder should receive a part of the sum of money in question rateably, according to the amount of his decree.

Certain of the decree-holders now appeal, and the substantial relief they claim is that each should be paid his decree in full, as far as the money in deposit will go, according to priority of attachment, and to each appeal the rival decree-holder, as well as the judgment-debtor, are made parties.

The question before us is whether such an appeal will lie.

I agree that this was not a procedure under Section 270 of the Act. If it had been, an appeal would certainly have been barred under the Full Bench ruling to be found in Marshall, page 527.

I agree, also, that there is no precise procedure laid down; and that yet, when all the decree-holders were before the Principal Sudder Ameen at one and the same time, praying for execution of their several decrees under Sections 237 and 242 of the Act, the Principal Sudder Ameen was bound to pass an order on the prayer of each one of the applicants.

The Principal Sudder Ameen did pass such an order, and this was "an order passed after decree and in execution thereof."

Then, Section 364 says that no appeal shall lie from any such order except as expressly provided; and Section 11, Act XXIII. of 1861, only modifies Section 364 in so far as regards questions between parties to a suit.

Now, here the question is not one between parties to the suit. It is substantially and really a question between rival decree-holders—a question as to whether each shall receive certain moneys according to priority of application for execution of decree, or whether all shall receive rateably; and the test is this, that, if we were to give the appellants the relief they ask, we should have to decide as between each of them as a rival decree-holder, and not as between each of them and their common judgment-debtor, who has no voice and no interest in the question in dispute.

For these reasons, I hold that no appeal lies in the case before us.

The 3rd February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, W. S. Seton-Karr, J. B. Phear, and A. G. Macpherson, *Judges.*

Execution—Debtor purchasing decree against a co-debtor—Appeal.

Case No. 890 of 1866.

Miscellaneous Review.

Degumburee Dabee, *Petitioner*,

versus

Eshan Chunder Sein and others, *Opposite Party.*

Baboos Sreenath Doss and *Chunder Madhub Ghose* for Petitioner.

Mr. R. V. Doyne and *Baboo Kishen Kishore Ghose* for the Opposite Party.

Case No. 854 of 1866.

Miscellaneous Appeal from a decision passed by the Judge of Beerbhoom, dated the 3rd October 1866.

Soroop Chunder Hazrah, *Petitioner*,

versus

Troylokhonath Roy and others, *Opposite Party.*

Baboo Sreenath Doss for Petitioner.

Baboo Juggadanund Mookerjee for the Opposite Party.

One of several judgment-debtors who purchases a decree against himself and his co-debtors cannot issue execution against his co-debtors, and recover from them the whole amount of the common debt. His only remedy is to sue them in a regular suit for contribution, and to compel them to pay him their shares of the amount for which the decree was purchased.

An appeal under Section 11, Act XXIII. of 1861, against the order for execution would not affect a purchaser at a sale under the execution.

The reference to the Full Bench in case No. 854 of 1866 followed that in case No. 890, which was referred by Bayley and Shumbhoonath Pundit, JJ., on the 16th of May 1867.

Pundit, J.—In this case, in execution of a joint-decree at the instance of a purchaser of the rights of the decree-holder, the property of one of the joint-debtors was sold. That debtor appealed to this Court against the legality of the execution of the decree and of the sale, on the ground that the purchaser of the decree was a benameedar for another joint-creditor.

The Lower Court had not tried that allegation, nor enquired into some other material grounds in the case, and therefore we remanded it to the Lower Court with directions to re-try those points. We remarked, however, that, if the petitioner, appellant, could show the purchaser to be one of the joint-debtors, the case need not be further gone into, and the sale should be set aside.

This order was passed, because we then held that no joint-debtor could legally pur-

chase a decree so as to be entitled to execute the same against his other joint-debtors, in the view that such a purchase was nothing less than a satisfaction or discharge of the debt under the decree, and that only a suit for contribution could be brought against the other debtors by the said purchaser.

In carrying out this order of remand, it was found below that the purchaser was one of the joint-debtors.

Subsequently, on review, it was held by us that a joint-debtor could legally *purchase* a decree against himself and others, and at the same time, after purchase, execute this decree in the same way as the original decree-holder.

This order having been passed, the debtor, whose property was sold, has now asked for a review, on the ground that, under the ruling of this Court, dated 10th March 1862, pp. 459-460 of Hay's Reports, Vol. I., "a creditor purchasing a decree is entitled to execute it against the other debtors only, after deducting his own share of the liability, and only to the extent of the respective liabilities of each of those debtors."

Now, after hearing Counsel on both sides, we first have to admit the review, and admit it accordingly.

We, however, doubt whether the above decision is correct law. We are inclined to think that, when a creditor purchases a decree, no law excludes him from exercising all the rights which the original decree-holder possessed.

We may remark that, if the original decree-holder had proceeded against one only of the joint-debtors under his decree, that debtor would, in order to recover what he may have thus been obliged to pay more than his due share, have had to sue for contribution, and so, when the joint co-debtor after purchase proceeds against one debtor, that debtor also would have to sue for contribution.

In the case cited above, the purchaser of the decree had, of his own accord, with a view to avoid litigation, deducted his own quota, and asked, in execution, for the realization of the remainder only; but it does not follow that in every such case such a purchaser is bound to make such a deduction.

Further, the conduct of the plaintiff in that case, with reference to the deduction, might have suggested to the Divisional Court the propriety of ruling that, if plaintiff has for his own convenience deducted *his* share of the liability, he should be compelled to be consistent throughout, by executing the decree against each debtor only to the extent of his share, and so protect these co-debtors from future litigation.

We observe that the extent of the shares of the joint-debtors in that case appears to have been admitted.

We, therefore, think that that case is special under these circumstances; and we hold that, ordinarily, it would be far from proper and convenient to receive and enter into, and adjudicate upon, disputes regarding the extent of liability and means of each creditor to pay off his liability. Further, it will not suffice to settle such disputes once only; for in case of the failure of any one of the joint-debtors to pay his quota, as allotted in the first instance, the Court will have again to re-open and adjudicate afresh on the extent of liabilities and means of the remaining co-debtors and of each of them from time to time *ad infinitum*, and so on.

Moreover, redress is not withheld at all by the present system. Any party who may be made to pay more than his just share of the debt may sue for contribution, and in that case the general principles of the precedent noted above may reasonably be adopted with advantage. It is to be kept in mind that *here* the fact of the purchaser being one of the joint co-debtors is denied by the purchaser of the decree and by the purchaser in the sale for execution, and though the Lower Court had found as a fact against this denial, still, as the order of remand under which the same finding was arrived at was set aside by us in review, those who deny the identity of the purchaser of the decree with the debtor had no occasion before to contest the correctness of that finding. They are now, however, of course, at liberty to deny the correctness of this finding, but before any final decision is pronounced in this case, the real facts on this point must, if not admitted, be clearly found in appeal, when the necessity for such ground arises.

At present, it is only necessary to refer the case to the Full Bench to decide whether the opinion expressed in the decision reported in Hay's Reports, Vol. I., pp. 459-460, 10th March 1862, is correct law; and if it be so, whether in the case of execution by the joint-debtor being taken out against one of

the joint-debtors for the whole debt, the sale is liable to be reversed.

The point decided by us in the former review regarding the powers of a joint-debtor to purchase a joint-decree, and to execute it against his co-debtors, was again taken before us in the present review; but it not being shown to us that our subsequent ruling was opposed to any other ruling, or that it was opposed to law, we did not think it proper to admit the objection taken on that ground; but if, in course of trial of these two points of law submitted by us to the Full Bench, that Bench discovers that, without trying that first question, the other two questions submitted by us cannot properly be tried, we would request the Full Bench to try the correctness of our further opinion upon that first question also.

The judgments of the Full Bench were delivered as follows:—

Peacock, C. J. (Bayley, J., concurring).—In the first case (No. 890) certain plaintiffs sued to enhance the rents of their estate. It does not appear what their respective interests in the estate were. But it appears that they failed in the suit, and were rendered liable for costs. But, unless we know the extent of their respective interests in the estate, we cannot say in what proportion, as between themselves, they were each liable for those costs. One of the persons, however, against whom the decree was passed for costs, unknown to the others, purchased the benefit of that decree against himself and the others, in the name of a third person benamee, and then he attempted to issue execution against the others for the whole debt which was due from him and them jointly. The Judge held that he had a right to issue that execution.

It is unnecessary for me to go through the several decisions of the Division Bench upon the subject. The last decision was this, that the party who purchased the decree had a right to issue execution against the others; but finding that there was a decision in 2 Hay's Reports, page 459, under which one of several judgment-debtors, purchasing a decree against himself and others, was declared entitled to execute it against the others only after deducting his own share of the liability, and only to the extent of the respective liabilities of each of the other debtors, the Division Bench referred the case to a Full Bench.

Under Section 208, Act VIII. of 185[illegible] the assignee of a decree has a right to issue execution, if the Judge think it just and proper that he should be allowed to do so.

The question, then, arises, whether it is proper to allow one of several debtors, who has purchased a decree against himself and the others, to issue execution against his co-debtors, and recover from them the whole amount.

The case not being provided for by any specific rule, it becomes necessary for the Court, under Regulation III. of 1793, to decide the case according to the principles of justice, equity, and good conscience. The Court must, therefore, decide whether it is according to the principles of justice, equity and good conscience, to allow one of several debtors under a decree to purchase the decree and levy the whole amount against his co-debtors. If he could do so, one of nine several debtors, liable amongst themselves to pay 8-9ths of a debt, might purchase the whole debt for 1-9th of the amount of it. If he could levy the whole, or even 8-9ths when he had paid only 1-9th as the purchase-money for the decree, instead of having to pay 8-9ths, he would pay 1-9th and put 8-9ths into his pocket, and by that means be a gainer of 7-9ths by the transaction. That would not be according to the principles of justice, equity, and good conscience.

Now, having to administer equity, justice, and good conscience, where are we to look for the principles which are to guide us? We must go to other countries where equity and justice are administered upon principles which have been the growth of ages, and see how the Courts act under similar circumstances; and, if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them.

If the decree had not been sold, the judgment-creditor might, in his discretion, have executed it against the debtor who has now purchased it.

Baboo Sreenath Doss, who argued this case very ably for the appellants, referred to Story's Equity Jurisprudence,* and cited many cases to show that, if a man being one of several debtors takes an assignment of the debt, he, by so doing, discharges the debt.

* Paras. 499 (*b*), (*c*), and (*d*).

There are also one or two other cases which were not referred to by Baboo Sreenath Doss. One is the case of Reed *versus* Morris (II. Mylne and Craig, page 361), in which a son, being indebted to his father upon a bond for £1,000 and interest, subsequently joined his father as surety in a bond to Lord Vernon for £500 and interest. A memorandum was endorsed upon the bond for £1,000, by which it was agreed between the father and son that the son should not be called on to pay the principal sum of £1,000. until the father should have paid the principal money and interest due on the bond for £500.

The son compromised the claim of Lord Vernon's executors on the bond for £500, and the question was whether the son's executors could set off the whole of that debt against the bond.

Lord Cottenham said: "The question is, how far the representatives of the son, the surety, having come to an arrangement with Lord Vernon's executors by which the bond for £500 has been got rid of and discharged, are entitled, as against the father's estate, to demand more than they have actually paid to Lord Vernon's executors, in exoneration of the liability of the son's estate upon the bond for £500.

"Now, if there had been no authority upon this subject, I should have found very little difficulty in making a precedent for deciding that, under these circumstances, the surety is not entitled to demand more than he has actually paid. I take the case of an agent. Why is an agent precluded from taking the benefit of purchasing a debt which his principal was liable to discharge? Because, it is his duty on behalf of his employer to settle the debt upon the best terms he can obtain; and if he is employed for that purpose, and is enabled to procure a settlement of the debt for anything less than the whole amount, it would be a violation of his duty to his employer, or at least would hold out a temptation to violate that duty, if he might take an assignment of the debt, and so make himself a creditor of his employer to the full amount of the debt which he was employed to settle. Does not the same duty devolve on the surety? He enters into an obligation, and becomes subject to a liability upon a contract of indemnity. The contract between him and his principal is that the principal shall indemnify him from whatever loss he may sustain by reason of incurring an obligation together with the principal. It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting. His contract with the principal is indemnity. Can the surety, then, settle with the obligee, and, instead of treating that settlement as payment of the debt, treat it as an assignment of the whole debt to himself, and claim the benefit of it, as such, to the full amount, thus relieving himself from the situation in which he stands with his principal, and keeping alive the whole debt?"

Applying the principle of that case to the present, let us see how it stands. In that case, the surety could only recover the amount which he had actually paid. But, in this case, one of several co-debtors, having paid less than the full amount of the debt, seeks to recover the full amount of the debt from the others. At most, he is entitled only to an equal proportion with the other debtors of the amount which he paid to get rid of the debt.

The other case is in 2 Yonge and Collyer's Reports, page 462 (Dowbiggen *versus* Bourne), which, I think, is almost a stronger case than the other. *A* and *B*, as his surety, having given a joint and several promissory note to *C*, the latter brought separate actions against *A* and *B* upon the note, and recovered judgment in both actions. *C* afterwards issued execution upon the judgment obtained against *B*, whereby *B* was compelled to pay the whole debt and costs. Upon a bill filed by the administratrix of *B* for the purpose of obtaining an assignment of the judgment which had been recovered against *A*, the principal debtor, it was held that such judgment, not being available at law in the hands of the creditor, was not available in equity in the hands of the surety, and consequently that the Court could not compel an assignment as sought by the bill.

Mr. Baron Alderson, in giving judgment in the case, said: "I expressed my opinion on the hearing of this case that the plaintiff could not derive any benefit from the assignment of the judgment against Cawthorne;

"and that, supposing that to be the case, "there was not any ground for the interfer- "ence of the Court of Equity to decree that "assignment. The question I desired an "opportunity to consider was, whether, un- "der the circumstances, there would be any "remedy at law, supposing an assignment of "the judgment were actually executed to the "executors of Mr. Dowbiggen. It is quite "clear from the authorities that a surety who "pays the debt of the principal debtor is en- "titled to the benefit of all those securities "which the creditor himself could render "available against the principal debtor. "That point was in effect determined by Chief "Baron Alexander on the argument of the "demurrer in this case; and I cannot help "regretting that he did not then dispose of "the question of law which is now raised, "and which was as ripe for discussion seven "years ago as it is at the present time.

"In this case, the assignee, if he obtain "an assignment of the judgment, must ne- "cessarily proceed in the name of the assignor "to enforce that judgment. Now, what are "the facts of the case? A joint and several "promissory note was entered into by Caw- "thorne and Dowbiggen as his surety. The "note, when due, was not paid, and the payee "of the promissory note brought an action "and obtained judgment for the full amount "of the note and interest against Caw- "thorne, the principal debtor, for I think "it is fully established that Cawthorne was "the principal debtor. The holder of the "note having obtained this judgment against "Cawthorne, finding that it was not "likely to be made available, brought "another action, as he was entitled to do, "against Dowbiggen, the surety, and re- "covered judgment against Dowbiggen for "the amount of the note and interest. Dow- "biggen paid for the amount of the prin- "cipal money and interest due on the note "and the costs of the action against him, "and the holder of the note, having been "thus satisfied the whole of the principal "money and interest, had no further claim "except, perhaps, in respect of the costs of "the action against Cawthorne; and if he "had afterwards ventured to proceed on the "judgment against Cawthorne, the Court "of King's Bench, in which the judgment "was recovered, would have interfered in "a summary manner to stay proceedings "on the judgment except for these costs. "The whole effect, therefore, of assigning "the judgment to the plaintiff would be to "give her that which would be wholly us- "less except for the purpose of recoveri- "the costs of the action against Cawthor- "and to which, as administratrix of Dowbi- "gen, she could not possibly have any righ- "and that it had been felt that she had c- "right was evident from the tender to t- "defendants, the Bournes, of those co- "The case in substance is not distingui- "able from the ca- "before Lord Eldon, "which he says that, "a bond is by principal and surety, and at t- "same time a mortgage is made for securi- "the debt, the surety paying the bond h- "a right to stand in the place of the mor- "gagee; but that, if there is nothing but th- "bond, the surety, after discharging it, ca- "not set it up against the principal debtor.

* Furner and Russell 231.

"It appears to me that any assignment o- "the judgment would be entirely useless- "and therefore, under the whole of the ci- "cumstances, I think the bill must be di- "missed; but as the Bournes might, I think- "readily have given to Mrs. Dowbigge- "what she required, though it was pe- "fectly useless, I think the bill must b- "dismissed against them with costs. Ther- "is no ground or pretext for making th- "surety pay the costs of the principal; th- "bill must, therefore, also be dismisse- "without costs against the defendan- "Cawthorne."

It appears to me that this case shows clearly that, if one debtor satisfies the judgment-debt, and takes an assignment of it, he cannot enforce it by execution, or in any way against his co-debtors. His only remedy is to sue them for contribution, and to compel them to pay him their shares of the amount for which the decree was purchased, having regard to the proportion in which they were bound, *inter se*, to satisfy the original decree.

It is said, if you do not allow the plaintiff to execute this decree, you will put him to all the inconvenience of instituting a regular suit for contribution. But suppose you do allow him to execute it, you will force the defendants to sue for contribution. It appears to me that that certainly would be a very inconvenient course, and would lead to a multiplicity of actions, which the law abhors.

It appears to me, upon the general principles of equity, that the debtor in this case, having taken an assignment of the judgment, was not entitled to enforce it by execution against his co-debtors.

Then the question arises, what is to be-me of the sale which has taken place der the execution? We are asked whe-r the sale ought to be reversed. It pears to me that the creditor who obtained execution ought not to have the benefit the moneys realized from the sale under execution. But whether the sale is to reversed so as to deprive the purchaser der the execution of the benefit of that ich he has derived from his purchase, is other question. That is a question which Court could not decide in the appeal der Section 256. All that the Court could ide under that Section was, whether the e could be set aside upon the ground of irregularity in publishing or conducting sale, not whether execution was granted-er the judgment had been satisfied.

Further, it appears to me that an appeal der Section 11, Act XXIII. of 1861, against order for execution, would not affect a rchaser at a sale under the execution, inas-ich as he was not a party to the proceed-gs. The only way to raise the question tween the co-debtors and the purchaser is a regular suit. Whether the sale can reversed as against the purchaser cannot decided in this appeal, and we express opinion upon it.

The case must go back to the Division ench which referred it for final decision.

The same principles apply to case No. 854, ich is the case of a surety.

The last case will also go back to the Divi-on Bench which referred it.

Seton-Karr, J.—I am of the same opi-ion. I was one of the Judges who passed e decision of 1863 recorded in Hay's Re-orts, as already quoted. On that occasion, appears to have been assumed or admitted ithout argument that the decree was erfectly capable of execution in some way r other; and the only point that we decid-d was, that, when one of several judgment-debtors purchased the decree, he could not, n execution thereof, realize from any one f them the whole of the debt *minus* his ne share, but that he was at the most ntitled to recover from each of them his particular quota of contribution to the com-mon debt. After hearing the arguments, I am now prepared to go still further than the above decision, which appears to me correct as far as it went on the particular point then raised before us; and I am now prepared to say that the decree under the circumstances, when purchased by one co-debtor, ought not to have been executed at all, and that the only remedy of the debt-or, purchaser, was to proceed against his co-debtors in a regular suit for their shares of the contribution to the common debt.

I think a decision to this effect, shutting out the execution of the decree altogether, and declaring the debt extinguished as far as the original decree-holder was concern-ed, is one consonant to equity, to public po-licy, and to that which should be the aim of our Courts, *namely*, the avoidance of multifarious and harassing litigation.

As regards the purchaser, who is not pro-perly before us, I also concur in the con-clusions arrived at by the learned Chief Justice.

Phear, J.—I agree so entirely with the judgment of the Chief Justice that I do not propose to add anything to it, except so far as to say this, that it seems to me that a money-decree may be treated simply as an order of the Court as between the par-ties, directing that the one party shall pay to the other a certain sum of money. Exe-cution is merely a process provided for the purpose of securing obedience to this order. Therefore, as soon as payment has been made by the person ordered to pay, there is in one sense an end of the decree, and no further execution can be taken under it. I do not think it necessary to go further than that. If that is so, then the moment one of the joint judgment-debtors in the case before us, who was himself bound to pay the whole debt, did satisfy the judgment-creditor by purchasing the decree—and as regards this result, it does not matter how many hands the decree had previously gone through —the whole object of the decree was fulfilled, and process of execution ought not to have issued. It is another question how the judgment-debtor, who has in this way satis-fied the judgment-creditor, is to get reim-bursed by his co-debtors in the event of their declining to do so without compul-sion. The obvious course for him to take is to bring a suit against them collectively for contribution.

Macpherson, J.—I also concur in the judg-ment of the Chief Justice.

The 3rd February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, W. S. Seton-Karr, J. B. Phear, and A. G. Macpherson, *Judges.*

Attachment—Execution—Notice—Section 119, Act VIII., 1859—Section 58, Act X., 1859.

Case No. 224 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 18th September 1866, affirming a decision passed by the Moonsiff of that District, dated the 24th February 1866.

Radha Binode Chowdhry (Plaintiff), *Appellant,*

versus

Digamburee Dossee and others (Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Mohinee Mohun Roy* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Case No. 317 of 1867.

Miscellaneous Appeal from an order passed by the Collector of East Burdwan, dated the 6th April 1867.

Nund Kishore Doss Mohunt (Defendant), *Appellant,*

versus

The Maharajah of Burdwan (Plaintiff), *Respondent.*

Baboo Umbika Churn Banerjee for Appellant.

Baboos Juggadanund Mookerjee and *Chunder Madhub Ghose* and *Moonshee Ameer Ali* for Respondent.

Process of execution is executed within the meaning of Section 119, Act VIII. of 1859, when an attachment of the property takes place; and if a party means to contest the validity of the decree, on the ground that he had no notice of the summons, he must come within 30 days from that time, and not from the time that the property is actually sold in cases under Act VIII. of 1859, and within 15 days in cases tried under Section 58, Act X. of 1859.

Case No. 224 was referred to the Full Bench by the Hon'ble Bayley and Shumbhoonath Pundit, JJ., on the 21st of May 1867.

Bayley, J.—After a reference to the records, and hearing Counsel, we are of opinion that the Lower Appellate Court wrongly refused in this case to hear in appeal and adjudicate the pleas of the special appellant, to the effect that the Court of first instance had improperly received the case under Section 119 of Act VIII. of 1859, after the limited time fixed by that Section.

We are supported in this view by the following decisions of this Court: Volume 6, W. R., Act X. Rulings, page 54, and page 198, Volume 7 of W. R.

We should ordinarily have remanded the case for re-trial with reference to these remarks, but we find that the two decisions quoted above materially differ from each other, as to the last date for such application, *viz.*, as to whether it be from date of sale or from date of other process in execution.

We, accordingly, lay this case before a Full Bench, that it may decide, with reference to the conflicting decisions cited, from what time or act the period of 30 days allowed for such applications is to be calculated.

Order.—Refer to Full Bench.

Case No. 317 was referred to the Full Bench by the Hon'ble L. S. Jackson and Hobhouse, JJ., on the 31st July 1867.

Jackson, J.—In this case it appears that the decree was passed *ex parte* against the defendant, and, in pursuance of that decree, plaintiff applied for attachment and sale of the defendant's property. The sale was to have taken place on the 6th of April. On that date the defendant appeared and pre-

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ented two petitions: one in the Court of the Deputy Collector, before whom the execution-proceedings were pending, and the other in the Court of the Collector, who represented the covenanted Deputy Collector in whose Court the decree had been passed.

The petition to the Deputy Collector objected to the regularity of the sale-proceedings, and it was stated (I understand) that the proclamation of sale had not been duly issued. The petition to the Collector set forth that the defendant had had no knowledge of the suit; he applied for a new trial. The Collector refused application under Section 58 for that new trial, on the ground that more than 15 days had elapsed since the attachment of the defendant's property. In appeal, the defendant contends that the Collector's decision is erroneous; and, in support of his contention, he cites a decision of this Court, which is to be found in the VII. Weekly Reporter, page 398.

In that case the learned Judges observe: "We are of opinion that process for "enforcing a judgment has not been executed "within the meaning of this Section, until "the proceedings in execution have been "brought to a termination by a sale of the "property attached." That is the meaning put by these learned Judges on the terms of Section 119, Act VIII. of 1859—that clause being in words precisely the same as those of Section 58 of Act X. The words are: "If a plaintiff, within fifteen days "from the date of the Collector's order, "and if a defendant, within fifteen days "after any process for enforcing the judg-"ment has been executed, or at any earlier "period. . . . . ." The opinion, therefore, of the learned Judges is, that a proclamation of sale of the judgment-debtor's property, duly made, would not be a process for enforcing the judgment executed.

It appears to me extremely doubtful whether that is the meaning of the words cited. I should have rather supposed that the law intended to allow the defendant 15 days after he shall have been apprised, by the execution of some writ upon his person or his goods, of the decree which had been passed against him. That is the view taken by another Bench of this Court, to be found at page 15, II. Weekly Reporter, Act X. Cases. The learned Judges there say: "We are clear that, independent "of the question of an ordinary review, de-"fendants could claim a re-hearing at any "time within 15 days after such steps in "execution as must necessarily bring the "decree to their notice, *e. g.*, the seisin of "their person or property." If we were to hold otherwise, it would follow that the defendant might raise, successively, a number of objections to the proclamation, or to the sale of his property, and contest these questions in every stage, and finally, when the decision had been given against him, and the sale was confirmed, he might then turn round, and, under Section 58, claim a new trial. It appears to me that the Legislature cannot have intended that, but that, as soon as execution of some process or writ against the defendant had apprised him of the fact of the decision, he is bound thereupon to apply to the Court within 15 days for a new trial.

This case has not been fully argued out before us; but we are given to understand that, in a similar case, this question has been referred for the decision of a Full Bench of this Court. I think, therefore, that the most convenient course will be to order that this case also should be referred to a Full Bench, in order that the parties concerned in it may have the opportunity of arguing the matter there.

I observe that the view above taken by us is in accordance with two other decisions of this Court. The cases are summary regular appeal No. 76 of 1866, Loch and Macpherson, JJ., decided 6th August 1866 (not reported); and Sheikh Gholam Ahyah *versus* Sham Soondur Koomaree, Loch and Macpherson, JJ., Weekly Reporter, VII., page 375.

Hobhouse, J.—I concur with my learned colleague in the interpretation which he has put on the words of Section 58, Act X. of 1859; and I concur also in the order by which he directs that this case shall be referred to the Full Bench.

Judgment of the Full Bench.

Peacock, C. J.—We are of opinion that, in cases falling under Section 119 of Act VIII. of 1859, the application must be made within a reasonable time, not exceeding 30 days, after process for enforcing the judgment has been executed. The question is, what is the meaning of the words "within "30 days after any process for enforcing "the judgment has been executed?"—whether they mean, in the case of property attached, within 30 days after the sale, or simply within 30 days after the attachment.

Mr. Justice Kemp and Mr. Justice Markby have held that they mean within 30 days after the property has been actually sold. If the time runs from actual sale, I apprehend they must run from the date of confirmation of sale, for, until it is confirmed, there is no actual binding sale of the property in execution.

The case which is provided for is the case of decrees passed against a defendant *ex parte;* and the object of the Legislature seems to have been to take care that, in the case of an *ex-parte* decree, the party against whom it is passed may have an opportunity of showing that he had no notice of the suit. The Legislature have fixed 30 days after process for enforcing the judgment has been executed.

The Legislature provided that, before an *ex-parte* decree should be given, the Judge should be satisfied that the defendant had been served with a summons.

Section 111 says: "If the plaintiff shall "appear in person or by a pleader, and the "defendant shall not appear in person or "by a pleader, and *it shall be proved to "the satisfaction of the Court that the sum-"mons was duly served*, the Court shall "proceed to hear the suit *ex parte*."

The Court cannot pass an *ex-parte* decree against a defendant until it is satisfied that the summons has been served; and it is only to provide for the contingency of the Judge's being satisfied that the summons has been served when it has not been served, that this provision is made for the defendant's coming in and asking to have the *ex-parte* decree set aside. If the plaintiff makes a false representation, he would be liable to punishment for perjury, or the fraud would itself vitiate the decree, and the other party might, on the ground of fraud, come in at any time to set aside the decree. But, where a defendant is not served with a summons, he may not know of the decree. The first notice he may have of it is when his property is attached in execution.

Section 119 was intended to provide against the contingency of the defendant's not being served with a summons, and it allows him to come in to set aside the judgment within 30 days after process for enforcing it has been executed.

By Section 232 it is provided: "If "the decree be for money, and the "amount thereof is to be levied from the "property of the person against whom the "same may have been pronounced, the "Court shall cause the property to be at-"tached in the manner following:—"

"If the property consists of lands, houses, "or other immoveable property, the attach-"ment is to be made by a written order, "prohibiting the defendant from alienating "the property by sale, gift, or in any other "way, and all persons from receiving the "same by purchase, gift, or otherwise." (See Section 235.)

When that notice has been given, the process of attachment has been executed, that is, one process of execution. The bailiff who executes the process is not to sell.

Section 248 declares that "sales in exe-"cution of decrees shall be conducted by an "officer of the Court, or by any other person "whom the Court may appoint."

It appears to us, therefore, that, as soon as the property has been attached under the warrant of the Court, directing the bailiff to attach it in execution, there has been a process of execution, completely executed, and the party wishing to have the *ex-parte* decree set aside must come in within 30 days from that time.

If he is entitled to wait until 30 days after the sale has been actually confirmed, then let us see what time he will get.

By Section 246 it is enacted: "In the "event of any claim being preferred to, or "objection offered against, the sale of lands, "or any other immoveable or moveable "property, which may have been attached "in execution of a decree, or under any "order for attachment passed before judg-"ment, as not liable to be sold in execution "of a decree against the defendant, the "Court shall, subject to the proviso con-"tained in the next succeeding Section, "proceed to investigate the same with the "like powers, as if the claimant had been "originally made a defendant to the suit, "and also with such powers as regards the "summoning of the original defendant as "are contained in Section 220."

He might be occupied six months (more or less) doing that. Then he is to proceed under Section 248, and after that there must be a proclamation under Section 249, and the sale cannot take place until after 30 days from the date of proclamation.

Under Section 256, before the Court can confirm the sale, 30 days are allowed for

application being made to the Court to set aside the sale on the ground of irregularity; and, if no such application be made, the Court shall pass an order confirming the sale; so that the party gets 30 days after proclamation, and 30 days after the sale before confirmation can take place, in addition to any time occupied in consequence of claims to the property. Then, in addition to that, under Section 256, he may come in and represent that there was an irregularity or any other matter, and thus occupy the Court for a considerable time; and then, if the construction contended for is correct, he is to have 30 days in addition to all this.

In the order of reference, in case No. 317, Mr. Justice Louis Jackson has stated the point so clearly that we cannot do better than give his own words. He says: "If "we were to hold otherwise, it would fol- "low that the defendant might raise suc- "cessively a number of objections to the "proclamation, or to the sale of his proper- "ty, and contest these questions in every "stage, and finally, when the decision had "been given against him, and the sale was "confirmed, he might then turn round, and, "under Section 58, claim a new trial. It "appears to me that the Legislature cannot "have intended that; but that, as soon as "execution of some process or writ against "the defendant had apprised him of the "fact of the decision, he is bound thereupon "to apply to the Court, within 15 days, for "a new trial."

It appears to us, therefore, that process of execution is executed, within the meaning of Section 119, when an attachment of the property takes place; and that, if the party means to contest the validity of the decree on the ground that he had no notice of the summons, he must come in within 30 days from that time in cases under Act VIII. of 1859, and within 15 days in cases tried under Act X. of 1859.

Both cases will go back to their respective Division Benches for final determination, together with this expression of our opinion.

The 3rd February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Evidence—Settlement-papers—Remission—Onus probandi.

Case No. 333 of 1867 under Act X. of 1859.

Regular Appeal from a decision passed by the Officiating Collector of Tirhoot, dated the 1st October 1867.

Bunwary Lall (Defendant), *Appellant,*

versus

Mr. J. Forlong (Plaintiff), *Respondent.*

Baboo Sreenath Doss for Appellant.

Mr. G. C. Paul and *Baboo Kishen Kishore Ghose* for Respondent.

In a suit for arrears of rent, it was held that settlement papers were only corroborative evidence, and that, though introduced on the testimony of sworn witnesses, they were not sufficient legal evidence of the yearly rental.

When defendant in such a case alleges remission, the *onus probandi* lies on him in regard to the remission.

Hobhouse, J.—THIS was a suit on the part of the Court of Wards, respondent, for arrears of rent, with interest from the year 1259 to 1267 F.

The first point in contention before us is as to the amount of rent due each year, and the burden of proof is on respondent, appellant, admitting only Co.'s Rupees 3,101.

The evidence on the part of respondent consists of certain settlement *Beheri* and *Awargha* papers, sought to be introduced on the testimony, on oath, of two witnesses.

Now, such papers are simply corroborative evidence, and it follows that, unless the witnesses have sworn distinctly that the contract between appellant and respondent is that which these papers purport to set forth, there is no sufficient legal evidence before us of the yearly rental of Sicca Rupees 3,451 claimed.

The witness Chukun Lall says nothing in point, and the witness Huree Hur Dutt simply says that there was a contract, and that Rupees 3,451 is entered in the papers as that contract; but he does not say that this was the contract, and, on the contrary, he does say that he does not know what the malgoozaree (*i. e.*, the yearly rental, *i. e.*, the contract) was.

We think, therefore, that respondent has failed to establish a rental of Sicca Rupees 3,451, and he can only, therefore, obtain a decree at the rate of Co.'s Rupees 3,101, and we modify the Lower Court's decree in this respect.

The second point is as to an alleged remission of Rupees 501, and on this point we agree with the Court below, and for the reasons given by that Court, that appellant, on whom is the burden of proof, has failed to establish this alleged remission.

The only other point taken refers to interest, and on this point we think that, in accordance with the well-known custom, and with the provisions of Section 2, Act X. of 1859, respondent is entitled to interest at 12 per cent. per annum on the principal sum of arrears found, on account, to be due up to date of payment; and, in order to arrive at this sum, a proper account will be drawn out by the Registrar of this Court, and will be inserted under our supervision in the decree.

Respondent will get all costs of all the Courts.

The 3rd February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Certificate under Act XXVII., 1860.

Case No. 338 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 30th March 1867.

Shurut Chunder Mookerjee, *Appellant,*

versus

Thakoormonee Debia and others, *Respondents.*

Baboos Issur Chunder Chuckerbutty and *Doorga Dass Dutt* for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

Before granting a certificate under Act XXVII. of 1860, a Judge is not required to ascertain whether there are any debts due to the estate of the deceased.

Loch, J.—We think that the decision come to by the Judge is wrong in law. Act XXVII. of 1860, Section 3, requires the Court to issue notice of application, inviting claimants, and fixing a day for hearing the petition, and upon the appointed day, or as soon after as may be convenient, to determine *the right* to the certificate, and grant the same accordingly. The law nowhere says that, before granting the certificate, the Judge must ascertain whether there are any debts due to the estate of the deceased. It might so happen that the applicant is not aware of the existence of debts, but applies for a certificate as a precaution; and it would be manifestly unjust, under such circumstances, to refuse a certificate merely because the applicant was unable to prove the existence of debts. We reverse the order of the Judge with costs, and direct him to determine whether the appellant is or is not entitled to receive a certificate.

The 3rd February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Proceedings releasing judgment-debtors or declaring liability—Section 20, Act XIV., 1859.

Case No. 851 of 1867.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 3rd April 1867, reversing an order passed by the Moonsiff of that District, dated the 20th November 1866.

Mohesh Chunder Biswas (Decree-holder), *Appellant*,

versus

Sreemutty Taramonee Dossee and others (Judgment-debtors), *Respondents*.

Baboo Gopeenath Banerjee for Appellant.

No one for Respondents.

A proceeding against certain of a number of joint judgment-debtors in which, in the presence of certain of them, some are released from execution and some declared liable, is a proceeding within the meaning of Section 20, Act XIV., 1859.

Hobhouse, J.—We think the special appellant was in time. His present application to execute was presented on the 20th June 1866.

In 1863, he proceeded against a certain number of the joint judgment-debtors, and this to the extent that, in the presence of certain of those debtors, on the 26th September 1863, and on the 14th May 1864, respectively, some of them were released from execution, and some of them (and amongst these Kenaram, represented now by certain of the judgment-debtors in Court) were declared liable in execution.

These proceedings of 1863 and 1864 were clearly proceedings within the meaning of Section 20, Act XIV. of 1859, and we remand the case to be tried on its merits, but without costs, no one appearing for respondents.

The 3rd February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges*.

Finding in execution—Section 11, Act XXIII., 1861—Admission by judgment-debtor—Wasilat—Unattested dakhilahs—Evidence.

Case No. 212 of 1867.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 26th January 1867, modifying an order passed by the Sudder Ameen of that District, dated the 15th September 1866.

Kazee Odiut Zuman and others (Decree-holders), *Appellants*,

versus

Mohioodeen Ahmed *alias* Mogul Jan (Judgment-debtor), *Respondent*.

Baboos Greesh Chunder Ghose and *Mohinee Mohun Roy* for Appellants.

Baboo Khetter Mohun Mookerjee for Respondent.

Where the finding by a Court in execution is in strict accordance with the original decree, and is not contested in due time under Section 11, Act XXIII., 1861, it becomes final.

The admission by judgment-debtors of a certain rate of wasilat concludes them in law.

Unattested dakhilahs, without corroborative evidence, are not in law sufficient evidence of payment of rent.

Hobhouse, J.—We think that appellants must succeed on all the points taken.

The original decree of the 29th July 1863, on the suit for possession and mesne-profits, declared that there were two plots of land on which mesne profits were due, and of which possession was awarded, *viz.*, two gardens in the judgment-debtor's *khas* possession, and the remaining lands leased out to one Gora Chand at a yearly rental of Rupees 117-12; and, that there might be no mistake, the decree went on to declare that there would be due mesne-profits on the leased lands and on the gardens also.

Then, on the 10th March 1866, the Court of the Moonsiff held that the leased lands and the gardens were two distinct plots, and that so mesne-profits were due on the gardens as well as on the leased lands.

This finding was in strict accordance with the original decree, and was not, as it might have been under Section 11, Act XXIII. of 1861, contested in due time in appeal, and

was therefore final, and neither the Court of the present Moonsiff nor the Lower Appellate Court had any authority to disturb it. We think, therefore, that in law this finding still stands and is good, and it follows that appellants are entitled to wasilat on the gardens, separate from the leased lands.

Then, as to the amount of the wasilat on the gardens, we find that respondents, the judgment-debtors, admitted to wasilat at the rate of Rupees 12-8, and we think that this admission concludes them in law, and so that the appellants are entitled to wasilat at that rate; and we direct the Lower Appellate Court to amend its decree by adding wasilat at that rate to the wasilat already awarded.

And, lastly, as to the item of Rupees 76-12-16, for which the Lower Appellate Court has allowed respondents a deduction as for rents paid to the zemindar in 1266, we think that the dakhilahs, standing alone and not attested, not even attempted to be attested, not even started by any corroborative evidence, are not in law sufficient evidence of the fact of the payment of those rents, and we hold, therefore, that respondents are not entitled to have those rents deducted from the wasilat.

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The 4th February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble E. Jackson, *Judge.*

Notice of sale under Regulation VIII., 1819—Verification of service under Clause 2, Section 8.

Case No. 1920 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 27th April 1867, reversing a decision passed by the Moonsiff of Rungunnea, dated the 6th September 1866.

Sona Beebee (one of the Plaintiffs), *Appellant,*

versus

Lall Chand Chowdhry and another (Defendants), *Respondents.*

Baboo Muttee Lall Mookerjee for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Where a Court finds that the notice prescribed in Clause 2, Section 8, Regulation VIII., 1819, has been duly served, it need not find whether the peon who served the notice complied with all the directions of the Regulation as to what should be done in verification of such service. Omission to comply with those directions does not vitiate a sale under the Regulation, provided notice is duly served.

Peacock, C. J.—This was a suit to cancel a sale of an under-tenure under Regulation VIII. of 1819.

The material part of Clause 2, Section 8, Regulation VIII. of 1819, so far as this case is concerned, is that the notice required to be sent into the Mofussil shall be served. The zemindar is exclusively answerable for the observance of the forms prescribed by that Clause. The subsequent part of the Section, which prescribes that the serving-peon shall bring back the receipt of the defaulter, or of his manager, or, in the event of his inability to procure it, that he shall obtain that which by the Regulation is substituted for it, is merely directory, and, if not done, does not vitiate the sale, provided the notice is duly served.

It is found in this case that the notice was duly served, and under these circumstances it was not necessary for the Principal Sudder Ameen to find whether the peon who served the notice had or had not duly complied with all the directions of the Regulation with reference to what should be done after the service, in verification thereof.

The decision of the Lower Appellate Court will be affirmed with costs.

The 4th February 1868.

Present:

e Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble E. Jackson, *Judge.*

Choses in action—Champerty.

Case No. 1926 of 1867.

ecial Appeal from a decision passed by the Judge of Tirhoot, dated the 27th May 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 20th December 1865.

Jug Mohun Lall, purchaser of the suit (Plaintiff), *Appellant,*

versus

Mussamut Buddun Koer and others (Defendants), *Respondents.*

ebo Debendro Narain Bose for Appellant.

Mr. R. E. Twidale for Respondents.

Choses in action are assignable in this country, d they are also assignable in England, although at the assignee cannot sue in his own name.

Every purchase of a suit is not champerty.

Peacock, C.J.—THIS case must be remanded to the Judge to be tried upon the merits. He says: "The Moonsiff dismissed the claim. He has found that the case is a false one, which has been got up by a vakeel of this Court, Aodun Lall. The vakeel is one of the witnesses, and the purchaser of the suit is his son-in-law."

If the Moonsiff's decision had been upheld by the Judge, Aodun Lall is not a proper person to be a vakeel of the Court, and in that case the Judge ought to take further steps against him. But the Judge did not enter into that question, but says that, "as to the purchase of the suit, there is no denial. The alleged right of the plaintiff to have the alienation set aside, and to obtain "possession, is a mere chose in action, and "not assignable."

In this the Judge is wrong, for choses in action in this country are assignable, and they are also assignable in England, although at law the assignee cannot sue in his own name.

The Judge proceeds: "There is, therefore, no plaintiff or appellant before the "Court." In that also he is wrong, for Jug Mohun Lall, in consequence of his purchase, had been entered in the register (which is the record) as plaintiff in the first Court.

The Judge then says that "purchasing a suit is champerty." But every purchase of a suit is not champerty, and the Judge does not show that the facts of this case amounted to champerty. There is no foundation whatever for the law laid down by the Judge that a chose in action is not assignable, and there are many cases* in the late Sudder Court, and one† in the High Court, which tend to show that champerty is not illegal in the Mofussil. In the face of those cases, the Judge ought not to have laid down the law as to champerty, in the positive manner in which he did lay it down.

* Sudder Decisions for 1847, page 609.
" " " 1852, page 394.
" " " 1859, page 1310.
† Marshall's Reports 303.

In trying the case *de novo* upon the merits, the Judge may find any facts, if any exist, which justify his assertion that this was a case of champerty, so that the parties, if they please, may have the question fully considered by this Court, whether in the Mofussil a purchase amounting to champerty is illegal or not.

The 5th February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Priority of attachment—Section 270, Act VIII., 1859—Sale of property already mortgaged—Right of redemption.

Cases Nos. 1155 to 1157, 1239, 1240, and 1250 of 1867.

Special Appeals from a decision passed by the Judge of Shahabad, dated the 6th

March 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 28th June 1866.

Lalla Joogul Kishore Lall and others (Defendants), *Appellants,*

versus

Bhukha Chowdhry and others (Plaintiffs), *Respondents.*

Baboos Unnoda Pershad Banerjee, Hem Chunder Banerjee, and *Mohinee Mohun Roy* for Appellants.

Messrs. R. T. Allan and *C. Gregory* and *Baboo Kishen Succa Mookerjee* for Respondents.

Priority of attachment does not give a decree-holder a right to set aside a sale made by another decree-holder on a subsequent attachment; but merely, as provided in Section 270, Act VIII., 1859, a right to be paid first out of the proceeds of sale.

Where a decree-holder sells a mortgagor's rights and interests in property already mortgaged, and declared liable to sale, in liquidation of the debt for which it was mortgaged, the purchaser purchases merely the mortgagor's right to redeem.

Loch, J.—THE history of these appeals is somewhat complicated, though the point to be decided is very simple.

It appears that Tayler made a loan of Rupees 6,000 to the Rajah of Buxar, on a bond dated 29th July 1861, in which the Rajah pledged two villages, Sooniputty and Panreyputty, as security for the debt; and on 3rd August 1861, the Rajah borrowed a further sum of Rupees 2,000 from Tayler, and gave him a bond in which he promised to sell none of his property till the debt was liquidated.

On 5th May 1882, Gudadhur Lall purchased the rights and interests of the Rajah in Mouzah Sooniputty, sold in execution of a decree held by Seekur Chand, and bearing date January 1862.

Tayler subsequently brought a suit against the Rajah and Gudadhur Lall upon both the bonds he held from the Rajah, and obtained a decree on 5th December 1862, and the decree was to the effect that the property pledged in each bond should be sold to liquidate the amount of each.

On 30th September 1863, Tayler sold his decree to Ram Jeewun, against whom Gudadhur Lall brought a suit, alleging that Ram Jeewun was only a *benamee* for the Rajah of Buxar, the real purchaser of Tayler's decree; and that, as the Rajah was the debtor in that decree, he had, by purchasing it, extinguished the debt, and he prayed, therefore, that the decree might be declared to have been satisfied. The first Court, in its judgment of 31st July 1865, held that the purchase of Ram Jeewun was a *bonâ-fide* purchase, and dismissed the suit. An appeal was preferred by Gudadhur to the High Court; but, when the appeal came up for hearing, the question which the Court was asked to determine was limited to this point, *viz.*, which of the two villages pledged to Tayler should be sold first, and the High Court, in their judgment of 12th February 1866, determined that Mouzah Panreyputty should first be sold in execution of the decree now held by Ram Jeewun, and that the proceeds of sale should first be applied to liquidate the debt due on the bond of 3rd August 1861 not covered by the mortgage, and the surplus go to pay the debt due under the other bond, and that, if any balance remained unliquidated, then the other village of Sooniputty could be sold.

There was another money-decree held by one Judoo Buno Lall against the Rajah of Buxar, dated the 15th January 1863. He attached and sold the rights and interests of his debtor in Mouzah Panreyputty, and they were purchased by Lalla Bhugwan Doss and others, plaintiffs in the present suit, on 5th April 1864, and they instituted the present suit to establish their title and the validity of their purchase of Mouzah Panreyputty, notwithstanding the decree held by Ram Jeewun.

While this suit was pending, Mouzah Panreyputty was advertised for sale in execution of Tayler's decree held by Ram Jeewun; and though the previous auction-purchasers prayed that the sale might be stayed, the Principal Sudder Ameen rejected the application, and sold the property on 14th May 1866 for Rupees 12,000, when it was purchased by Joogul Kishore Lall and others, special appellants before us. As this sum was insufficient to cover the whole amount of the debt which, with interest, now amounted to Rupees 16,000, Gudadhur Lall, in order to save his village Sooniputty from sale, paid down the balance of Rupees 4,000, and so liquidated the decree.

The first Court gave the plaintiff in this case a decree, which the Judge in all material points confirmed in appeal. It is unnecessary for us to state the grounds upon which these judgments are based, but we think that both must be set aside.

It has been urged before us in appeal that, on the 22nd February 1863, Tayler attached the two villages in execution of his decree; that, on the 22nd March following, he applied to the Court to sell Panreyputty only, as his right to Sooniputty was then disputed by Gudadhur Lall; that Ram Jeewun, after his purchase from Tayler, applied to the Court on 9th October 1863 to postpone the sale, preserving the attachment, and an order was passed accordingly. This priority of attachment does not, however, in our opinion, give Ram Jeewun any right to set aside a sale made by another decree-holder on a subsequent attachment. It merely gives him, as provided in Section 270, Act VIII. of 1859, a right to be paid first out of the proceeds of sale. If, therefore, the special appellant's case rested merely on the priority of attachment, he would have no case. But when the plaintiffs purchased Mouzah Panreyputty in execution of Judoo Buno Lall's decree, they purchased only such rights and interests as the debtor, the Rajah of Buxar, then had, for the property was then mortgaged to Ram Jeewun, and had been declared liable to sale in liquidation of the debt for which it had been mortgaged, so that all that plaintiff bought was the debtor's right to redeem. It has been contended by Mr. Allan for the respondents, but we think unsuccessfully, that, had the decree-holder followed the terms of his decree, it might have been difficult to make out a case for his clients, but, as the decree-holder had taken another course, and had, under the judgment passed by the High Court on the 12th February 1866, departed from the original decree, and had sold the property in satisfaction of the bond for Rupees 2,000, dated 3rd August 1861, to secure which the property was not pledged, the purchaser did not buy the estate which had been mortgaged as security for the payment of the other bond, but only the rights and interests of the debtor; and, as these had been previously purchased by the plaintiffs, the special appellants had, in fact, purchased nothing. Looking, however, to the terms of Tayler's decree, and the order of the High Court, and the sale-proceeding, we do not think that there was any real departure from the terms of the decree. The sale-proceeding clearly shows that the property was sold to realize the whole of the sum decreed, and made no specification of the sale being made in liquidation of one bond rather than another. Nor does the High Court's order alter the term of the decree. For some reason, the Court thought proper to say that Mouzah Panreyputty should first be sold in execution of the decree, and that the surplus proceeds of sale should be applied first to liquidate the bond not covered by the mortgage; but this was only a direction as to the disposal of the proceeds of sale, and not any alteration in the terms of the decree. Under this view of the case, we think that the sale of the plaintiffs cannot in any way affect or interfere with the rights of the special appellants who have purchased the mortgaged property; that the plaintiffs have no right in the property, and, therefore, their suit must be dismissed with costs in all Courts.

With regard to the appeal preferred by Gudadhur Lall, we find that all he did was to take care of his own interests; and for doing so, he certainly should not be saddled with the whole costs of the suit. As the plaintiff's suit is dismissed, Gudadhur is entitled to his costs in all Courts.

As the decree-holder Ram Jeewun has unnecessarily been made a respondent in this appeal, he will get his costs from the special appellants.

Hobhouse, J.—I concur in the judgment and order given by my brother Loch in this case.

On the 29th July 1861, the village of Panreyputty was mortgaged to Tayler by the judgment-debtor, the Rajah of Buxar. On the 5th December 1862, Tayler got a decree directing that this village should be sold in satisfaction of the mortgage-money; and on the 30th September 1863, Tayler sold the decree to Ram Jeewun, and that decree is admittedly still alive.

On the 5th April 1864, the plaintiffs purchased the Rajah of Buxar's rights and interests in Panreyputty, at a sale in execution of a second decree against the Rajah held by one Judoo Buno Roy, of date 15th January 1863.

Clearly, then, when the plaintiffs thus purchased the Rajah's rights and interests, they did so subject to the mortgage and to Tayler's decree and lien there according; and inasmuch as at a sale in execution of that decree, and in following that lien, the sale-proceeds only just covered the debt,

and the whole of the Rajah's rights in Panreyputty were legally sold, it follows that plaintiffs have not by their purchase acquired any rights and interests in the said Panreyputty, and have not, therefore, any rights on which a declaratory decree could be given. I agree, therefore, that the suit must be dismissed, and that this appeal must be decreed with costs in both Courts.

This decision, by consent, governs Nos. 1156, 1157, 1239, 1240, and 1250 of 1867.

The 6th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

A Criminal Judgment as evidence—Resiling from a grant of abatement of rent—Powers of Revenue Courts in regard to fixing a day for hearing.

Case No. 207 of 1867.

Regular Appeal from a decision passed by the Assistant Collector of Purneah, dated the 18th May 1867.

Rajah Enayet Hossein (Plaintiff), *Appellant,*

versus

Beebee Khoobunnissa (Defendant), *Respondent.*

The Advocate-General and *Messrs. R. T. Allan* and *R. E. Twidale* for Appellant.

Mr. C. Gregory for Respondent.

In a suit for arrears of rent from a putneedar, where plaintiff stated that he had, on an allegation made by defendant that a dacoity had taken place in her house, allowed her an abatement, but, finding from a judgment of the High Court that no such dacoity had taken place, he claimed full rents.

HELD that the High Court's judgment was admissible, with a view to ascertain the truth of plaintiff's case.

HELD also that, even if plaintiff could resile from his grant of abatement, he could not do so without giving notice of intention.

Collectorate authorities under Act X. have not the same powers as Judicial authorities under Act VIII., 1859, to fix the first hearing, either as final, or for the fixing of issues. If the parties do not secure the attendance of their witnesses at the first hearing, and there are on the examination of the parties issues upon which evidence is necessary, the Court is bound to fix a day for the hearing of such evidence.

Jackson, J.—THIS is a suit to recover arrears of rent at the rate of Rupees 5,450-12 per annum, for the years 1272, 1273, and 1274, on a putnee-lease taken by the defendant at that rate. The plaintiff states that he had, on an allegation made by the defendant that a dacoity had taken place in her house, allowed her an abatement of rent, to the extent of Rupees 2,000 per annum, but that it appears from a decision of the High Court that no such dacoity took place, and the plaintiff now urging that the story of the dacoity was a fabrication, and fraudulently put forward to induce him to grant the abatement of rent, sues to recover his full rent as if no such abatement had been allowed.

The defendant states that a dacoity did take place, and that she is entitled to the remission of rent which has been granted to her, and that she is willing to pay the balance, with the exception of the rent of that portion of the putnee-jumma of which one Rowshun Jan has obtained possession by decree of Court passed in a suit between Rowshun Jan and the plaintiff.

The amount claimed in this suit was, with interest, Rupees 14,657. The Assistant Collector of Purneah, Mr. Wyer, fixed the 7th May for the attendance of the defendant; and in the summons to the defendant directed that he should, if possible, have his witnesses in attendance on that day. On the 7th, the hearing was deferred to the 9th. On that day, the agents of the plaintiff and defendant were shortly examined. The plaintiff wished to put in a copy of the judgment of the High Court, but the Assistant Collector refused to receive it. He adjourned the further hearing to the 11th May, and on that day again adjourned it to the 18th, because he was engaged in Magistrate's duties. On the 18th, he decided that, as the plaintiff had allowed the abatement of rent, he could only recover the remainder of his claim, and that

the rent due on the portion of land obtained by Rowshun Jan should also be deducted.

The Advocate-General, on appeal, urges that this grant of abatement of rent by the plaintiff was a voluntary act on his part, from which he could resile at any time; that no consideration was paid for it, and it had no binding force. But, as he admits that no notice of such intention to resile from the agreement was given to the defendant, we think that that argument cannot be sustained even if his contention is correct law, upon which we give no opinion. It was not a point raised in the Lower Court. The allegation of the plaintiff then turned wholly on the question of fraud. The Assistant Collector refused to receive the judgment of the High Court in the case of dacoity referred to, because it was not evidence in a civil suit. There is no doubt that it is not conclusive evidence; but in order to ascertain the truth of the case, which the plaintiff attempts to make out, we have thought it right to receive the judgment and file it on the record. We find that that judgment by no means decides whether any dacoity took place or not. The opinions of the Judges who gave it are not to the same effect, and the only point it really decided was that the prisoners accused before them were not guilty of the crime. It appears also that this abatement of rent was granted by the plaintiff long after that decision was passed, and the decision, therefore, cannot have any effect in this suit.

But the question still remains, whether the plaintiff was induced to grant this abatement upon a fraudulent misrepresentation made to him as to the occurrence of the dacoity. The Advocate-General points out that the Assistant Collector has not made any attempt to decide this issue. Mr. Gregory, on the other hand, urges that the plaintiff was bound to produce his evidence on this point at the hearing before the Assistant Collector on the 9th May; and that, as the only evidence he then offered was the judgment of the High Court, which did not prove that any fraud occurred, the Assistant Collector was right in deciding as he did.

We are of opinion that the procedure of the Assistant Collector in this suit is not according to the rules laid down in Act X. of 1859. Section 61 of the Act lays down that, if either of the parties shall bring forward a witness on the day fixed for the first hearing of the suit, the Collector may take the evidence of that witness. In this case, the parties did not produce their witnesses on that day. Section 73 of the Act then declares that, if after the examination of the parties, and the examination of any witnesses who may have attended, and after consideration of the documentary evidence adduced, a decree can be properly made without further evidence, the Collector shall make his decree accordingly. This is the course which the Assistant Collector adopted. But it is evident that further evidence was necessary. It was not proper that the suit should be decided without giving time to the parties to produce their evidence on the issue which had been raised between them, as to whether a fraudulent misrepresentation had been made to the plaintiff as to the occurrence of the dacoity. If the plaintiff has been induced to grant an abatement of rent in consequence of any such misrepresentation, he is entitled to have the agreement made by him on that misrepresentation set aside. The Collector in his decision has taken no notice of this—the one important issue in the suit. He should have, under Section 65, Act X. of 1859, declared and recorded such issue, and have fixed a convenient day for the examination of witnesses upon it. The case must be remanded to him, in order that he may now adopt the procedure so laid down in the law.

Mr. Gregory argued as if the Collectorate authorities under Act X. had the same powers as Judicial authorities under Act VIII. of 1859, to fix the first hearing of the suit either as a final hearing, on which the parties were bound to have their witnesses in attendance, or as a hearing solely for the fixing of issues. But this is not a correct view of the law. It is altogether within the discretion of the parties whether they shall produce their witnesses in Court on the first hearing. If they do so produce them, the Collector may take their evidence and decide the case. But the parties are not in any way injured if they do not secure the attendance of their witnesses on that day; and if they do not, and there are on the examination of the parties issues upon which evidence is necessary to enable the Court to decide such issues, the Court is bound under the law to fix a day for the hearing of the evidence upon those issues. We have some doubt whether the law is correctly administered upon this point, and we have, therefore, most carefully consulted the provisions of the Act, and we have no hesitation in laying down that the procedure now pointed out is the correct procedure under the law.

We have also to point out to the Assistant Collector that he must find, upon some evidence as to the extent of the share which has been decreed to Rowshun Jan, the rent payable to her, and the period for which it is due.

The orders of the Assistant Collector are reversed, and the case is remanded to him for re-trial.

The 6th February 1868.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Secondary evidence—Denial in pleading no substitute for legal testimony.

Case No. 2499 of 1867.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 29th August 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 31st January 1866.

Sookram Sookul and others (Defendants), *Appellants,*

versus

Ram Lall Sookul (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboo Onookool Chunder Mookerjee* for Appellants.

Baboos Kalee Mohun Doss and *Chunder Madhub Ghose* for Respondent.

A copy of a document should not be received in evidence until all legal means have been exhausted for procuring the original. Where a document is alleged to be in the possession or power of a certain party, such party's denial in pleading that he has ever had the document is not sufficient to justify the omission of the processes the law provides for his testimony, and his being called on to produce the original.

If a Judge is satisfied of a plaintiff's inability produce an original pottah on which he relies, he o to allow secondary evidence to be given of the tents of the document; but he should be satisfied, reasonable grounds, that the evidence gives a true sion of its contents, and he should require suffi evidence of the execution of the pottah.

Bayley, J.—THIS special appeal, 2499, is connected with regular appeal 71 of 1867, which has been decided this d

In this case, plaintiff sued one Sookr to recover possession of a *khut*-ijara, alle by plaintiff to have been given to plaintiff the holder of *dur*-ijara, *viz.*, Sheo Persh who obtained his *dur*-ijara from Mung Pershad, the admitted farmer of Ranee Bul Putun, the proprietor.

Sookram's answer was that, although Mu glee Pershad was truly the Ranee's farme yet he had given the *dur*-ijara, *not* to Sh Pershad, but to Recknath, and that Reckna again had given a *khut*-ijara to defendant.

The first Court's verdict was in favor Sookram, the defendant.

The Lower Appellate Court, howeve reversed that decision, and gave plaintiff decree.

The defendant appealed specially, an urged—

1st.—That the Lower Appellate Court wa wrong in admitting the alleged *copy* of She Pershad's pottah without absence of th *original* being accounted for ; and

2nd.—That the evidence available from the registered mooktearnamah of Sheo Pershad to Recknath had not been duly considered.

The Division Bench of this Court, Kemp and Glover, JJ., held that it had not been shown that the original document, though in the hands of Recknath, was out of the reach of the Court's process ; that no notice had been served upon the party in whose possession or power the document was alleged to be to produce it; and that, until all lawful means had been exhausted, the Lower Appellate Court would be wrong in accepting the copy as evidence. It was added that the ends of justice in this case required the production of the best available evidence, and that plaintiff must have the burden of so proving his case.

The Division Bench, on the *second* point, held that the Lower Appellate Court had taken all the evidence in support of Sheo Pershad's mooktearnamah into consideration.

The case was ordered to "go back on the t point taken."

The case having so gone back, the Lower pellate Court now records that, as the vision Bench indicated Recknath as party in possession of the original tah (although the Lower Appellate Court lf never thought so), Recknath had been amoned, and appeared and denied any posion of the document. The Lower Appel- Court then held that the secondary evince of the copy might be received, as it s impossible for the plaintiff to produce original; because that document ought be with Sheo Pershad's widow; that she nied having it, and her husband ever hav- had it; that she was inimical to plaintiff's erests, and lived in Oudh; and thus it s beyond plaintiff's power to cause her ndance with the document; and that conduct in suits for rents showed that statement was correct.

The Lower Appellate Court, accordingly, creed plaintiff's case.

Mr. Doyne now appears for defendant, apling specially, and urges that the remandler, in respect to the copy of the pottah, s not been properly carried out, inasmuch the Lower Appellate Court could have ised a commission for the examination of the dow of Sheo Pershad, and for her to produce deed; and that the law provided express- for such further process; and that, till s should have been done, it could not be d that the Lower Appellate Court had exusted all the proper legal means for the oduction of the best available evidence, ., the original deed and Sheo Pershad's dow's testimony; and thus the copy ould not have been admitted as it had, plaintiff's case considered duly proved by ch copy.

Mr. Doyne secondly urged that the Lower Appellate Court had not noticed the registered power of attorney above referred to, which was some evidence in support of defendant's case.

On the *first* point, I think that in this case the contention of the learned Counsel is correct, and I would remand the case, accordingly, for the examination, by commission in Oudh, of the widow of Sheo Pershad, and that she be called on to produce the document or explain why she has it not. Her denial in pleading is not sufficient to justify the omission of the processes the law provides for her testimony, and her being called on to produce the original deed.

On the *second* point of this special appeal, I observe that the remand-order was limited to the first point: nor would the fact of the grant of a registered power of itself show that it had been acted upon; and, if that were not shown, the power by itself would not prove defendant's case.

In this view I would remand the case for a re-trial with reference to these remarks, and on the *first* point only.

Remand accordingly.

Phear, J.—This case was remanded by this Court, as I understand the matter, for the trial of the issue, whether or not Munglee granted a *dur*-ijara to Sheo Pershad. And the remanding Bench accompanied its order with the direction that, "until all "lawful means for the production of the "original (pottah from Munglee) have been "exhausted, the Court below would be "wrong in accepting the copy as admissible "evidence."

The Judge, who tried the case on remand, says: "I am of opinion that the secondary "evidence of the registered *dur*-ijara pottah "given to Sheo Pershad may be accepted by "the Court, because it is impossible for the "plaintiff to produce it." Had the judgment gone no further than this on this point, I should have been indisposed to entertain the objection of the appellant relative thereto, because I think the question, whether or not a party to a suit has at the trial laid a sufficient foundation to enable him to tender secondary evidence in the place of primary evidence, is a matter of fact to be judicially determined by the Court which tries the case; and its conclusions in this head cannot, therefore, be generally disturbed on special appeal. But in this case, the Judge, in giving the reasons of his decision, discloses, as it seems to me, that he has allowed himself to be influenced by evidence which he ought not to have looked at. He says that the document should be with Mussamut Rashee, Sheo Pershad's widow, but he concludes that the plaintiff could not probably get it from her, because she is inimical to him, lives in Oudh, and has denied that such a pottah ever existed. There is, however, no evidence whatever in this suit to support this conclusion, except the written statement of Mussamut Rashee, which is clearly not admissible as evidence between the plaintiff and the appealing defendant, whatever may be its force against the lady herself. It follows, therefore, that the opinion of the Judge as to the admissi-

bility of secondary evidence of the *dur*-ijara pottah has been wrongly arrived at as against the appellant, and the trial which followed thereon was a *mis-trial.* The case must, consequently, go back to him again for re-trial of the issue on which it was before remanded.

I do not think that the mooktearnamah from Munglee to an agent, authorizing the grant of a *dur*-ijara to Recknath, is any evidence relevant to the issue which was to be tried. It can only go to show that the *dur*-ijara alleged to have been granted by Munglee to Recknath in 1266 was authentic; but the fact, if established, that Munglee gave a *dur*-ijara of the land in question to Recknath in 1266, affords no evidence that he did not give a *dur*-ijara of the same land to Sheo Pershad in 1267. It seems to me, therefore, that the Lower Court was right in refusing to notice this document, and the objection of the appellant to the effect that he was wrong ought to be overruled.

At the trial on remand, if a document be tendered by the plaintiff as the original pottah alleged to have been granted by Munglee to Sheo Pershad, it will be the duty of the Judge to take care that its authenticity is duly proved. If the plaintiff professes to be unable to procure the original, the Judge must satisfy himself upon proper and sufficient evidence, whether or not the excuse is well founded. In the event of his finding that the plaintiff has not satisfactorily made out his inability to produce the original document, he ought not to receive secondary evidence thereof, but should dismiss the plaintiff's suit. If, however, he comes to the opposite conclusion, he ought to allow secondary evidence of the contents of the original document to be given; but before he gives weight to such evidence as against the defendant, he should be satisfied on reasonable grounds that the secondary evidence so produced gives a correct copy, or true version of the contents of the pottah sought to be proved, not merely of some document *registered* as a pottah granted by Munglee to Sheo Pershad; and, incidentally to this, he should require sufficient evidence of the execution of the pottah.

I would remand the case to try whether or not Munglee granted the alleged *dur*-ijara pottah to Sheo Pershad.

The 6th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Suit for accounts under Section 24, Act X., 1859.

Case No. 1481 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 5th April 1867, reversing a decision passed by the Deputy Collector of that District, dated the 31st December 1866.

Pran Nath Chuckerbutty (Defendant), *Appellant,*

versus

Syud Beny Ameen (Plaintiff), *Respondent.*

Baboo Nil Madhub Sein for Appellant.

Baboos Kalee Mohun Doss and *Romesh Chunder Mitter* for Respondent.

In a suit for accounts against a naib, under Section 24, Act X., 1859, defendant pleaded acquittance, adding that he was not the naib of some of the estates. The Deputy Collector found the acquittance proved; but the Judge in appeal reversed the decision, and ordered the defendant to give an account of his stewardship.

HELD that the Judge should have found what estates were in defendant's management, and for what period, and what accounts he is to render.

Kemp, J.—THIS was a suit for accounts against a naib under Section 24, Act X. of 1859. Defendant admitted his agency, but pleaded, *first*, limitation, and, *second*, his acquittance. He also added that he was not the naib of some of the estates mentioned in the plaint, *i. e.*, he had not collected the rents of those estates.

The Deputy Collector found the acquittance proved, and the plaintiff's claim as a matter of course fell in.

Plaintiff appealed. The Judge found that the acquittance was not proved, and reversed the decision of the Court of first instance—the defendant to give an account of his stewardship within six weeks.

In appeal, it is contended that the Judge ought to have tried whether the defendant was really in charge of the estates named in the plaintiff's plaint.

We think that the Judge has not decided this case in a satisfactory manner. His order is a very general one. The defendant is to give an account of his stewardship; but for what period and for what estates? The defendant, having won his case in the first Court on the acquittance, did not prefer a cross-appeal on the point he now raises, though he distinctly raised it in his written statement. It is not equitable to decree that a man is to give an account without specifying for what period, and for what properties, and the nature of the accounts to be given.

The defendant avers that some of the estates were never under his management at all, and it is admitted that they passed away from the plaintiff by sale in execution before the alleged termination of the defendant's agency, as per plaintiff's own showing.

The Judge will find what estates were in defendant's management, for what period, and what accounts he is to render.

The 6th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Oral evidence to vary a deed of sale.

Case No. 1444 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 28th March 1867, reversing a decision passed by the Moonsiff of that District, dated the 13th December 1866.

Radha Mohun Shamee (Plaintiff), *Appellant,*

versus

Ram Mohun Surmah and others (Defendants), *Respondents.*

Baboo Gopeenath Mookerjee for Appellant.

Baboo Tara Prosunno Mookerjee for Respondents.

In the absence of any circumstance giving rise to a presumption that an alleged deed of absolute sale is a mortgage, a Civil Court is right in refusing to credit oral evidence to vary the express and unambiguous terms of the deed.

Kemp, J.—In this case it is objected that the Principal Sudder Ameen, in applying the principles laid down in the decision of the Full Bench* to this case, ought to have considered the conduct of the parties.

Doubtless, he ought to have done so if any such allegation had been made before him. The Court was not asked to look at the conduct of the parties as an index to their intentions. We think that the Principal Sudder Ameen had rightly applied the principles of the decision of the Full Bench to this case.

The deed was one of absolute sale; and, in the absence of any allegation of conduct of parties, non-possession of the vendor, or other circumstances giving rise to a presumption that the transaction was a mortgage, the Principal Sudder Ameen was right in refusing to credit oral evidence with a view to vary the express and unambiguous terms of the deed.

Appeal dismissed with costs and interest.

The 7th February 1868.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Limitation.

Case No. 1805 of 1867.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 30th April 1867, affirming a decision passed by the Moonsiff of Selimabad, dated the 5th September 1866.

Bhiloo Mundul and others (Defendants), *Appellants,*

versus

Motee Lall Ghose Mundul (Plaintiff), *Respondent.*

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* *See* 5 W. R., Civil Rulings, p. 68.

Baboo Debendro Narain Bose for Appellants.

No one for Respondent.

In a suit to recover possession of lands as heir, where the plea of limitation is raised, the plaintiff must prove that he or the person through whom he claims was in possession within 12 years prior to the institution of the suit, limitation running, not merely from the date on which the plaintiff's right to sue accrued, but from that on which the cause of action arose.

Miller, J.—THIS case must be remanded to the Lower Appellate Court for a fresh trial on the question of limitation.

The plaintiff, now special respondent before this Court, instituted this suit to recover possession of certain lands as heir-at-law of one Mohun, deceased. It is admitted that the death of Mohun occurred in Bhadro 1262, and the suit was not brought until Bysack 1273, nearly eleven years afterwards.

The plaintiff further stated in his plaint that his cause of action accrued on the date of Mohun's death, without, however, alleging distinctly whether Mohun remained in actual possession of the property in dispute down to the time of his death.

On the plea of limitation being raised by the defendant, the Lower Court observes that, inasmuch as the suit was instituted within 12 years from Mohun's death, limitation cannot apply. This judgment is clearly wrong. It was incumbent on the plaintiff to prove, by satisfactory evidence, that either he himself, or Mohun, his ancestor, was in possession of the property in dispute at any time within 12 years prior to the institution of the suit. The plaintiff does not allege that he himself was in possession, so that, upon his own showing, the defendant has been in possession of the property for nearly eleven years.

Under these circumstances, unless the plaintiff can prove that Mohun was in possession at any time within 12 years prior to the institution of the suit, the present action must fail. The *onus* was clearly on plaintiff to prove that his cause of action accrued within 12 years prior to the institution of suit. The plea of minority advanced in the present case is of no avail. If Mohun was in possession at any time within 12 years prior to the institution of the suit, no limitation can apply.

If, on the other hand, the cause of action accrued before the death of Mohun, the plaintiff cannot save his claim from the operation of the Law of Limitation by pleading his own disability. Under these circumstances, it will be for the Judge to determine whether Mohun was in possession at any time within 12 years prior to the institution of the suit, and the case will be disposed of with reference to the result of that enquiry.

Case remanded accordingly; costs to abide the ultimate result of the suit.

Macpherson, J.—The plea of limitation cannot be properly decided without deciding upon what date the cause of action accrued—not merely upon what date the plaintiff's right to sue accrued to him. If it accrued to Mohun in his lifetime, the plaintiff's suit is barred. If it arose only on or after his death, the suit is not barred. In order to determine this question, it is necessary to decide what was Mohun's position with reference to the property in dispute at the time of his death.

I concur in the order of remand.

The 8th February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. Hobhouse *Judge.*

Jurisdiction — Suit for salvage — A Judge giving evidence.

Reference to the High Court by the Officiating Judge of the Court of Small Causes at Cantonments of Barrackpore, dated the 21st December 1867.

Kishore Singh and others, *Plaintiffs,*

versus

Gunnesh Mookerjee, *Defendant.*

A suit for salvage, even when the saved property had been abandoned by those in charge of it, is not cognizable by a Court of Small Causes.

When a Judge gives evidence, he should be sworn like other witnesses.

Case.—PLAINTIFF in this case saved six casks of oil which were floating down the Hooghly on the morning after the late Cyclone, namely, the 2nd of November 1867, and, in consequence of this, they claim Rupees 30 as the value of part of the property saved by them.

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Defendant examined, declared on solemn affirmation that—" I despatched from Cal-" cutta 25 barrels of oil in a boat, two days " before the late Cyclone. Their destination " was Mookshodabad ; they were sent up the " Hooghly. I have recovered 11 barrels of " these, 6 (saved by the plaintiffs, and made " over to Kotewally) from the Kotewally " here, and 5 from Nawabgunge Police " Thannah. I have not recovered the rest ; " the value of each barrel is Rupees 36 ; " there were three maunds in each barrel, " the oil was cocoanut and castor-oil mix-" ed."

The defendant's pleader makes the following written objection :—

" The present suit is measure of remuner-" ation for salvage-services. Under Section " 6 of Act XI. of 1865, Small Cause Court " has no jurisdiction to try a case of this " nature, but only claims as specified in the " aforesaid Section are triable by this Court."

Defendant's pleas.

1st.—That this case is not within the jurisdiction of this Court, seeing that it does not come within any of the definitions of suits given in Section 6, Act XI. of 1865.

2nd.—That three of the plaintiffs being policemen, whose duty it is to save unclaimed property, they are only entitled to nominal remuneration, say one rupee for each cask.

3rd.—That Ramluggun (not a policeman) would be fairly rewarded with Rupees 2.

The Court holds that salvage in cases where the property has been saved, when abandoned by those who have charge of it, is a part of the value of the property saved, and as the property is personal property in this case, and as it is alleged to have been abandoned, the Court holds that it has jurisdiction.

On the morning after the late Cyclone, namely the 2nd of November last, I went to the bank of the Hooghly in this Cantonment, having heard that there was some property floating away that might be saved. I saw some men in the shallow water pushing casks before them up-stream along the bank, and I saw some two or three casks stranded at the ghat opposite Major Gordon's house. Rain was falling, or had been falling, shortly before, and it was cold for the natives. I have no doubt these barrels I now write of were the same as the barrels in this case.

I think there is little doubt that, if plaintiffs had not saved the barrels, they would have been lost to defendant in the same way as 12 others have been lost. Even if I had seen them, I should have had to offer high wages to induce any one to go into the water under existing circumstances to save them, and I am not sure that I should have succeeded in getting them saved. People were occupied each with his own affairs that morning, at least people in the position of coolies, for every thatched and tiled hut was dilapidated, and all dwellers in such must have passed a wet night in much trepidation. Plaintiffs had no doubt masonry-building to protect them, and the policy of giving such persons more inducement to save property going to destruction than is afforded by the satisfaction of doing one's duty, is, I think, too manifest to need further notice.

As to three of the plaintiffs being policemen, whose duty it is, under Act V. of 1861, to take charge of unclaimed property, I do not think such men are bound to do as plaintiffs did ; and, judging from the analogy of men in Her Majesty's Navy being capable of claiming salvage not exceeding half the value of the property (*vide* Merchants' Shipping Act), I think them fairly entitled to a portion of the property, or its value. The portion should be proportionate to the risk and inconvenience incurred, as the property was abandoned by those in charge of it. I do not think it has been proved that plaintiffs swam into deep water, but I saw them under circumstances that endangered their health ; and as the amount they claim is below one-fourth of the value of the property, I think it is not out of proportion to the risk they ran, and the inconvenience they incurred ; and I think that less would not afford such encouragement to others to go and do likewise, as it is politic to give in order to protect the interests of owners generally of abandoned property in such jeopardy of being lost as this was.

Subject to the decision of the High Court on the *first* plea of defendant, namely, whether this suit is cognizable by this Court, I give judgment in favor of plaintiffs, and award them costs. Each will share equally as they have claimed.

If the High Court shall rule that this suit is cognizable by this Court, the defendant will pay to each of the four plaintiffs Rupees 7-8, and defendant will pay to

Kissur Singh, plaintiff, costs Rupees 4-13. If the High Court should rule that this suit is not cognizable by this Court, the four plaintiffs will pay to defendant his costs, namely, vakeel's fees Rupees 1-8, and vakalutnamah 8 annas; total 2 rupees. Plaintiffs will each pay 8 annas of these costs.

Judgment of the High Court.

Peacock, C. J. — We are of opinion that this suit is not cognizable by the Small Cause Court. We would remark that, when a Judge gives evidence, he should be sworn like other witnesses.

The 8th February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. Hobhouse, *Judge*.

Suit by agent having no interest in the subject-matter.

Reference to the High Court by the Judge of the Court of Small Causes at Chooadanga, dated the 7th January 1868.

Mr. G. Glascott, *Plaintiff*,

versus

Gopal Sheikh, *Defendant*.

In an action brought by the Manager of a Concern on the basis of a contract executed by defendant, and addressed to a previous Manager, now deceased, it was HELD that, as the plaint did not disclose that the plaintiff had any interest of his own in the suit, and as the contract was not in terms with him personally, he could not maintain the action in his own name.

Case.—THIS is an action brought by Mr. Glascott, as Manager of the Lokenathpore Concern, on the basis of a kubooleut, or contract to cultivate indigo, dated the 17th February 1864, alleged to have been executed by the defendant, and addressed to Mr. George Meares, late Manager of the said Concern, and now deceased.

The defendant's pleader has taken a preliminary objection to the hearing of the action, on the ground that, as Mr. Glascott is merely an agent, acting under a power of attorney for his principals, he should have brought the action in their name; and the plaint does not disclose any interest of Mr. Glascott in the suit. * * *

The power of attorney held by Mr. Glascott is executed by Messrs. F. G. Sandes and F. C. Sandes, by their attorney, R. F. Stack, and empowers him to sue and be sued; and the plaintiff's pleader, therefore, contends that the present action is well maintainable by his client without making his principals parties to the action. * * *

The general rule is that a mere agent having no interest in the suit ought not to be made a party, and Chitty, on his work on Pleading, says, Vol. I., page 8, 7th edition: "In general, a mere servant or "agent, with whom a contract is expressed "to be made on behalf of another, and who "has no direct beneficial interest in the "matter, cannot support an action thereon. "But when an agent has any beneficial "interest in the performance of the contract, "as for commission or the like, or has a "special property or interest in the subject-"matter of the agreement, he may support "an action in his own name on the contract. "So, where a contract is in terms with an "agent personally, he may sue upon it; and "if a servant personally carries on business "for his master, and appears to be the "owner, he may sue upon contracts made "with him in that capacity."

Calvert, on his Treatise upon the law respecting parties to suits in Equity, says, page 232: "If an agent institutes a suit under an "authority given to him by his principal, "he must do so in the name of the principal." And this practice, I believe, is invariably adopted on the original side of the High Court, and was recently adopted in the case of A. B. Mackintosh *versus* Emily Temple and another, in which the plaint was verified by the local agent of the plaintiff who was absent in England. (*See* Indian Jurist, N. S., page 333.)

In the present case, the plaint does not disclose that Mr. Glascott has any interest of his own in the suit, nor is the kubooleut in terms with him personally, so that he is not a necessary party. I therefore suggested to the pleader to withdraw from the suit, but this he refused to do, as being against the express instructions of his client, and the result has been that I have struck off the plaint with costs, the plaintiff to be at liberty to bring a fresh suit in an amended form; but this order has been passed contingent on the opinion of the High Court on the following point, *viz.*:—

Whether Mr. Glascott, under the circumstances stated, is the proper party to

maintain this action, his principals being resident in England, and not having been made parties, plaintiffs?

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the Judge of the Small Cause Court has taken a correct view of this case, and that Mr. Glascott cannot maintain the action in his own name.

The 8th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation—Allegation of fraud—Sections 9 and 10, Act XIV., 1859.

Cases Nos. 60, 67, 80, and 81 of 1867.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Sarun, dated the 31st December 1866.

Byjnath Suhaye and others (Defendants), *Appellants,*

versus

Brohmo Deo Narain and others (Plaintiffs), *Respondents.*

Baboos Sreenath Doss, Kissen Succa Mookerjee, Kalee Kishen Sein, and *Rajendronath Bose* for Appellants.

Baboos Onookool Chunder Mookerjee, Unnoda Pershad Banerjee, and *Mohesh Chunder Chowdhry* for Respondents.

In a suit to recover landed and other property to which plaintiff made title by inheritance, and endeavoured to set aside defendant's plea of limitation by alleging fraud—HELD that, even if the allegation were true, as it did not exhibit concealment of the cause of action within Section 9, Act XIV., 1859, and the alleged fraud did not constitute an ingredient in plaintiff's cause of action, it could not get rid of the effect of time.

Phear, J.—THESE appeals arise out of one suit, in which the plaintiff sought to recover landed and other property, to which he made title by inheritance from his father, one Bukshish Narain. The appellants in the four cases now before us are some of the many defendants against whom the Lower Court has given decrees in the suit.

In No. 60, the appeal is brought by defendants against whom the Principal Sudder Ameen has decreed that the plaintiff is entitled to recover certain lands named as Mouzahs Russoolpore, Berham, and Saholee. It appears by the evidence of the plaintiff himself that Bukshish Narain, through whom the plaintiffs claim, was dispossessed of this property by his co-sharers in it, so far back as 1242 F. S., and afterwards brought a suit for the same in which he was non-suited. It is also admitted that Russoolpore has never, from that time to this, come back to the possession of either Bukshish or his son, or of any one in their behalf. The plaintiff, however, seeks to get rid of the effect of time in barring his claim by alleging fraud in the defendants; but even supposing his statements in this respect to be true, they do not exhibit a concealment of the cause of action within Section 9 of Act XIV. of 1859, nor does the fraud alleged constitute an ingredient in the plaintiff's cause of action within Section 10 of the same Act. We are, therefore, of opinion that, as regards Russoolpore, the plaintiff's suit is barred by lapse of time.

As regards Berham and Saholee, it seems to be clear that, after the death of Bukshish Narain, and during the minority of his son, the present plaintiff, they were given back by the co-sharers of Bukshish Narain to Mahtab Koer, his widow, the mother of the present plaintiff and at that time his guardian, and were afterwards sold by her to the appellants. The plaintiff contends that this alienation was not such as could be justified under Hindoo Law; but the defendants urge that plaintiff is not now entitled to question it on this ground, inasmuch as he himself, as they say, after coming of age, presented a petition to the Collector ratifying the sale, and praying that mutation of names might be made accordingly. The plaintiff totally denies ever having presented such a petition, and, indeed, sets up an *alibi* to prove that he could not have done so. He also maintains that he was a minor at the date of this alleged petition. The Lower Court finds that the defendants' case on this point is a fraud, and that the plaintiff did not in fact present any petition for mutation of names

to the Collector. We regret that we cannot concur in this finding. The petition itself and the *factum* of its presentation by the plaintiff are very distinctly deposed to by two witnesses, mooktears, one of whom is a distant relation of the plaintiff's, and who both say that they identified the plaintiff on that occasion. No reason is given for supposing that these persons were committing deliberate perjury, and their evidence is very clear, and apparently natural. On the other hand, the depositions of the four witnesses adduced by the plaintiff, to show that he was at Darjeeling at the time, are of the most meagre character. It would be almost impossible to assign perjury upon them, and, even if taken to be true to the letter, they do not exclude the possibility of the plaintiff having been at home at intervals, during one of which he might have filed the petition relied upon by the defendants; and then we observe that, although the plaintiff himself gave his evidence at the trial, he did not repudiate the petition, or in any way deny having presented it, although his plaint in express words asked to have it annulled. We think, therefore, that the petition was presented by him as the defendants allege. We also think that the course taken by the plaintiff in denying it relieves us from the necessity of inquiring whether the ratification contained in the petition ought to bind him. It seems to us, considering the plaintiff's falsehood on this point, that the weight of the evidence is in favor of his having been of age at the date of the petition; and as he does not come into Court with clean hands, he has no good ground for asking the Court to exercise its equitable discretion in his favor, by saying that the defendants took undue advantage of his youth. On the whole, we are of opinion that the appellants in No. 60 ought to succeed, and that the plaintiff's claim against them ought to be dismissed, as well as regards Berham and Saholee, as Russoolpore.

In appeal No. 67, the plaintiff-respondent's vakeel admitted before us that his client's claim was barred by the operation of the Act of Limitation.

And in No. 80, the plaintiff-respondent's vakeel said that the parties had come to terms, and consented that the appeal should be decreed with costs.

In No. 81, it appeared to us, after a lengthened discussion, that, as against the appealing defendant, the plaintiff only seeks in this suit to set aside a certain assignment of his rights and interests under decree of 1829, which assignment had bee made on his behalf to one Odit Shaha, b his mother and guardian in August 1858 and we think that the plaintiff substantiall obtained no further remedy in the Cou below, although the decree of that Cou seems, on first reading, to go further. Od Shaha, the assignee, does not now resist th application, and the appealing defendan himself, who is only made a defendan because he is admitted in the situation of judgment-debtor under the decree of 1829 does not care about the matter of the assign ment of the plaintiff's rights and interest under the decree; he is only concerne in urging that he is not liable to satisfy th decree of 1829, or any part of it. It is clea that we cannot consider this point here. I does not arise between the parties, but i will properly come to be determined whe execution of the decree of 1822 is sough in the Court which is charged with carrying that decree into effect. And so far as th petition of appeal objects to the setting aside of the assignment of 1859, no ground is shown on the part of the appealing defendant why the decree of the Lower Cour should be interfered with. This appeal is therefore, dismissed. But no costs are given, because the plaint not only asks as against the appealing defendant that the assignment in question should be set aside but also seeks to recover from him the debt which formed the subject of the decree of 1829, and it is only now before us that the plaintiff admits he cannot press this claim in this suit. The decree of the Lower Court is also vague on this portion. Consequently the appealing defendant had justification for coming to this Court.

Appeals Nos. 60, 67, and 80 are decreed, and the judgment of the Lower Court, so far as it affects the appealing defendants, respectively, is, in each case, reversed, and the suit of the plaintiff is to the same extent dismissed with costs in both Courts.

As regards appeal No. 81, the decision of the Lower Court, setting aside the assignment of 1858, is affirmed; but it is at the same time declared that the decision in no other respect affects the appealing defendant, and no costs are given.

The 10th February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Documents diverting inheritance—Hibbanamahs—Seisin—Legacy to one of several heirs—Posthumous son.

Miscellaneous Appeals from an order passed by the Judge of Dacca, dated the 28th May 1867.

Case No. 403 of 1867,

And the cross-appeal No. 26.

Abedoonissa Khatoon and others (Decree-holders), *Appellants,*

versus

Ameeroonissa Khatoon and others (Judgment-debtors), *Respondents.*

Messrs. R. V. Doyne and *C. Gregory* and *Baboo Kishen Kishore Ghose* for Appellants in No. 403.

Mr. G. C. Paul and *Baboo Onookool Chunder Mookerjee* for Respondents.

Deeds of sale or wills, which divert the course of inheritance, must be proved by legal evidence before they can become operative.

To make a deed of gift valid under the provisions of the Mahomedan Law, seisin is necessary; if the donor is not in possession at the time, the gift is void.

A legacy cannot be left to one of a number of heirs without the consent of the rest.

A posthumous son has a legal share in his father's property.

Loch, J.—The facts of this case are as follow. Wahud Ali brought a suit against his father Abdool Ali to recover possession of certain estates which devolved upon him from his mother and others, which had been given under deeds of *heba* by his father, of the possession of which his father had deprived him. Wahud Ali was unsuccessful in the first Court, and with Mr. Dunne, to whom he had sold a portion of the property in litigation, preferred an appeal to the High Court, which reversed the decision of the Principal Sudder Ameen. Before the appeal was disposed of, Wahud Ali died, leaving a widow, Abedoonissa, and a daughter, Ali Rukhi, since deceased. Abedoonissa was allowed by the Court to represent her husband for the purpose of carrying on the appeal, and the judgment of the High Court, dated 14th March 1864, is given in these words: "Confining "ourselves to the matter in issue in the "present suit, our decree will proceed on "the basis of the validity of the three "deeds of gift, and the invalidity of the "later documents. We shall declare that "Wahud Ali was in his lifetime, and "that those who are now by law his heirs "and representatives are, entitled to a de-"cree for setting aside the documents "relied upon by the respondents, and for "the recovery of the property sued for."

The representatives of Wahud, then, at the time of his death, were his widow Abedoonissa, entitled under the Mahomedan Law to 2-annas share; his daughter Ali Rukhi, to an 8-annas share; and his father Abdool Ali, the defendant (respondent) in this appeal, to 6-annas share. Ali Rukhi subsequently died, and her share in the paternal property was to be divided among her legal heirs, among whom is the respondent Abdool Ali, her grandfather, entitled, in the absence of other nearer relations, to two-thirds. Abdool Ali died after the appeal was decided, and left as his heirs a widow, Ameeroonissa, the appellants in case No. 426, and a daughter Kurumunissa. It is also said that a posthumous son, by name Wajid Ali, has been born to Wahud Ali, and it is to establish the paternity of this child that the other appeal, No. 403, has been instituted.

The property is in the possession of the heirs of the judgment-debtor Abdool Ali, who, as above stated, is an heir and representative of Wahud Ali. Rukhi, the widow of Wahud Ali, with Messrs. Dunne and Wise as executors of Wahud Ali, applied to execute the decree of the High Court, but were opposed by Abdool Ali, and the Judge, instead of determining who were the heirs of Wahud Ali, entitled to represent him in execution of the decree, refused to carry out execution, and referred the

parties to a regular suit, to determine which of the claimants was entitled to represent the deceased, Wahud Ali. An appeal was preferred to the High Court, and on 11th February 1867 the Judge was directed to ascertain who were the parties entitled to execute the decree of the High Court of 14th March 1864, and from his judgment, passed in conformity with the above order, the present appeals have been filed.

Four instruments, said to have been executed by Wahud Ali, were produced in Court. The first is a deed of sale to Mr. Dunne, dated the 12th Falgoon 1268; the second is a hibbanamah of the 10th Falgoon 1269, in favor of his wife Abedoonissa and his daughter Ali Rukhi; the third is a will, bearing date the 11th Falgoon 1269, by which he appointed his wife to be the manager of certain *wuqf* property in default of heirs male of his own body; and the fourth is a will of the same date, under which he appointed his wife, Mr. Wise, and Mr. Dunne, executors and managers of the property of his daughter Ali Rukhi. It is contended by Mr. Paul, for the appellant Ameeroonissa, that these documents divert the course of inheritance, and therefore, to render them operative. it was necessary that they should be legally proved; that the Judge has not taken any legal evidence in support of them, and the conclusion he has come to, that they are genuine documents, is based on no legal evidence; that, even if genuine, the hibbanamah is void under the Mahomedan Law, as seisin was not given to the donors at the time, and the will in favor of his wife is invalid, it having been made in favor of an heir without the consent of the other heirs.

For the appellants in case No. 403, two points are urged by Mr. Doyne: *first*, that the Judge, without taking evidence, has decided against the legitimacy of Wajid Ali, the posthumous son of Wahud Ali; and, *secondly*, that the Judge has refused to give mesne-profits, though granted by the decree.

The objections raised by the appellants in No. 426 are valid, and the Judge's order must be modified. The Judge, before pronouncing on the genuineness of the documents before us, should have required the party propounding them to prove them by legal evidence. The fact of registration does not establish the genuineness of the documents. It is, however, unnecessary to send back the case to have the hibbanamah of 10th Falgoon 1269 and the will of the 11th Falgoon 1269 proved: for, even admitting them to be genuine, they are invalid under the provisions of the Mahomedan Law. To make a gift valid, seisin is necessary. Now, when Wahud Ali gave this property to his wife and daughter, it was not in his possession, and consequently he could not give them possession, and therefore the gift is void. (*See* Baillie's Mahomedan Law, pages 512 and 513, and Macnaghten's Mahomedan Law, page 50, Section 4, and the precedents of gifts in the same volume, case 6, page 201)

The deed in favor of Abedoonissa, dated 11th Falgoon 1269, must, we think, be treated as a will. It has all the effect of a will, and disposes of property after the death of the party executing it. As such, it is clearly inoperative under the Mahomedan Law, whether it be genuine or not, for we do not find that it was executed with the consent of the legal heirs. The rule is, "that "a legacy cannot be left to one of the "heirs without consent of the rest." (*See* Macnaghten's Mahomedan Law, Chapter Wills, Rule 3, case 4.) Now, it is clear that Abdool Ali was one of the heirs of his son, and that he was not a consenting party to this will.

The objection raised to the other will of the same date, appointing Abedoonissa and Messrs. Dunne and Wise executors to the property of Ali Rukhi, is not pressed. If she died before Abdool Ali, it will be necessary to determine whether he is entitled as an heir, and to what extent. We think, therefore, that on the appeal of Ameeroonissa, No. 426, the case must go back for the Judge to take evidence as to the execution of the deed of sale by Wahud Ali in favor of Dunne on 12th Falgoon 1268, and to determine whether it was a *bonâ-fide* sale. If the sale be proved, Dunne will be entitled to represent Wahud Ali to the extent of his purchase, and the legal heirs and their representatives will take the remainder according to their respective shares; the share of Ali Rukhi from her father will be taken by her legal representatives.

With regard to the other appeal on the part of Abedoonissa, No. 403, we think the case must be remanded that the Judge may allow the appellant to produce evidence to prove that Wajid Ali is the legitimate posthumous son of Wahud Ali, and, should this be the case, he must be admitted to represent his father to the extent of his legal

share in his father's property under the Mahomedan Law. On the second point raised in this appeal, we are clearly of opinion that the decree intended to give mesne-profits. It in effect decreed the claim of the plaintiff Wahud Ali. The case will be remanded to the Judge, to be disposed of by him with reference to the above remarks, and we think the parties should pay their own costs in these appeals.

The 11th February 1868.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Sale of khas mehal—Adding parties in appeal—Possessory decree.

Case No. 66 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Moorshedabad, dated the 6th October 1866.

Messrs. R. Watson and Co. and others (Defendants), *Appellants,*

versus

Ranee Shurno Moyee (Plaintiff), *Respondent.*

Messrs. R. V. Doyne, R. T. Allan, and *J. S. Rochfort,* and *Baboos Kishen Kishore Ghose, Juggodanund Mookerjee,* and *Nil Monee Sein* for Appellants.

Messrs. G. C. Paul and *J. T. Woodroffe,* and *Baboos Sreenath Doss, Unnoda Pershad Banerjee, Ashootosh Chatterjee,* and *Bhugobutty Churn Ghose* for Respondent.

Suit laid at Rupees 93,751.

A plaintiff, suing for possession of lands on the ground that they form part of a *khas mehal* bought by him from Government, must prove that they do, in fact, form part of it.

When a Collector, by order of the Board of Revenue, sells a *khas mehal* as of a specified area and jumma, and borne on the *towjee* under a certain number and name, it is the duty of the Collector to point out and give possession of that which he has professed to sell.

Persons not parties in the original suit are not entitled to have themselves added as appellants in the Appellate Court.

Seton-Karr, J.—THE plaintiff sued, stating that she had bought from Government the khas mehal of Chur Doomreah, recorded as No. 560 in the Collectorate rent-roll of Moorshedabad, on the 15th of January 1864; that the said mehal was then held in lease, as it had long been, by Mr. Dalrymple on the part of Messrs. Watson; that, on the termination of this lease, she obtained possession, through the nazir and an ameen, in May and June 1865, and cultivated the *chur* now claimed, by sowing vetches and mustard-seed in Assin 1272 (September 1865), whereon the defendants, in the month of Kartick following, dispossessed her from 15,000 beegahs of the said mehal; and that she has been accordingly obliged to sue to retain possession.

The defendants, Messrs. Watson and Co. and Messrs. Jardine, Skinner, and Co., filed separate written statements, which, however, agreed in all material points. Their defence was, that the lands claimed did not form part of Chur Doomreah at all; that this mehal, as bought by the plaintiff, contained beegahs 10.377-10-2, and no more: whereas the lands now claimed belonged to certain villages of Pergunnah Goas, being lands which had been washed away prior to the survey of 1853, and had again re-formed on their original sites subsequently to that operation; that the defendants held the land by different titles; that the plaintiff had never been in possession for any time, and had never been dispossessed; and that she had no right or interest in the same.

Ranee Anund Moyee pleaded that the lands were not part of the Chur Doomreah, which was a resumed mehal, and that they were situated outside its boundaries. The plaintiff, in a written statement, which we observe she was improperly allowed to file more than six weeks after the defendants had filed theirs, reiterated the statements made in her plaint, and added that the Government had been in possession themselves, or by lease, of the lands claimed, as part of the resumed mehal for some 24 years; that the Puddah River had broken through the *chur* somewhere between 1845 and 1853, and had divided it into two parts without destroying its continuity; and that the lands claimed had been demarcated as part of the *chur*, and as belonging to Government by the survey of 1853.

The Principal Sudder Ameen got over an issue of limitation, and then tried the suit on the main issues as to whether the land was part of mehal No. 560, and whether it formed part of the plaintiff's purchase, or whether it was an accretion to the villages of the defendants, known as Majhiadiar and others.

The Principal Sudder Ameen also deputed an ameen to the spot; and, relying on his map and lengthy report, as well as on the other evidence filed in the case, and on the depositions of witnesses, decided that the lands claimed belonged to Chur Jazeera Doomreah, and that they had been bought by the plaintiff, who was consequently entitled to a decree.

In appeal, the case has been fully argued by Mr. Doyne for the appellants, Messrs. Watson and Co., and by Messrs. Paul and Woodroffe for the plaintiff. Mr. Rochfort also appeared for Ranee Anund Moyee, but practically on the same side and to the same effect as Mr. Doyne.

Baboo Kishen Kishore Ghose put in a claim to be heard on the part of Government as intervenor, and also on the part of the Court of Wards.

It seems, to go back to the origin of the lands, that in 1838 and 1842 resumption-proceedings were instituted by Government for Chur Doomreah, which was then claimed by certain parties as belonging to Kidderpore, in Pergunnah Goas; and it was decided by the Special Commissioner that the said *chur*, of which the area was stated to be 6,179 beegahs, belonged to Government. Accordingly, the *chur* was resumed, and was leased out to Mr. Dalrymple as the representative of Messrs. Watson, for various periods, the first of which dated from October 1845, while the last ended in 1865. The *chur* at its first settlement was stated to contain 6,179 beegahs, and the jumma assessed was Rupees 2,294-9-10.

The documents filed in this case are somewhat voluminous, but the main issue to be tried is, after all, what was the nature and extent of the plaintiff's purchase from the Government in January 1864? Did the lands now in dispute form part of the Government khas mehal No. 560, and were they held by Government and parted with to the plaintiff by the sale of its rights?

The plaintiff's case, as laid in her plaint, was that she purchased the lands in question, and that she obtained *khas* possession of the *chur*, including these lands, though she was soon after dispossessed by the servants of the defendants.

The mehal No. 560 is one of those which are, at certain periods, offered to the public for sale by Notification in the Government *Gazettes*, formally published under the authority of the Board of Revenue.

The Notification regarding this mehal in the Government *Gazette* is as follows:—

No. of Lot.	Towjee.	Name.	Area.		Revenue.		Upset price.	
			Bhs.	Co. Ch.	Rs. As. P.		Rs. As. P.	
1	560	Doomreah Jazeera, Pergunnah Goas.	10,377	10-2	2,469	13-11	4,819	1-10

In the Lotbundee the same area is stated.

No area is specified in the deed of sale, nor is there any attempt to fix or define the boundaries, or to specify the extent of this mehal otherwise than by the area in so many beegahs. The plaintiff, out-bidding several competitors, purchased the mehal for about 50,000 rupees, and her present claim would make in some 26,000 beegahs in extent.

After purchase, complaints arose in the way not unusual in these cases, and the matter terminated by the defendants being retained in possession by the orders of the Magistrate under Section 318 of the Criminal Procedure Code.

The part which the defendants say is the real, and the whole of, Chur Doomreah, is marked in yellow in the map of the ameen.

It is separated from the spot now in contention by a stream or *srota*, and it is not denied by the plaintiff that the undisputed portion now held by her contains an area fully equal to the area described in the Notification and Lotbundee which preceded the sale.

The main contention which has been raised in this appeal depends on the effect of the sale-proceedings, as well as on that of the survey-proceedings in 1853-54, and on certain proceedings of the Collector in 1855-56, when a dispute arose as to the extent of the *chur* then leased to Mr. Dalrymple, to which proceedings we shall more particularly allude.

It is perfectly true that, in the survey-map of 1853, the whole of the part now claimed by the plaintiff is designated as "Chur Jazeera Doomreah," and that it forms there one continuous piece running from east to west with the main stream of the Ganges on its north and a branch to the south.

It is also true that, at the time, the number of the mehal was changed from 306 to 560, and that its extent was estimated by the officers of the Department to be 28,000 beegahs—an extent which would fully cover both the disputed and the undisputed lands.

But this survey was made when there was no dispute or discussion of any kind as to the limits of the *chur*.

The proceedings of the Collector in 1855-56 are much more important. About that time Mr. Dalrymple, as lessee of the Government, had complained to the Revenue Authorities in regard to this *chur*, stating that the land on the west had washed away, and that on the east had accreted; while a proclamation in regard to a different *chur* had induced the ryots to withhold their rents, and an ameen, who was sent to the spot, also reported that Mr. Dalrymple was preventing him from making certain measurements which he wished to make of the lands as appertaining to Kidderpore and other mouzahs. The whole contention of Dalrymple was, then, that the lands actually formed a part of the Government *chur*, of which he was the lessee; but, though such a contention was apparently favorable to the interests of Government, the result of the Collector's enquiry, which was very full, was that the said lands were not part of the *chur*; and it is perfectly clear and indisputable that, after this full investigation, the disputed Chur Doomreah, with its accretions up to the channel on the east, which channel now forms the western boundary of the piece in dispute, was settled with Mr. Dalrymple for a period of 10 years, and that the part of the *chur* further to the east, and now in dispute, was excluded from the settlement, and was left in the hands of Mr. Dalrymple, to be held by him under some other title, which perhaps is not very clear.

The Lower Court, in the first part of its judgment, alludes to these proceedings, but says that they did not constitute a judicial award, and that the Collector did not find that the excluded lands did not belong to Chur Doomreah.

What is quite clear is, that from that time the Government ceased to have any connection with this part of the *chur* in question. The *chur* was again leased to Mr. Dalrymple after the investigation of 1855-56 at a jumma of Rupees 2,409-13-11, and its area was then stated by the ameen of the day to be 11,381 beegahs, which, allowing for deductions of 748 beegahs for jungles, roads, and so forth, would make the extent very nearly to correspond with the extent described in the Notification of the sale as that of the whole mehal.

It is contended by Mr. Paul for the plaintiff that, in spite of the refusal of the Collector to take these lands into account as part of the Chur Doomreah, Mr. Dalrymple still continued to hold them as *ijaradar* on the part of Government; that he had always dealt with these lands as part of the leased mehal, and had sub-leased out to one Ram Mundul the right of cutting grass over the whole area, as is shown by the pottah given to Ram Mundul; and that the defendants have not proved that Mr. Dalrymple held these lands as part of Habaspore, Surendarpore, Kidderpore, or other villages to the south of the lands in dispute, and separated from the same by a branch of the River Puddah with high banks on the southern side.

Much stress has also been laid by Mr. Paul on the full investigation of the ameen in the present case, which terminated in the plaintiff's favor; on the various maps filed in the suit, commencing with the resumption-map of 1842, and ending with the map drawn in this suit; on the evidence of the witnesses taken both by the ameen and by the Lower Court; and on all the probabilities; and Mr. Paul contends that it is clearly proved, from all this mass of evidence, that the whole *chur*, including the lands in dispute, formed for many years one continuous piece of alluvial land, until a small branch of the big river broke in somewhere in 1853, and divided the *chur* into

two parts; and that, subsequently, owing to other changes, the said *srota* became two streams, now known as Chilmaree and Chunchunnia, and clearly demarcated by the ameen.

It may be admitted for the plaintiff that, in spite of certain discrepancies in the evidence of the witnesses, it is quite possible that the *chur* did form originally somewhat in the manner alleged by her; that, at any rate, whether her account of the formation be accurate or not, the *chur* was for a long time one long alluvial formation broken here and there by small streams, but stretching from west to east, with a greater or less area varying with the changes of the river; and that, at whatever time the two streams which now cut through it from north to south did form, the said *chur* was at all times separated from the villages in Pergunnah Goas, held by the defendants under various titles, by a branch of the Puddah of some extent which has only of late years become fordable in particular places and at particular times of the year. The survey-map, however, would seem to show that in 1853-54 the part now in dispute had already been severed from the island which had been resumed, and which was known as Jazeera Doomreah; and this may explain a fact prominent in the contention, and quite beyond dispute, *viz.*, that for at least 10 years prior to suit the *chur* has not been treated or dealt with by the Government or its officers as one continuous *chur* of some 26,000 beegahs in extent; that the western part, over which, from that date, the Revenue Authorities claimed to exercise any acts of ownership, has never, for that period, exceeded in round numbers, and without allowing for deductions, 11,000 beegahs; and that the plaintiff is bound to show, by the clearest evidence, that Government had the power to part with, did intend to part with, and did actually part with, the great piece now in dispute, of some 15,000 beegahs, as portion of the mehal when it sold its zemindaree of the same.

The Notification of the sale, though no boundaries were specified then or subsequently, is very positive and specific as to the actual area, and it is wholly impossible for us, looking to the well-known practice in regard to these sales of khas mehals, to separate the subsequent certificate of sale from the advertisements by which the Government invited intending purchasers to come forward and invest their money in zemindaries of a certain well-known and, it may be said, an accurately defined extent.

But the plaintiff lays stress on certain proceedings of the Collector which took place after the purchase of the plaintiff, when she applied to him for some assistance in obtaining possession. The Collector, promising that he took steps in the matter only to assist the plaintiff, and without accepting any responsibility on the part of the Government, directed an ameen to give the plaintiff possession according to the survey-map of 1853; and nominal possession, as it appears to us, was given accordingly.

But, not to say that the area defined in the survey-map of 1853 does not and cannot correspond with the present extent of the *chur*, it is quite certain that we cannot accept any unusual and irregular proceedings of this kind, for they certainly deserve that character, as settling the question. Nor can we refuse to consider these same proceedings in connection with what was, and must have been, the intention of Government in parting with its rights. If the Collector took on himself to order that possession should be given to the plaintiff according to the former Thakbust map, or to any other, without due reference to subsequent proceedings of the Revenue Authorities, equally formal in character, we must consider whether that possession was what the higher Revenue Authorities intended, and whether it was the possession of what the Notification and the sale of the mehal had really conveyed.

It is quite impossible for us to accept the direction of the Collector as conclusive of the matter, when we find that little more than 10,000 beegahs were notified as the extent of the Government estate, when the plaintiff is clearly in possession of that amount already, and when she has undertaken to make out her title to the additional 15,000 beegahs which she claims as part of her purchase.

On this part of the case, we may remark that we do not put the slightest faith in the evidence as to acts of ownership exercised by the plaintiff, such as sowing mustard and other cold-weather crops on the *chur*, after she had obtained possession by the ameen deputed by the Collector in the manner indicated. Such a proceeding, in the face of the long and undisturbed possession held by the defendants, who are parties likely to watch their own interests carefully, and who have abundant resources at their disposal, would be, in itself, violently improbable, and would require to be supported

by the very best and most irrefragable evidence.

The depositions of witnesses regarding such acts of possession are very vague and general and inconclusive, and are, besides, altogether unreliable.

Thus, on this part of the case, which it was for the plaintiff to prove, and in which she must make out her title, I am quite satisfied.

1st.—That it was not the intention of the Revenue Authorities and of the Government to part with this portion of the *chur* as belonging to their khas mehal No. 560; that they had long ceased to regard it as forming part of the same, and had waived their rights to it, if they ever had any; and that, the plaintiff, standing in the shoes of Government, cannot pretend to take more than what the Government in very express terms agreed to give her, or than what she got when she openly bid for a mehal of 10,377 beegahs in extent.

2nd.—That the plaintiff, who has not come in, we must observe, under Section 15 of Act XIV. of 1859, to be summarily replaced in possession, but who has come forward to prove her right and title, cannot ask us to replace or retain her in possession, on the ground that her possession over these 15,000 beegahs was a possession in due course of law or of right, from which she has been violently and unjustly ejected.

Her possession, as we have shown, was no substantial reality; that is, she never exercised the acts of ownership which she pleads, and her nominal taking possession of what we have shown was never sold to her is at least quite as tortuous and void of right as she has contended that of the defendants to have been since 1856.

On the question of replacing in possession plaintiffs, who were unable to prove their title, but who pleaded that they had been put out of possession wrongfully by the act of the defendants, who had themselves no title, the following cases have been quoted :—

Sudder Dewanny Adawlut, 1858, p. 392.

Hay's Reports for 1862, p. 41.

Legal Remembrancer, Vol. I., 27th May 1864.

Weekly Reporter, 1864, page 243: Vol. VIII., p. 387.

Hay's Reports, page 200, Volume for 1862.

But it is unnecessary for us to go into these cases at length, or to examine the arguments and inferences which Mr. Woodroffe, for the plaintiff, has based upon them. The present case has no affinity with any of them, it being that of a plaintiff who, as we have shown, obtained a mere nominal possession, followed by no exercise of ownership whatever of that to which she had no right at all.

Neither is it necessary for us to examine at length that part of the case which was raised by Mr. Doyne for the appellants, to the effect that, on the evidence of the maps, the enquiries made at different times, and the depositions of the witnesses, the land, whatever may have been its origin or previous changes, now belongs to the defendants, inasmuch as the channel between it and the villages admittedly held by the defendants is now fordable, and that the said land is consequently an adjunct to their estates.

On this point the following decisions were quoted : Weekly Reporter, Vol. II., pp. 34 and 132 ; V., p. 283.

As just observed, however, it is not necessary to decide the case by referring to these judgments in detail, or by consideration of how far the principles which they undoubtedly lay down for the guidance of the Courts are applicable to the facts now disclosed or established by the evidence on both sides.

The real issue of the case (which is, shortly put, what did the Government sell, and the plaintiff buy, and to what is she entitled?), though not very clearly raised by the defendants' written statements, was raised at the hearing, and was properly put in issue, though the Lower Court was led away by the ameen's report, which dealt with matters beyond that officer's competence, and it disposed of this issue rather summarily, and without perceiving its important and essential bearing on the merits of the contest. It is, too, perfectly possible that an examination of the *chur* in 1855, 6th May, fully satisfied the Collector that Government had really no right in the part then excluded ; at any rate, he was so satisfied, and he abandoned the Government claim.

On the whole, we are fully satisfied that, whatever may have been the origin of the *chur*, or the effect of the changes in the river on its formation and accretion, the Government, after the fullest enquiry, expressly waived any possible claim to the land in dispute so far back as 1856, when it conferred

the last ten years' lease on the defendants; that it again formally recognized the extent of the *chur* to be that of the land now undisputed, and in the plaintiff's possession, when it notified the sale of an area of 10,377 beegahs 10 cottahs and 2 chittacks; and that it thereby practically, again, ratified the Collector's deliberate proceedings of 1855-56: that the plaintiff is bound by these formal acts of the Government; that any act of the Collector, directing possession to be given according to a survey which was made before those proceedings, and at a time when there was nothing in dispute, must be looked at by the light of the sale and of proceedings preliminary to the sale; and that, on the whole, it was never the intention of the Government to give, nor could it be possible for the plaintiff to take, anything more than the spot marked in yellow in the ameen's map, and bounded on the east by the stream known as Chilmaree.

In this view, the suit of the plaintiff should have been dismissed, and I would decree the appeal in the defendants' favor with all costs.

Government should not have appeared in any capacity, and should be struck altogether out of the record, paying its own costs.

Macpherson, J.—The plaintiff's case, as stated by her in her plaint, is that she, on the 15th January 1864, purchased the Government khas mehal, "the island Chur "Doomreah, recorded No. 560 in the rent-"roll of the Collectorate of the District of "Moorshedabad;" that the Government had concluded successive farming settlements of the said mehal with Mr. Dalrymple; that the term of Mr. Dalrymple's lease expired on the 30th April 1865; that the plaintiff "held the proprietary right" from the date of her purchase till the end of the lease, and that, on the expiry of the lease, she got actual possession "as per boundaries specified in the Thak map of 1853;" that she began to cultivate and sow crops on the land; and that thereupon the defendants ousted her from about 15,000 beegahs of the land of which she had just been put in possession, and which appertained to the mehal purchased by her. She therefore sued to recover possession of the 15,000 beegahs of which she was so dispossessed.

The first and most important issue suggested by this plaint is whether the plaintiff, who claims this land solely on the strength of her title as purchaser from Government, did, in fact, purchase the disputed lands, when she, on the 15th of January 1864, bought Chur Doomreah, No. 560 in the towjee. If the importance of this issue had been sufficiently kept in view by the Lower Court, the case might have been disposed of comparatively speedily and easily.

It was contended for the respondent that this issue was raised for the first time before us in appeal. But this is not so. In the written statement of the defendants it is raised indirectly, though not expressly, as it ought to have been. But it is one of the issues which were distinctly laid down for trial, and were tried and decided expressly, by the Lower Court. There is, therefore, no reason why the objection should not be taken now.

In her plaint the plaintiff states that, at the time of her purchase, Mr. Dalrymple held a lease of the property, which lease did not expire till the 30th April 1865. It appears to me that that lease, and the proceedings which preceded and attended the granting of it, show very clearly what it was that the Government intended to sell, and the plaintiff intended to buy, at the sale of the 15th January 1864.

Mr. Dalrymple had an *ijara* of Chur Jazeera Doomreah for the 10 years from 1252 to 1261. When his lease expired in 1261 (or 1854), the Government made a fresh measurement and settlement of the *chur*, which resulted in the *chur* being declared to contain 11,381 beegahs 2 cottahs of land, less certain deductions for waste, and the *chur* was then re-let to Mr. Dalrymple at a jumma of Rupees 2,677-10-1, less Rupees 267-12-2 collection-expenses, for a term of 10 years from the 1st May 1855. In the course of these proceedings, various other *chur* lands (which are now represented, more or less, by the land, the subject of the present suit), lying to the eastward of the lands measured and re-let as above, were expressly excluded from the settlement as not belonging to the Chur Jazeera Doomreah.

This is clear from the proceedings of the Revenue Authorities which are in evidence, and in particular from the roobookary of the Collector of Moorshedabad, dated 30th January 1856, and that of the Commissioner of the Nuddea Division of the 15th March 1856. The Commissioner confirmed the lease for 10 years from the 1st May 1855, which the Collector had given to Mr. Dalrymple, and in the roobookary in

which he does so, he thus stated the position of the Chur Doomreah: "The *chur* "has now been found to contain 11,381 "beegahs 6 cottahs 21 chittacks, from "which, deducting 748 beegahs 6 cottahs "17½ chittacks for unculturable waste lands, "there remain 10,632 beegahs 15 cottahs and "15 chittacks; out of this, 10,377 beegahs "10 cottahs 2 chittacks have been assessed at "Rupees 2,661-7-2, and 255 beegahs 8 cottahs and 15 chittacks at Rupees 16-2-41, "thus making a total jumma of Rupees "2,677-10-0 on the whole area of the *chur*. "Deducting Rupees 267-12-2 from the whole "jumma for collection and other charges "at the rate of 10 per cent., there remains "a net jumma of Rupees 2,409-13; and "a farming settlement on that jumma has "been recommended with the former ijaradar, Mr. Dalrymple, for 10 years, commencing from the 1st May 1855 to 30th April "1865."

These proceedings show, in my opinion, conclusively, that Chur Doomreah, at the time Dalrymple's last lease was granted, consisted (so far as the Government Authorities were concerned) only of that portion of the *chur* lands which had been measured and mapped as containing 11,381 beegahs 6 cottahs and 12 chittacks. As to the identity of that portion of the *chur*, there is not any real question; and that is the estate which the plaintiff purchased from Government, and of which she is accordingly now (as she admits) in possession.

Chur Jazeera Doomreah being thus under lease to Dalrymple, the Government in 1864 advertised the khas mehal for sale. In advertising the sale in the Government *Gazette*, it is stated that the sale is to be made under the authority of the Board of Revenue, and a description of the property to be sold is given in the usual tabular form. The details given are as follows :—

"No. of Lot—1; No. in the Towjee—560.

"Name—Doomreah Jazeera, Pergunnah "Goas. Area, 10,377 beegahs 10 cottahs 2 "chittacks. Revenue, 2,469-13-11. Upset "price, Rupees 4,819-11-10."

The plaintiff was declared the purchaser for Rupees 50,000, and she got a certificate of sale from the Collector in the following terms :—

"I do hereby notify that the undermentioned Government khas mehal, in the District "of Moorshedabad, at a public sale held in the "Collectorate of Moorshedabad, under orders "of the Board of Revenue, No. 125, dated "September 22nd, 1863, has been purchased "by Ranee Surnomoyee as shebait of Lukhe-"narain Dutt Thakoor, 5th February 1864 "(24th Magh 1270)."

No. of Towjee.	Name of Mehal.	Sudder Jumma.
560	Chur Doomreah, Pergh. Goas.	Rs. 2,469-13-11.

(Sd.) C. MACKENZIE,

Collector of Moorshedabad.

The plaintiff, not content with having got possession of the 10,377 beegahs 10 cottahs and 2 chittacks sold to her, seeks in this suit to get a decree for about 15,000 beegahs in addition thereto. Her contention is that she did not buy any limited area such as 10,377 beegahs 10 cottahs and 2 chittacks, but that she bought "Chur Jazeera Doomreah" *generally*, whatever might be its area; that the lands she sues for do, in fact, appertain to Chur Jazeera Doomreah; and that, therefore, she has a right to get possession of them.

Evidence has been gone into to show that the whole *chur* representing (more or less) the lands now sued for were, prior to the granting of the last lease to Dalrymple, dealt with by Government, and occupied by Dalrymple, as forming part of Chur Doomreah.

It may be that this was so, and it may also be that, in the thak and survey, prior to the granting of the last lease to Dalrymple, the estate numbered 560 in the towjee, and included all the lands which the plaintiff says it did. Nevertheless, if these facts are so, they do not prove the plaintiff's case.

There is nothing to show that, at the time of the sale to the plaintiff, the lands now sued for were included in the estate known as No. 560 in the towjee. Their having been so included in 1853 and 1854, and prior thereto, does not prove that they were so in 1864; and the proceedings of the Collector and Commissioner in 1856 lead to a directly opposite conclusion. From the sale-advertisement and certificate of sale, it would appear that the Government khas mehal Chur Doomreah was known on the

towjee as No. 560. But it appears from the proceedings of 1856 what really was Chur Doomreah, and what was its area in the opinion of the Government Revenue Authorities. And it appears from the sale-advertisement, and the certificate of sale, that it was the estate as settled by the Collector and the Commissioner in 1856 that the Government intended to sell, and the plaintiff intended to purchase, in 1864; for the name of the estate is the same, the area is the same, and the jumma reserved is the same.

The fact of a larger area having been once included in or occupied with the estate is no reason why that area should not have been subsequently reduced or abandoned by Government, who, as the proprietor, could sub-divide and deal with the property at pleasure.

It is suggested that the Revenue Authorities were, in 1855 and 1856, dealt with unfairly by Dalrymple and others, whom the defendants represent; and it is said that the Government was, in fact, defrauded when it declared Chur Doomreah to contain only 11,381 odd beegahs. But the question is not whether the interests of Government were neglected, or how far Government was defrauded in 1856, but whether or not the lands now sued for passed from Government to the plaintiff under the sale of 1864.

But it is said that the Government have admitted that the construction which the plaintiff puts upon her purchase is the correct one, for that the Collector himself subsequently (on the 8th of June and 6th of July 1865) directed that she should be put in possession of Chur Doomreah according to the Thakbust map. The Collector did make such an order upon the plaintiff's application. But he had no possible authority to do anything of the sort. For the Thakbust map referred to was an old map prepared in 1853 or 1854, prior, at any rate, to the proceedings of 1856, which fixed the limits of the *chur*, and declared the area to be (with deductions) 10,377 beegahs 10 cottahs. The Collector, in making such an order, acted in direct contravention of the authority he had received from his immediate superiors, who had directed the sale of the estate in the manner shown in the sale-advertisement; and his act cannot add to or detract from the rights acquired by the plaintiff under the contract of sale.

Moreover, the Collector, in making the order referred to, said: "I have no objection to appoint an ameen for this purpose; "but I do so on the distinct understanding that the definition of boundaries by "the ameen is not, in any dispute which "may arise about that boundary, to be "held as making Government responsible "in any way. The Ranee has bought the "property without defined boundaries, and, "in deputing the ameen now solicited, I "do an act merely to aid the Ranee, and "not one by which I accept any responsibility."

It appears to me that, in passing such an order, and in deputing an ameen to mark out the boundaries according to the Thak map, the Collector acted very negligently and very wrongly. The plaintiff had purchased an estate of a specific area from the Government, and it was the clear duty of the Government and of the Collector, as representing the Government, to point out and to give her possession of that, and that only, which she had purchased. By acting as he did, the Collector complicated matters, which up to that time were clear enough. Had he taken the trouble to see that the plaintiff was put in possession of that which she had bought, which there would have been no sort of difficulty in doing, the present suit would probably never have been brought. As I have said, however, I do not consider that the acts of the Collector in 1865 really assist the plaintiff in any degree in proving her title to the lands she now claims.

It is quite clear that all that was intended to be sold by the Government, and all that was intended to be bought by the plaintiff, at the sale in 1864, was the Chur Jazeera Doomreah, containing an area of about 10,377 beegahs 10 cottahs 2 chittacks as defined by the Revenue Authorities in 1856, and then re-let to Mr. Dalrymple; and that no portion of the lands now sued for were included in the conveyance by the Government to the plaintiff.

It has been argued that this is not a case between the Government and the plaintiff, and therefore that these questions, as to the precise area which passed to the plaintiff, do not arise properly in the present suit. But the plaintiff seeks to eject the defendants on the strength of her purchase from Government; and the defendants are, therefore, well entitled to make her prove that she did, in fact, purchase these lands as alleged. The defendants say the plaintiff never did purchase them; and such, as it appears to me, is the true state of the case.

What the relative rights of the defendants nd the Government in these lands may be, need not stop to consider.

The Government and the Court of Wards espectively appeared and prayed to be laced upon the record as appellants along ith the appellants who were defendants in the Lower Court. Their prayer as granted, subject to any objections which ight be taken by the respondent. Mr. aul, for the respondent, has objected to eir being allowed to appear in this manner, as they were not parties in the Court elow. I think that to add them now is regular; that they should be removed from mong the appellants; and that the appeal ust be dealt with as between the parties the original suit only. Government and e Court of Wards, not being parties to the roceedings, will be in no way concluded y them.

For the plaintiff it has been urged that, en if she has failed to prove her title, she as made out a sufficient case to entitle her a decree for possession—to a merely possessory decree. I shall not enter into the nsideration of the general question as to e rights of one who has been dispossessed be restored to possession even if he fails prove title; for the plaintiff cannot have e right contended for, because she, having iled to prove title, must be taken to ave been a wrong-doer in dispossessing e defendants in the first instance. One ief ground upon which it is deemed ght to give merely possessory decrees in e absence of proof of title is that it is sirable to prevent the *onus* of proving his le to be unfairly thrown on one on hom it would not have fallen had he not een wrongfully dispossessed. But the dendants were in possession long before the aintiff ever got possession; and to give e plaintiff a possessory decree, as asked , would be to throw the *onus* unfairly the defendants.

I may add that, on the evidence, I wholly isbelieve that the plaintiff ever had any subantial possession of the disputed lands. e may have had nominal or symbolical ssession, as by the ameen sticking up a mboo on the land, or the like; but disbelieve the evidence so far as it goes to ove anything beyond that.

For these reasons, I concur in the proosed decree, which will reverse the decree of the Lower Court, and dismiss the plaintiff's suit. The plaintiff will pay all costs in both Courts.

The 12th February 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Ameen's report—Withdrawal of objections.

Case No. 1965 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 31st May 1867, reversing a decision passed by the Deputy Collector of that District, dated the 31st January 1867.

Bhugobutty Burmonee (Plaintiff), *Appellant,*

versus

Gour Chunder Mundul (Defendant), *Respondent.*

Baboos Chunder Madhub Ghose, Nil Monee Sein, and *Ashootosh Chatterjee* for Appellants.

Baboo Nil Madhub Sein for Respondent.

Where parties have, before the Deputy Collector, withdrawn their objections to an ameen's report, the Lower Appellate Court should not allow the same objections to be revived before it.

Macpherson, J.—I AM of opinion that the parties having before the Deputy Collector withdrawn their objections to the ameen's report, the Lower Appellate Court was wrong in going into any question as to the correctness of that report.

I think, therefore, that the decree of the Lower Appellate Court should be altered so as to order that the rents be assessed on the full quantity of land claimed in the

plaint, and not only on the 29 beegahs admitted by the defendant. In this respect only the decree should be altered.

Each party will pay his own costs of this appeal.

Seton-Karr, J.—I am of the same opinion.

The 12th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Joint Hindoo family—Relinquishment of a lease by managing member.

Special Appeals from a decision passed by the 2nd Principal Sudder Ameen of Hooghly, dated the 6th February 1867, affirming a decision passed by the Moonsiff of Hurripal, dated the 29th August 1866.

Cases Nos. 1066 and 1067 of 1867.

Bykuntnath Dass and another (Defendants), *Appellants,*

versus

Bissonath Majhee and others (Plaintiffs), *Respondents.*

Baboos Poorno Chunder Shome and *Bykuntnath Paul* for Appellants.

Baboos Otool Chunder Mookerjee and *Rajender Coomar Bose* for Respondents.

Where a member of a joint family is registered as jotedar in a zemindar's serishta, not as for himself only, but as manager for the family, his relinquishment of the jote is not sufficient in law to authorize the zemindar to make arrangements with any others he pleases.

Bayley, J.—It is admitted by the Vakeels of both sides that these two special appeals will be governed by one and the same decision.

Plaintiff, alleging a right to a share, in certain jote lands, as one of a joint family of three brothers, sued for possession. Plaintiff stated that the property stood in the name of Nufur, but on account of the joint family, and not for Nufur only; that Nufur had collusively acted with it as his own, and had relinquished it, and it had then been leased by the zemindar to a stranger.

The zemindar and farmer were made parties to the suit; and the first Court held that it was a joint jote of the three brothers, and in their joint possession, although standing in the zemindar's serishta in the name of Nufur only.

The first Court, therefore, decreed plaintiff's suit.

The Lower Appellate Court, on a careful review of all the circumstances surrounding the case and the evidence, affirmed this order on the same finding of facts.

On special appeal, it is urged before us that, as Nufur was the registered tenant, his relinquishment was quite sufficient in law to authorize the zemindar to make arrangements with any others he pleased for the jote; further, that the Lower Appellate Court's decree will have the effect of splitting *one* jote, so registered in the zemindar's serishta, into many, to the prejudice of the security of the zemindar's rents; and that a suit for enhancement resulted in showing the jote to be Nufur's, and not joint; lastly, that the statement of Nufur and others as to the jote being *ijmalee* is not legal evidence against the zemindar in this case.

We have fully considered the arguments of the pleaders in these cases, and referred to the record; and we do not think there is any such error in law as will affect the decision on the merits.

It is true that, where the register in the zemindar's serishta shows a certain party named as the registered jotedar, the zemindar need not go any further as to whom he shall sue, provided the zemindar has not, by receipt of rent or otherwise, recognized others. But the question here is, whether Nufur was registered *as for himself only*, or (as is not unusual in Hindoo joint properties) as manager for the family.

Now, we find Nufur and the brothers pleading in another case for this as one *joint* property; and although this of itself might only bind Nufur, it is a fact on the record. Then there is other evidence that, in fact,

ough Nufur was registered, the other others held jointly with him.

On all the facts of the case and the probabilities referred to by the Lower Appellate Court, we think it is clearly found that it was joint, and not Nufur's sole property.

We may add that the plea that the effect of the decree will be to split up the jote and to injure the zemindar is futile; because the whole tenure will not, by the decree now passed, be a whit less liable for the rent than heretofore, and, moreover, the three parties will be jointly and severally liable for the arrears, instead of Nufur only.

On the whole, then, not seeing sufficient reason to warrant our interference with the decisions of the Lower Courts, we dismiss this special appeal with costs.

The 13th February 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Jurisdiction—Release of property attached, pending appeal to Privy Council.

Case No. 496 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Gya, dated the 31st August 1867.

Annundee Kooer, *Appellant,*

versus

Ranee Sooneet Kooer, *Respondent.*

Moonshee Ameer Ali and *Baboos Unnoda Pershad Banerjee* and *Romanath Bose* for Appellant.

Mr. R. E. Twidale for Respondent.

Where a third party prays for the release of property attached by order of the High Court, pending an appeal to the Privy Council, a Principal Sudder Ameen has no authority to interfere.

Loch, J.—We think the Principal Sudder Ameen had no jurisdiction in this matter. The property has been attached by order of the High Court, pending the result of an appeal to the Privy Council. The petitioner in the Court below is a third party, who was not a party to the suit; but he prays for the release of a certain part of the property attached, and the Principal Sudder Ameen has ordered the release of that property. We hold that the Principal Sudder Ameen had no authority to interfere, and, quashing his proceedings, we reverse his order with costs.

The 13th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Contract—Specific performance—Damages.

Case No. 1455 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 19th April 1867, affirming a decision passed by the Moonsiff of that District, dated the 22nd December 1866.

Kishoree Debia and others (Defendants), *Appellants,*

versus

Jugunnath Acharjee (Plaintiff), *Respondent.*

Baboo Greesh Chunder Ghose for Appellants.

Baboo Tarucknath Sein for Respondent.

Where plaintiff had contracted with defendant to purchase from him a share of certain landed estates, excluding from the contract certain land in those estates situated within a defined boundary, defendant binding himself to make over to plaintiff other lands in exchange—Held that, if defendant failed to make over the lands last mentioned, plaintiff might sue him for specific performance or for damages, but could not, under the contract, sue to recover lands which he did not buy.

Jackson, J.—The defendant in this suit is special appellant. The plaintiff contracted with defendant to purchase from him eight-

annas share of certain landed estates; but, as regards certain lands in those estates situated within a detailed boundary, and upon which the defendant's house stood, and which were in his own nij-jote and in the occupation of his servants, it was agreed that those lands should be excluded from the contract, and the defendant bound himself to make over to the plaintiff other lands in exchange for them. The plaintiff asserts that the defendant has not made over any lands in exchange under the terms of the contract, and he, therefore, sues to recover the lands which were excepted from the contract. The defendant answered that he had made over certain lands in exchange, but both the Lower Courts have held that this is a false allegation. In both the Lower Courts, the defendant also raised the objection that, as the lands now sued for were not sold to the plaintiff, he cannot sue to recover them. This objection is again raised on special appeal. The suit is based upon the contract, and there can be no doubt that its terms are express, and exclude these lands from the plaintiff's purchase. If the defendant has broken his contract, the plaintiff may sue him either for specific performance or for damages, but he cannot, under the contract, sue to recover the lands which he did not buy. The decision of the Lower Courts upon this point is reversed, and the plaintiff's suit to that extent dismissed.

Looking to the fact that the defendant has, in this suit, alleged that he did give the plaintiff other lands in exchange, and that this allegation has been found on trial to be false, we direct each party to pay his own costs in this litigation, except on this special appeal, in which the appellant is entitled to recover his costs from the respondent.

The 14th February 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Enhancement—Uniform payment of rent—Nature of proof.

Case No. 1839 of 1867.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 8th May 1867, affirming a decision passed by the Deputy Collector of that District, dated the 25th February 1867.

Surno Moyee Dossee (Plaintiff), *Appellant,*

versus

Baboo Khan Mundul (Defendant), *Respondent.*

Baboos Chunder Madhub Ghose and *Sre nath Banerjee* for Appellant.

Baboos Debender Narain Bose and *Rajend Narain Bose* for Respondent.

In order to bar enhancement of rent, proof of u form payment must be shown, if not for every year the 20 years, at least for the greater portion of th period, and for years in the earlier, as well as in t later, portion of the same.

Seton-Karr, J.—THIS case has been ver superficially tried by the Judge, who seem to think that he had only to decide, as he puts it, whether the suit was barred by limitation.

The question does not appear to me to be one of limitation properly so termed. One main point in the case was, no doubt, whe ther the defendant had proved a holding at a uniform rate for 20 years so as to ba plaintiff's claim to enhancement.

But several other points were regularly raised on appeal before the Judge, as well as before the first Court; which points have not been decided, and which were essentially necessary for a right determination of the case.

The plaintiff sued to recover rents, after notice, on 67 beegahs. The defendant pleaded that, of this quantity, 18 beegahs 7 cottahs were rent-free, and had been long ago released in his favor; that 25 beegahs were held by him at a jumma of Rupees 30-1; that 8 beegahs and 9 cottahs formed part of a jote of certain other persons; and that 10 cottahs were in excess of one *dagh.*

The total thus variously accounted for by the defendant amounts to 53 beegahs 6 cottahs, leaving a discrepancy of some 13 or 14 beegahs between the total of the plaintiff and that of the defendant.

With regard to the lakheraj land, the plaintiff, on the other hand, urged that the rent-free lands covered by the resumption-case are not those which he sued for.

Of all these various pleas and counter-pleas, the Judge takes no notice whatever. The Judge will take up the case again, and will come to a proper decision on all the points urged by the plaintiff on appeal.

With regard to his decision that the defendant had proved his plea to resist enhancement by *dakhilas* of later years,

hich are admitted to be correct, although e older *dakhilas*, he says, are not attest-d, I have to observe that mere proof f continuous holding at the same rate for years previous to suit is not sufficient to r enhancement.

The proof of uniform payment at a rate bstantially the same must be shown, if t for every single year in the full period of years, at least for a greater portion of t period, and for years in the earlier, as ll as in the later, portion of the same: t is to say, that the defendant must give od proof that, for a period covering years from first to last, he has been in e habit of paying at the same rate.

If the Judge is not satisfied that the *khilas* are properly attested, and, con-quently, that they show payment for the rlier years, he is not justified in giving decree, simply because payments for six or ven years previous to suit show the same te of rent.

The Judge should also look carefully at e *Canoongo* papers, and see from what arter they come, and what they prove, rticularly in defendant's favor.

The Judge's former decision is set aside, d he must come to an entirely new finding the points above indicated, and with re-rence to the above remarks.

Macpherson, J.—I concur in this order remand.

The 14th February 1868.

Present:

he Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

ecree for damages—Liability of purchaser for personal debt—Substitution as legal representative under Sections 102 and 103, Act VIII., 1859.

Case No. 7 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 10th September 1866.

Mr. Macleod in place of Mr. Wilson, deceased (Defendant), *Appellant,*

versus

Kunhoje Sahoo (Plaintiff), *Respondent.*

Messrs. R. V. Doyne and *G. C. Paul* and *Baboo Umurnath Bose* for Appellant.

Mr. R. T. Allan for Respondent.

A defendant, against whom a Principal SudderAmeen had decreed damages on accou..t of certain malicious and wrongful conduct towards plaintiff, appealed to the High Court; but, before the appeal came on for hearing, he died. Upon this a party (*M*) sought to be substituted for the deceased appellant, not as his legal representative, otherwise than as having purchased a share in his property and in consequence liable to be injuriously affected if the plaintiff proceeded to execute the decree which he had obtained in the Lower Court.

HELD that the *dena-pauna* clause in *M*'s deed of purchase from deceased did not make *M* liable to pay so purely personal a debt of deceased as that which the decree created, and consequently *M's* only title to be the appellant's legal representative fails.

Quære.—Whether a contract to pay a judgment-debt of another, or the possession of assets out of which such debt is liable to be satisfied, would, each of itself, constitute the contractor or possessor, respectively, legal representative of the judgment-debtor within the meaning of Section 102 and Section 103, Act VIII., 1859.

Bayley, J.—THE suit out of which this appeal arises was brought by Kunhye Sahoo in the Principal Sudder Ameen's Court of Sarun against Mr. Edward Wilson to recover damages, which the plaintiff alleged that he had sustained as the consequence of certain specified malicious and wrongful conduct of the defendant. The Principal Sudder Ameen gave a decree in favor of the plaintiff, and the defendant appealed to this Court. After this appeal was instituted, and before it came on to be heard, the appellant, Mr. Wilson, died. Previously to his death, a Mr. Macleod purchased of him a 4-annas share in a certain indigo-factory belonging to him, and this gentleman has been allowed to have his name put upon the appeal-record in the place of Mr. Wilson, deceased, subject to all objections which the respondent might make at the hearing.

The cause now comes before us in due course, and Mr. Allan for the respondent

objects that Mr. Macleod is not a person entitled to carry on the appeal in the place of the deceased. We think he is right. The procedure which admits of Mr. Macleod seeking to be substituted for Mr. Wilson is that which is laid down by Section 102 of Act VIII. of 1859, enlarged by the operation of Act XXIII. of 1861. This Section so enlarged may be read thus: "In "the case of the death of a sole appellant, or "sole surviving appellant, the Court may, on "the application of the legal representative "of such appellant, enter the name of such "representative in the place of such appellant "in the register of the suit, and the suit shall "thereupon proceed;" and the following Section enlarged in like manner says: "If "any dispute arise as to who is the legal re-"presentative of a deceased appellant, it "shall be competent to the Court, either to "stay the suit until the fact has been duly "determined in another suit, or to decide at "or before the hearing of the suit who "shall be admitted to be such legal repre-"sentative for the purpose of prosecuting "the suit." The Legislature has omitted to declare what shall be the criteria of the legal representation referred to in these Sections. We shall not attempt to supply this omission. We shall confine ourselvss to expressing our opinion upon the particular claim which Mr. Macleod puts forward.

It is admitted in this case that Mr. Macleod has not been declared by any Court or other competent authority to possess the character of legal representative of Mr. Wilson, whatever might be the effect of such a general declaration if made; and it is also clear that he is in no way concerned with the original cause of suit. The plaintiff's original right of action does not relate to the property which Mr. Macleod has bought, and, in fact, does not in any sense survive against Mr. Macleod. Mr. Macleod's counsel does not contend that his client is legal representative of Mr. Wilson in the matter of this appeal, otherwise than because he has purchased a share in a portion of Mr. Wilson's property, and is in consequence liable to be injuriously affected, if the plaintiff proceeds to execute the decree which he has obtained in the Court below. Mr. Macleod has put in his deed of purchase for 4 annas of the property. This deed exhibits the usual *dena-pauna* clause, and the contention made before us amounts to this, that he is apprehensive that the undertaking therein contained may be interpreted to make him responsible for the judgment-debt against Mr. Wilson created by the decree of the Principal Sudder Ameen. And, on this argument alone, he asks us to admit him as the legal representative of Mr. Wilson for the purpose of prosecuting the appeal. Now, without deciding whether a contract to pay a judgment-debt of another, or the possession of assets out of which such a judgment-debt is liable to be satisfied, would, each of itself, without anything more, constitute the contractor or possessor respectively legal representatives of the judgment-debt, or within the meaning of Sections 102 and 103 above quoted, we are of opinion that the *dena-pauna* clause to which we have been referred does not make Mr. Macleod liable to pay so purely a personal debt of Mr. Wilson as that is, which the decree of the Principal Sudder Ameen created. Consequently, the only title to be the legal representative of Mr. Wilson which Mr. Macleod can set before us entirely fails.

Mr. Macleod's name must be struck out of the record, and he must pay the costs occasioned by its having been put there.

The 14th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Exaction of rents contrary to a decree—Interest.

Cases Nos. 1128 and 1188 of 1867.

Special Appeals from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 28th February 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 13th August 1866.

Tara Monee Dassia (one of the Defendants), *Appellant,*

versus

Mr. J. B. Mackintosh, *Manager of the Bengal Indigo Company* (Plaintiff), *Respondent.*

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Baboos Romanath Bose and *Ashootosh Chatterjee* for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

Where a lessor, who has agreed to deduct rents in case of his special appeal being unsuccessful, compels payment of such rents, notwithstanding a decree of the Lower Court being against him, he must pay interest if the result of the litigation shows that he had no right to the money.

Bayley, J.—BOTH these special appeals will, it is admitted by the pleaders, be governed by one and the same decision here.

The special appellant urges, *firstly*, that the Lower Appellate Court has wrongly held that limitation does not bar the suit, that Court taking the cause of action from the date of the Sudder Court's decision. But it is clear to us from the very terms of the agreement between the parties that the cause of action did then arise.

The special appellant's second plea is that, as there is no condition for interest to be paid as to rents conditioned to be deducted by the lessor in case of special appellant being unsuccessful in the litigation referred to, no interest should have been allowed thereon by the Lower Appellate Court.

But as the special appellant took the rents after a decree below against him, and compelled payment, he must, we think, pay interest, for the result of the litigation showed that the special appellant had no right to the money, and the special respondent had.

In this view, we dismiss these two special appeals, 1128 and 1188, with costs.

The 14th February 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Cross-appeal—Section 348 of Act VIII. of 1859.

Case No. 1812 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 3rd May 1867, reversing a decision passed by the Sudder Moonsiff of that District, dated the 8th September 1866.

Sabetoollah Meah (one of the Defendants), *Appellant,*

versus

Rohim Dewan (Plaintiff) and others (Defendants), *Respondents.*

Baboo Gopeenath Banerjee for Appellant.

Baboos Tara Prosunno Mookerjee and *Obhoy Churn Bose* for Respondents.

Where a plaintiff's suit is dismissed, and a defendant appeals, seeking no relief whatever, but acting in the same interest with the plaintiff, the latter is not entitled, by way of cross-appeal under Section 348, to argue that his suit was wrongly dismissed.

Seton-Karr, J.—THE defendant, special appellant, has literally no *locus standi* in appeal. He put in both the *kabalahs*, and the Principal Sudder Ameen was quite right in passing a judicial opinion upon them, and in dismissing the case of the plaintiff who relied on those deeds.

I dismiss the appeal with costs and interest.

The plaintiff, who did not appeal from the decision of the Court below, wished to take a cross-appeal before us; but, as the appeal of the defendant is not made against the interests of the plaintiff, the latter cannot be allowed to avail himself of the privilege of cross-appeal.

Macpherson, J.—The plaintiff's suit having been dismissed, and no decree having passed against the appellant, it is clear his appeal will not lie, and is bad on the face of it.

The plaintiff has not appealed himself, but wishes by way of cross-appeal to be heard to argue that his case was wrongly dismissed. But he is not entitled to come in by way of cross-appeal in a case like this, where the appellant has manifestly no right of appeal, and where the appellant seeks no relief whatever against the plaintiff, but, on the contrary, is acting in the same interest with him.

I concur in the proposed decree dismissing the appeal with costs.

The 14th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Evidence—Effect of admitting documents which are not legal evidence.

Case No. 1107 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Nuddea, dated the 21st February 1867, reversing a decision passed by the Deputy Collector of that District, dated the 22nd August 1866.

Boidonath Parooye (Defendant), *Appellant,*

versus

Russick Lall Mitter (Plaintiff), *Respondent.*

Baboos Poorno Chunder Shome and *Khetter Mohun Mookerjee* for Appellant.

Baboo Tarucknath Dutt for Respondent.

Where a Judge is influenced in his estimate of parol testimony by the result of his consideration of documents, which he ought not to have dealt with as evidence, there is no proper trial of the case.

Phear, J.—This is a suit brought in the Collector's Court to obtain a kubooleut at a specified rent in respect of a right of fishing.

The defendant denied that he held any right of fishing of the plaintiff, and the primary issue in the case was whether or not the relation of landlord and tenant subsisted between the plaintiff and defendant.

The Deputy Collector decided in favor of the defendant, but the Judge, on appeal, reversed this decision, and decreed the kubooleut asked for by the plaintiff.

It is now objected on special appeal that there was no evidence before the Court to establish the relation of landlord and tenant, and also that the Judge looked at and allowed himself to be influenced by papers and documents which were not legal evidence against the defendant on the issue whether or not the relation of landlord and tenant subsisted.

We think this second objection is made out. The Judge discusses and evidently attributes much weight to certain Collectorate proceedings and jaibakee papers, neither of which class of documents ought to have been received as evidence against the defendant on this issue. The Collectorate proceedings of themselves would not even have been evidence of title, had the question before the Court required title to be inquired into; and the jaibakee papers, brought from the plaintiff's own possession, could not be used against the defendants without showing that he had in some way agreed to them.

The documentary evidence being placed on one side, there remains the parol evidence of witnesses on both sides, upon which the issue as to the existence of the relationship of landlord and tenant must be determined. With regard to this evidence, the Judge remarks: "There is not perhaps much "difference in the value of the evidence of "the witnesses for either side, judging from "their position, &c., but I do not agree with "the Deputy Collector in his estimate of the "one and of the other. I believe the evidence "with regard to the tender of a pottah."

It is not clear from these words whether the Judge formed any belief, from the oral testimony, as to any other fact than the tender of the pottah; and we need hardly say that the tender of the pottah, if proved, is an unimportant fact, until after the relation of landlord and tenant has been established. However, assuming that the Judge did believe the plaintiff's witnesses on all points in preference to those of the defendant, he gives no reason for thus differing from the Deputy Collector, who had had the advantage of seeing the witnesses and observing their demeanour. This omission is unfortunate and is irregular. We are ourselves unable to detect anything on the face of the depositions to guide us to the Judge's reasons for attaching greater credibility to the witnesses of plaintiff than to those of the defendants. We can only come to the conclusion that he was influenced in his estimate of the parol testimony by the result of his consideration of the documents which he ought not to have dealt with as evidence in the case. There has, consequently, in our opinion, been no proper trial of the case in the Appellate Court. It is pressed upon us that the case need not go back for re-hearing, inasmuch as there is not, according to the defendant's con-

tention, any legal evidence on the record to support the plaintiff's claim; but we think that, if the plaintiff's witnesses are believed, and those of the defendant disbelieved, there is direct testimony enough to make out the allegations of the plaint.

The plaintiff, under Section 348 of Act VIII. of 1859, also objects to the judgment of the Lower Appellate Court, on the ground that it has disregarded the evidence relative to the rate of rent, which the defendants, as they say, distinctly agreed to pay under a kubooleut for 5 years from 1271, and it certainly seems to us that this objection is well founded. If the plaintiff's story, as told by his witnesses, is worthy of belief, the kubooleut decreed ought to have been at Rupees 20; whereas the Judge, although he appears, by decreeing in favor of the plaintiff, to have acted on some portion at any rate of the plaintiff's evidence, only gave a rent of Rupees 2. This is unintelligible in the absence of all explanation on the part of the Judge.

For all the above reasons, the case is remanded to the Appeal Court, in order that that Court may try, on the parol evidence in the record, *first*, whether the relation of landlord and tenant subsisted between the plaintiff and defendant at the time of bringing this suit; and, *secondly*, whether the defendants agreed with the plaintiff, as alleged in the plaint, to give a kubooleut for 5 years at a rent of Rupees 20. If either of these issues are found in the negative, the suit should be dismissed. If both are found in the affirmative, then a kubooleut should be decreed at rent of Rupees 20, for 5 years, as claimed by the plaintiff.

The 14th February 1868.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges*.

Income-tax papers—Evidence—Mortgagee's accounts.

Case No. 1380 of 1867.

Special Appeal from a decision passed by the Judge of Patna, dated the 29th March 1867, modifying a decision passed by the Sudder Ameen of that District, dated the 29th December 1865.

Shah Gholam Nuzuf (Plaintiff), *Appellant*,

versus

Mussamut Emanum and others (Defendants), *Respondents*.

Mr. R. E. Twidale for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

Where the accounts of a mortgagee who has been in possession are being taken, his income-tax papers are inadmissible as evidence in his favor, though they may be used against him.

It is the mortgagee's duty to keep regular accounts, and the *onus* lies in the first instance upon him. If he has not kept proper accounts, the presumption will be against him; but this does not mean that all statements of the mortgagor against him must therefore be taken as true.

Macpherson, J.—In this case, the judgment of the Lower Court is exceedingly confused, and it is quite manifest that the accounts between the parties have not been properly taken. The case must be remanded to the Judge in order that the accounts may be taken again, and upon a proper basis.

One objection taken to the finding of the Lower Court is, that the income-tax return papers have been taken as evidence showing what the collections actually were. The income-tax papers are wholly inadmissible for any such purpose. They are admissible as contradicting the mortgagees; they may be used as *against* the *mortgagees*, but they cannot be taken against the *mortgagor*.

The accounts must be taken from the date upon which the mortgagees entered on possession, down to the present time; and they must be taken in the manner in which mortgage-accounts are usually taken. The mode of taking such accounts has been indicated by this Court over and over again, and no Judge can fail to be familiar with it.

It is the duty of the mortgagee to keep regular accounts from the day he entered on possession; and it is on the mortgagee that the *onus* lies in the first instance. If

the mortgagee has not kept proper accounts, the general presumption will be against him; but by this we do not mean to say that, because the mortgagee has neglected to keep proper accounts, all statements of the mortgagor against him must be taken as true. The Court must take the best evidence available, and decide upon it.

As regards the sum paid by the mortgagee on account of Government revenue after the resumption (payments which were not contemplated when the mortgage-contract was entered into), the mortgagee must be allowed credit for this with interest at 12 per cent. as on all other sums paid out of pocket.

We see nothing difficult or special in this case, and only remand it to the Judge that the accounts may be fully and properly taken from the beginning, in the way in which mortgage-accounts are usually taken.

The Judge will take up the case at once, and decide it without delay.

The mortgagee is entitled to interest at 12 per cent. only on his mortgage.

The 15th February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. Hobhouse, *Judge.*

Analogous cases—Judgment by consent—Effect of judgment in appeal on unappealable cases.

Reference to the High Court by the Recorder of Moulmein, dated the 24th December 1867.

Nga Bike (Plaintiff), *Petitioner,*

versus

R. Snadden (sole Defendant), *Respondent.*

When the first of 12 suits against the same defendant was filed in the Recorder's Court at Rangoon, it was agreed between the parties, by their advocates in open Court, that all legal evidence to be taken in the first suit should be evidence in the rest. When the case came on for hearing, the advocate for the plaintiffs consented that the other cases should follow the finding of the Court in the first case, but the advocate for the defendant refused assent. Judgment was given in favor of the plaintiffs in the first case, when judgment for the plaintiffs was also entered up in all the remaining cases. Defendant appealed from these decisions to the High Court, which reversed the Recorder's decision in the first case, and subsequently, without hearing arguments, reversed the decisions in such (7) of the eleven as were appealable.

HELD that the decrees passed by the Recorder's Court in the four unappealed suits are good decrees, on which execution may be issued in the usual form, provided they be not altered on review.

Case.—THIS is an application for execution of a decree passed by this Court on the 24th August 1866, in Civil Regular No. 161 of 1865. The circumstances out of which the litigation of which this suit is an item originated are as follows:—

For some years previous to the year 1865, Burmese and other foresters were in the habit of visiting the Mhineloonghee forests, and, by arrangement with the authorities in those forests, cutting timber there. According to the usual practice in the forests north of this province, the timber, when felled, was dragged into the various creeks, where, by the rise of the water during the rains, it floated and found its way into the Salween, down which river it drifted to Moulmein. In the year 1865, the plaintiff and other foresters (the plaintiffs in the numerous other suits against the present defendant Snadden) cut and dragged a large quantity of timber into a position to be floated. It was not, I think, denied, except by way of formal pleading, that the plaintiffs had arranged with the authorities, had paid the duty on, and had cut and dragged, the disputed timber, or alleged that the defendant had cut or dragged the timber, or paid any duty in respect of it. While the timber was lying ready to be floated, Captain Burn, formerly an officer in the Commission of this Province, proceeded to the Mhineloonghee forest with funds supplied by the defendant Snadden, and marked, with the hammer-marks of M and CO., on the whole or a greater part of the timber he found felled. A large portion of this timber (the subject-matter of the various Mhineloonghee suits) floated in the rains of 1865, and came down the Salween. On entering British territory, the portion sued for was secured by men employed by Snadden, and taken to Snadden's depôt at Kadoe.

I would observe that all foreign-grown timber has, in passing from the bank where it is grown to Moulmein, to pass over rapids and over rocks which prevent its being rafted, and necessitate its abandonment. The imposition of a fraudulent hammer-mark at any time before its arrival at Kadoe enables the party who imposes that mark to enter it, and to claim from the Revenue Authorities at that place a certificate called a *Tyneza*, on the production of which, after a short notice, the party who has entered the timber is allowed to remove it from Kadoe on payment of a certain rate of duty.

The principal point of difficulty, I feel, has arisen from the mode in which the Mhineloonghee suits have been treated, both in this and the Appellate Court. The first of 12 suits in which Snadden was defendant, pending in this Court on the 3rd October 1865, was Civil Regular 153 of 1865 (*Nga Khine and others* vs. *Burn and Snadden*). Under date 3rd October 1865, an entry was made on the record of this case by the then Recorder, Mr. Kennedy, as follows:—

"Regular Nos. 161 (the present suit), "162, 163, 164, 165, 166, 170, 171, 173, "174, and 176.

"Let the answers in these cases be filed "on the first day on which the offices "of this Court open after the recess, the "defendants undertaking to furnish to the "plaintiff's Advocate copies of the written "statement in these cases, respectively, on "or before Monday, the 9th instant, and it "is consented and agreed between the parties to the said several suits by their respective advocates, in open Court, that all "legal evidence to be taken in Civil Regular "No. 153, Nga Khine and others *versus* "Burn and others, shall be evidence in the "several other cases hereinbefore mentioned.

"This order to be filed with Civil Regular "No. 161, and a copy to be annexed to each "of the other cases, and let the above case "stand for the 17th instant."

Under date the 15th August 1866, there is the following entry made by Dr. Clarke, the then Recorder, on the record of the same suit (153 of 1865).

"Advocates on both sides present.

"Mr. Macleod addresses the Court, and "first raises the question as to the effect of "the order of Mr. Recorder Kennedy, dated "the 3rd October 1865, in reference to the "11 suits therein enumerated, following "the finding of the Court in this suit.

"Mr. Law, in answer to the Court, states: "'I am willing and consent certainly that "the Mhineloonghee cases should, as a "whole, follow the finding of the Court in the "case No. 153.'

"Mr. Macleod does not assent.

"The Court calls on Mr. Macleod to proceed with defendant's case in No. 153."

It is on the effect of the agreement here recorded and the subsequent refusal of defendant's Advocate that I am desirous of obtaining the opinion of the High Court.

In August 1866, Dr. Clarke gave judgment in the case above-mentioned (No. 153 of 1865) in favor of the plaintiffs, the Court finding, as a fact, that plaintiffs had cut the timber. The decision amounted, as I read it, to a finding that, whatever Shoay Gan's rights may have been, plaintiff's title was not affected by them. By a process which I do not exactly understand, but which does not appear to have met with opposition from defendant's counsel, judgment for the plaintiffs was entered up without further evidence or argument in all the remaining 11 cases. Judgment was given in these remaining suits in the following printed form:—

"With reference to the judgment and "decree this day pronounced in open Court, "and signed by the Recorder in Civil "Regular suit No. 153, and to the order of "this Court signed by Mr. Recorder Kennedy, dated the 3rd of October 1865, "the Court now proceeds to give decree in "this case, *mutatis mutandis*, in conformity "with the decree in the said case."

The defendant appealed to the High Court from the whole of these decrees, and I presume, from the mode in which their Lordships disposed of such of the eleven as were appealable, that they were of opinion that the course taken by defendant's counsel in this Court was no bar to the appeal.

Their Lordships, on appeal, reversed the decision in 153 of 1865, and subsequently, without hearing argument, reversed the other seven cases in the following judgment:—

"These are all appeals from the Recorder's Court at Moulmein.

"That Court heard and determined with "the Regular Civil No. 153 of 1865 "eleven other cases, in all of which it gave "judgment for the plaintiffs: and seven of

" those eleven cases, being within the limits " of value appealable to this Court, were " appealed with the first-named suit 153, " which was the subject of the appeal No. " 298 disposed of by our judgment of the " 22nd March.

" On the appeal in these cases being " opened by Mr. Doyne, the learned coun- " sel (Mr. Peterson) for the respondents " interposed, and, admitting that, after our " judgment in 298, he could not hope to " support the decisions in these cases as it " stood, urged that they ought to be re- " manded for a new trial, on the ground that " the plaintiff's evidence had not been com- " pletely heard, and that it was an error in " the Court below to determine all these " cases at once.

" He contended that the evidence as to " possession in the several suits would have " been distinct; and that, without hearing " such evidence, no decree could be passed " which an Appellate Court would be likely " to affirm.

" We cannot accede to this prayer. It is " quite clear, on reference to the proceedings " in the Recorder's Court in several places, " and more especially from what took place " on the 15th August 1866, at which time " the case for the plaintiffs in No: 153 had " concluded (*see* page 52 of the printed " book), that the plaintiffs deliberately *elect- " ed to be bound by the decision of the " Court in the first case*, and see the order " of 3rd October 1865 (page 12 of the same " book), by which it is declared to be agreed " between the parties that the evidence to " be given in the one case should be evidence " in all the cases.

" And the Court below, at the plaintiffs' " express request, proceeded to adjudicate " upon all the cases simultaneously.

" It is not contended that the evidence in " the other cases, if they had been separate- " ly tried, would have been of a different " kind or better than the evidence adduced " in No. 153, and we cannot shut our eyes " to the certainty that, if we send these cases " back to be re-tried (if, indeed, we were " competent to do so) after our judgment in " the appeal in No. 153, we should be " simply affording the plaintiffs an oppor- " tunity of making a new case framed so as " to meet the exigencies of our decision.

" But, in fact, it is extremely doubtful " whether, in accordance with the Code of " Civil Procedure, Sections 351-2, we should " be competent to remand these cases, if " even we thought that justice required us " to do so.

" We might, indeed, permit the reception " of additional evidence, but assuredly the " facts of the case would afford no justifica- " tion for our doing so; and we are bound " by a recent decision of the Judicial Com- " mittee (in the case of Sreeman Chunder " Dey *versus* Gopal Chunder Chuckerbutty) " to abstain from admitting further evidence " on appeal without any substantial cause " for so doing to be recorded in the proceed- " ings.

" We have therefore no choice but to " reverse the several decrees of the Court " below, and we reverse them accordingly " with all costs of these proceedings."

A further point arises here as to the effect of that decision on the suits in which (as in the present suit) the value of the property in dispute was under 3,000, and are therefore unappealable.

Defendant, on the decree in 153 of 1865 being given against him in this Court, was called on to give security to prevent execution issuing pending appeal, and to deposit the costs of the original hearing. It seems to have been considered that plaintiffs would have sufficient security by the deposit, in Court, by defendant Snadden, of certain Tynezas of the disputed timber, which was entered by Snadden partly in his own name and partly in that of R. C. Burn, and by the deposit of certain other Tynezas relating to the disputed timber which were in the hands of the Revenue Authorities at the timber-station at Kadoe.

The question I am now desirous of submitting, *viz.*, whether the decree here is capable of variation by any agreement between parties, and whether, if capable, it is affected by any such agreement, is of additional importance by reason of an application which the plaintiff makes for the payment to him of the costs of the proceedings of the original suit, deposited by defendant under the impression that the case was subject to appeal.

On the 13th May 1867, defendant moved for review of judgment in the present suit, which application was dismissed. It is argued by plaintiff's counsel that the defendant, by moving for a review of judgment, has admitted the validity of the judgment of this Court.

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My own opinion as regards the latter is to a certain extent controlled by express decision of the High Court, which has admitted the appeals in the other cases, and thereby *impliedly decided that they were not decrees made by consent.* If the judgment was by consent, there could have been no appeal.

The following is the question on which I am desirous of obtaining the opinion of the High Court:—

Are the decrees passed by this Court in the four unappealed suits good decrees in which execution should issue in the usual form?

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the decrees passed by the Recorder's Court in the four unappealed suits are good decrees, on which execution may be issued in the usual form, provided they be not altered on review. As to one (the present suit), the Recorder has, as we understand him, refused to review the judgment.

The 15th February 1868.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Declaratory decree—Purchase of a transferable tenure—Registration in zemindar's sherista.

Case No. 1290 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 9th March 1867, affirming a decision passed by the Moonsiff of that District, dated the 20th June 1866.

Hurrish Chunder Mookerjee and others (some of the Defendants), *Appellants,*

versus

Amund Chunder Chatterjee (Plaintiff), *Respondent.*

Baboo Greesh Chunder Ghose for Appellants.

Baboo Motee Lall Mookerjee for Respondent.

A *bonâ-fide* purchaser of a transferable tenure is entitled to sue for a declaration of title and possession, though he may not have registered his name in the zemindar's sherista.

Phear, J.—On the finding of the Lower Appellate Court it appears that the tenure purchased by the plaintiff at the execution-sale was not such as to render it incumbent on him to register his purchase in the sherista of the zemindar, defendant. Also the title of the plaintiff by purchase is admitted by the defendant, the tenure being admittedly one of a transferable nature, and the sale *bonâ fide.* Under these circumstances, we are of opinion that the plaintiff is entitled to a declaration of title and possession, notwithstanding that he does not make out that he had registered his name in the zemindar's sherista, as he alleged in his plaint.

The special appeal is dismissed with costs.

The 15th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Municipal Commissioners—Notice of action under Section 87, Act III. (B. C.), 1864—Right of suit by a member of joint Hindoo family—Taking down a ruinous building under Act III. (B. C.), 1864.

Cases Nos. 117 and 133 of 1867.

Regular Appeals from decisions passed by the Judge of Hooghly, dated respectively the 27th February and 1st March 1867.

Gopee Kishen Gossain (Plaintiff), *Appellant,*

versus

Mr. W. H. Ryland and others (Defendants), *Respondents.*

Messrs. R. V. Doyne and *M. L. Sandel*, and *Baboos Kishen Kishore Ghose* and *Obhoy Churn Bose* for Appellants.

Mr. J. P. Kennedy and *Baboo Mohendro Lall Seal* for Respondents.

Municipal Commissioners are entitled to one month's notice of action under Section 87, Act III. (B.C.), 1864, when they have been acting *bonâ fide*, in the belief that they were exercising powers given to them by that Act; not if their proceedings were not justified by that Act, and only colorably done under cover thereof.

A member of a joint undivided Hindoo family is not precluded from suing alone to obtain compensation in respect of a loss to himself personally, caused by wrongful destruction of property in which he had a definite share.

By Section 63, Act III. (B.C.), 1864, Municipal Commissioners, if they deem a house or building to be in a ruinous state, may, after the notice prescribed by that Section, cause the same to be taken down.

Bayley, J.—THESE two cases will, it is admitted by the pleaders for the parties, be governed by one and the same decision in this Court.

In the one case, Gopee Kishen Gossain, a resident of Serampore, sues the Chairman and Vice-Chairman of the Municipal Commissioners of that place for 5,000 rupees as damages for the illegal and malicious demolition of a house, and in the other for damages for the demolition of another house, and also for the value of the materials misappropriated by them.

The plaintiff made his co-parcener in the joint-property, Hem Chunder Gossain, a co-defendant.

The Chairman and Vice-Chairman, defendants, rested their answer on the legality of their proceedings under Sections 64 and 65, Act III. of 1864, Bengal Council.

The Lower Court has held the above Section (64) "has given the determination of the "question of fact as to whether such build-"ing is or is not in a ruinous state to the "Commissioners, and to no one else," and that, the Lower Court having no jurisdiction, the case must be dismissed by it.

Against this decision, plaintiff appeals, urging—

1. That there is nothing in Act III. of 1864 that bars the jurisdiction of the Civil Court in suits for damages for the illegal acts of the Municipal Commissioners.

2. That, as the Section 64 is to be read as providing for the action of the Municipal Commissioners under it, only when the buildings are *ruinous, likely to fall, and to be dangerous*, and as these buildings were not dangerous because they were in an open compound, away from the ordinary resort of the public, the Municipal Commissioners did act illegally, and damages are, therefore, due.

3. That the law requires the materials of demolished buildings, walls, &c., to be sold and then accounted for and appropriated in a certain mode; and that, in the cases before us, the processes required by the law were not observed.

Before, however, the case for the appellant was opened by his counsel, the counsel for the opposite party took two preliminary objections:—

1. That in one of these two cases, notice of 30 days had not been given before the plaint was filed, as required by Section 87 of Act III. of 1864.

2. That, as the plaintiff and defendant, Hem Chunder Gossain, were co-parceners in these houses, as their joint undivided Hindoo family property, the plaintiff could not sue *alone*.

The objection as to the notice not having been given for thirty days before plaint is met by the plaintiff, stating that the 30 days would have been one on which the Courts were shut; wherefore he was, by force of law, compelled to file his plaint the day before, so as to be in time. But, in my opinion, this objection comes too late. It was never pleaded below, and might well have been taken before the Judge as a plea in bar, with reference to procedure. I would, therefore, overrule this plea.

I would also overrule the *second* objection raised to the hearing, for, although the property is that of co-parceners in a joint undivided Hindoo family, the plaintiff can, in my opinion, sue for his share, whatever it may be, either as recognized amongst co-parceners, or by Hindoo Law. Here it is not contended that plaintiff has not a right to a moiety.

Then, as to the appellant's grounds of appeal, I am of opinion that the decision of the Municipal Commissioners is by the terms of the law final, so long as they act within the law.

Now, it is contended that they did not act within the law, because there was no evidence of the property being in a dangerous state, and that the local position of the houses in the middle of an open com-

pound precludes danger to passengers or others specified in the Act; and that those who came into the compound as plaintiff's private property were trespassers, and acted at their own risk.

The law is contained in Sections 64 and 65 of the Bengal Council Act III. of 1864. The important words in this case are the following in Section 64:—

"If any house, building, or wall, or anything affixed thereon, be *deemed* by the Municipal Commissioners to be in a *ruinous state, or likely to fall, or* in any way *dangerous* to the inhabitants of such house or building, or to the neighbouring houses or buildings, or to the occupiers thereof, or to *passengers*," the Commissioners (after certain proceedings) "may cause all or so much of such house, building, or wall, or thing, as they shall think necessary, to be taken down, repaired, or otherwise secured."

I see no ambiguity in these terms. Their ordinary grammatical construction, therefore, is to be followed. I think in this case that construction to be that, if the Commissioners *deemed* the house or houses to be *ruinous* (which is what their notice says they did), or if they had *deemed* it to be *likely* to *fall*, or, irrespective of either of these, they deemed it to be *in any way dangerous to passengers*, or others specified, they might legally proceed under Sections 64 and 65.

Defendants having, then, in my opinion, so far acted legally, I see no cause of action to plaintiff. I would, therefore, dismiss plaintiff's appeal on this point.

In regard to the Commissioners not having proceeded to sell before appropriating the materials, I find that Mr. Ryland's deposition on oath, which is not contradicted by other evidence, is that there was due sale of the materials and the account-sales rendered.

Under this state of facts, I would dismiss both appeals with costs.

Phear, J.—I am of opinion that, by Section 64, Act III. of 1864, Bengal Code, the Municipal Commissioners, if they deem a house or building to be in a ruinous state, may, after the notice prescribed by that Section, cause the same to be taken down. The written statements of the two defendants in these actions do not in express words state that the Municipal Commissioners of Serampore did at any time deem the building in question to be in a ruinous state, nor is there even an allegation that the acts which are charged by the plaint against the two defendants were done by them, under the directions of the Commissioners given in pursuance of such belief. But I assume, from the course which the case has taken, that both parties to the suit considered the defence to be that which such a statement and allegation would have made it. And further, inasmuch as no issue of fact was raised in the Court below, I conclude that the plaintiff does not dispute the truth and *bona fides* of that defence. In this view of the position in which the case stands, the interpretation which I have put upon Section 64 of Act III. of 1864, Bengal Council, leads me to think that the defendants are entitled to a decree in their favor on the merits. In the same view, it appears to me that the defendants, having acted as they did *bonâ fide*, under the belief that they were exercising powers given to them by the Act (as indeed they were if the facts assumed are true), were entitled strictly to one month's notice of action under Section 87 of Act III. of 1864; and consequently the suit in which the period of notice was one day short ought for that reason alone to have been determined in favor of the defendants. I may add, however, that the objection to the sufficiency of the notice is not an objection which could be made preliminary to the hearing of the suit. For, had the facts judicially arrived at been such as to show that the conduct of the defendants was not justified by the Act of 1864, and that their proceedings were only colorably done under cover of that Act, then they would not have been entitled to the protection of the notice at all.

As to Mr. Kennedy's second objection on behalf of the defendants, I think it cannot be sustained. The plaintiff is not seeking to recover that to which he has no title except he be joined with another; nor is he seeking to enforce an obligation existing towards himself jointly with others, and not otherwise. He is merely suing to obtain compensation in respect of a loss to himself personally caused, as he says, by reason of the defendants' wrongful destruction of property in which he had a definite share. It seems to me that such a loss would give rise to a distinct right of action in the plaintiff himself, entirely separate from all consideration of other persons.

But for the reasons which I have already given, I think that these appeals must be

dismissed, and the judgment of the Court below affirmed, with costs in both cases.

The 15th February 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Optional and compulsory registration—Section 68, Act XVI., 1864.

Case No. 1166 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 12th March 1867, modifying a decision passed by the Moonsiff of that District, dated the 16th March 1866.

Munsoor Ali (Plaintiff), *Appellant,*

versus

Azmut Ali and others (Defendants), *Respondents.*

Baboo Gopeenath Mookerjee for Appellant.

Baboo Motee Lall Mookerjee for Respondents.

Under Section 68, Act XVI., 1864, registered deeds are entitled to preference over unregistered deeds, even of that class the registration of which is optional; the practical distinction between the two classes being, that deeds, the registration of which is compulsory, if unregistered, will not be received in evidence at all, whereas deeds, the registration of which is optional, will be received in evidence, notwithstanding the absence of registration, though they must give way to registered documents of subsequent dates relating to the same property.

Mitter, J.—THE following points have been urged before us in this special appeal:—

1st.—That Futteh Ali and Azmut Ali having purchased the property in dispute under a bill of sale, which does not specify the shares to which they were respectively entitled, the presumption is that they purchased it in equal shares, and the *onus* of proving the contrary lies upon the special respondent.

2nd.—That the two bills of sale propounded by the special appellant being each for a sum below 100 rupees, the Lower Appellate Court was wrong in giving priority to those propounded by the special respondent, simply on the ground that these latter were registered, whereas the former were not registered.

With reference to the first point, we observe that the question of *onus* does not fairly arise. The Lower Appellate Court has found, upon exhibits produced by the special appellant himself, that the shares of Futteh Ali and Azmut Ali were such as they were represented to be by the special respondent, and we do not see any valid reason for interfering with this finding.

With reference to the second point, we observe that the Lower Appellate Court was wrong in applying the provisions of Act XIX. of 1843, the deeds in question being dated subsequent to January 1865, or, in other words, subsequent to the period when Act XVI. of 1864 came into operation. This mistake, however, does not in any way affect the soundness of the conclusion arrived at. It is quite true that, under the provisions of Section 16 of the latter Act, it was optional with the special appellant to register or not the bills of sale propounded by him; but Section 68 of the Act distinctly lays down that, even with regard to that class of deeds the registration of which is optional, registered deeds will be entitled to preference over unregistered ones. The practical distinction between the two classes of deeds, namely, those the registration of which is compulsory, and those the registration of which is optional, amounts to this, that the former, if unregistered, will not be received in evidence at all, but the latter will be received in evidence, notwithstanding the absence of registration, though they must give way to registered documents of subsequent dates relating to the same property.

The special appeal is rejected with costs and interest thereon at 12 per cent. per annum.

The 15th February 1868.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Prescription—User.

Case No. 787 of 1867.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 29th January 1867, reversing a decision passed by the Moonsiff of Hathazaree, dated the 21st July 1867.

Doorga Churn Paul (Plaintiff), *Appellant,*

versus

Pearee Mohun and others (Defendants), *Respondents.*

Baboo Otool Chunder Mookerjee for Appellant.

No one for Respondents.

A title by prescription cannot be created by length of user short of 12 years, the ordinary period prescribed by the Statute of Limitations.

Mitter, J.—THE two following points have been urged before us in this special appeal :—

1st.—That the length of user, established by the evidence produced by the special appellant, is sufficient to create a title by prescription.

2nd.—That the Lower Appellate Court has misconstrued the report of the Ameen who was deputed to hold a local investigation in the cause.

With reference to the first point, we observe that it is not necessary for us to determine in this case the precise length of user by which a title by prescription can be created. We think that any period shorter than 12 years, the ordinary period prescribed by the Statute of Limitations, is by no means sufficient for the purpose. The evidence produced by the special appellant does not carry his case beyond 10 years, and we accordingly reject this ground of appeal.

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* * * * *

The 15th February 1868.

Present :

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Appeal—Registration Law.

Case No. 400 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 4th May 1867.

Ramessur Mahatah, *Appellant,*

versus

Kullyanessuree Debia, *Respondent.*

Baboo Oopendur Chunder Bose for Appellant.

Baboo Mohinee Mohun Burdhun for Respondent.

No appeal lies to the High Court from an order passed under the Registration Act.

Loch, J.—As the pleader for the appellant is unable to show us any Section of the law under which an appeal from an order passed under the Registration Act by the Judge lies to this Court, we dismiss the appeal with costs.

The 15th February 1868.

Present :

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Jurisdiction—Restoration of cases struck off the file.

Case No. 1249 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of

Nuddea, dated the 7th March 1867, reversing a decision passed by the Deputy Collector of that District, dated the 14th December 1865.

Deen Dyal Puramanick (Plaintiff), *Appellant,*

versus

Ram Coomar Chowdhry and others (Defendants), *Respondents.*

Baboo Otool Chunder Mookerjee for Appellant.

Baboos Nil Madhub Ghose and *Greesh Chunder Mitter* for Respondents.

It is incidental to every Court of Justice to be able, in its discretion, to restore to its files any case which it has itself removed therefrom undetermined.

Phear, J.—We think the Lower Appellate Court has misapprehended the position in which this case was when it came before it. The Deputy Collector, on being assured that the parties had come to a final settlement, whether judicially or not we do not say, struck the case off his files, instead of giving a final judgment between the parties. Afterwards, he was satisfied that the parties had not settled the matter in dispute, and that, in fact, it had never been intended by them that the suit should altogether drop; he accordingly replaced the case, and tried it on its merits. We find it impossible to say that he had no jurisdiction to do this. He had not, when he restored the case, given any judicial determination of the issues in litigation before him, and was not, as we think, *functus officio*. It must always, in our opinion, be incidental to every Court of Justice to be able, in its discretion, to restore to its files any case which it has itself removed therefrom undetermined. No doubt, this discretion ought never to be lightly exercised. But in this case the discretion of the Deputy Collector is not impeached; and, as far as we can see, he acted rightly in restoring the case, whatever may with propriety be said as to the course which he took previously in striking it off.

The decision of the Lower Appellate Court is reversed, and the case is remanded to be tried on its merits.

The 17th February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble W. S. Seton-Karr, *Judge.*

Sale by Hindoo widow under legal necessity.

Case No. 883 of 1867.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 11th March 1867, reversing a decision of the Principal Sudder Ameen of that District, dated the 17th July 1865.

Sugeeram Begum (one of the Defendants), *Appellant,*

versus

Juddoobuns Suhaye and others (Plaintiffs), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Baboos Unnoda Pershad Banerjee and *Onookool Chunder Mookerjee* for Respondents.

A sale by a Hindoo widow of her husband's estate under legal necessity cannot be set aside upon payment of the amount which it was necessary for the widow to raise, or in the proportion which that sum bears to the amount for which the estate was sold.

Peacock, C. J.—In this case the plaintiff seeks to set aside the sale of the widow altogether, and he is not at liberty to set aside the sale upon payment of the amount which the defendant has proved that it was necessary for the widow to raise; nor is he entitled to have the sale set aside in the proportion which the sum, for the raising of which necessity is proved, bears to the amount for which the estate was sold.

This case is governed by the principles laid down in special appeal No. 1664 of 1867.*

The decision of the Lower Appellate Court will be reversed with costs, and the decision of the first Court affirmed.

* See *ante*, p. 107.

The 17th February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble W. S. Seton-Karr, *Judges*.

Recital in bond given by Hindoo widow—Declaratory Decree.

Case No. 1817 of 1867.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 11th of March 1867, affirming a decision of the Principal Sudder Ameen of that District, dated the 17th July 1865.

Sunker Lall (one of the Defendants), *Appellant*,

versus

Juddoobuns Suhaye and others (Plaintiffs), *Respondents*.

Baboo Debendro Narain Bose for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

A recital in a bond for money borrowed by a Hindoo widow, to the effect that the bond was given for the performance of her husband's *shradh*, is no evidence of the fact in a suit against the heirs of the husband or in a suit to charge the estate, and no declaratory decree is necessary to show that the bond was not given for the purpose specified.

Peacock, C. J.—We do not think that in this case the plaintiff is entitled to a declaratory decree that the bond was not given, as recited in the bond, for money borrowed by the widow for the performance of the husband's *shradh*. It is admitted by the vakeel for the plaintiff, that if the bond had not contained any such statement, a suit could not have been maintained for a declaration that the money was borrowed for the purposes of the widow, and not for any purposes binding upon the husband's estate or upon the heirs of the husband; and it is also admitted in like manner that the recital in the bond that the money was borrowed for the husband's *shradh* would be no evidence of the fact in a suit against the heirs of the husband, or in a suit to charge the estate. In point of law, therefore, the recital sought to be set aside makes no difference as regards the estate of the husband, or as regards the evidence which would be necessary to prove the fact in a suit against the heirs. There is, therefore, no necessity for a declaratory decree.

This case, like the case to which appeal No. 2542* relates, is a claim which ought not to have been mixed up in the same suit with claims to set aside sales made by the widow without necessity. The decisions of both the Lower Courts must be reversed, and the respondent must pay the costs of this appeal and the costs incurred by the defendant in both the Lower Courts.

The 17th February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble W. S. Seton-Karr, *Judge*.

Benamee sale by ancestor—Declaratory decree.

Case No. 2542 of 1867.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 11th of March 1867, affirming a decision of the Principal Sudder Ameen of that District, dated the 17th July 1865.

Rajbunsee Lall (one of the Defendants), *Appellant*,

versus

Judoobuns Suhaye and others (Plaintiffs), *Respondents*.

Baboo Debendro Narain Bose for Appellant.

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* *See* the following case.

Baboo Chunder Madhub Ghose for Respondents.

In a suit brought by reversionary heirs to declare that the property standing in the name of defendant had been purchased by the ancestor in his name *benamee*, it was held that there was no ground for a declaratory decree.

Peacock, C. J.—We think that the suit as to this defendant must be dismissed.

The suit was brought by the reversionary heirs to declare that the property standing in the name of this defendant had been purchased by the ancestor in his name *benamee*. It was a suit for a declaration of right, and not for relief.

If persons choose to purchase property in the names of others *benamee*, they ought at least to retain sufficient evidence in their own hands to prove that they did so; and there is no reason why the time of the Court is to be occupied for the benefit, either of such purchasers or their heirs, in making declaratory decrees in their favor.

We think, therefore, that there is no ground for the Court's making a declaratory decree; and it will be sufficient for the Court to decide what was the real transaction between the parties when the plaintiff seeks for relief.

If an application had been made to the Court in proper time to dismiss the suit as against the present defendant, there would have been ample ground for dismissing it upon the ground of multifariousness, for the plaintiffs are not contented with suing the widow and several purchasers to set aside sales made by the widow under circumstances wholly unconnected with each other, but they have thought it necessary, also, to add the present defendant, and to ask to have it declared, as against him, that he held other property *benamee* for the ancestor, and now holds it *benamee* for them as reversionary heirs.

The decrees of both Courts will be reversed, with the costs of this appeal and the costs in both the Lower Courts.

The 17th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Sale of non-transferable tenure in execution of Revenue Court's decree.

Case No. 1304 of 1867.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 23rd February 1867, reversing a decision passed by the Moonsiff of Serampore, dated the 24th July 1865.

Joy Kishen Mookerjee and another (two of the Defendants), *Appellants,*

versus

Hureehur Mookerjee (Plaintiff) and others (Defendants), *Respondents.*

Baboo Pearee Mohun Mookerjee for Appellant.

Baboos Kishen Succa Mookerjee and *Umbika Churn Banerjee* for Respondents.

Where a tenure has been sold in execution of a decree by a Revenue Court, a third person, *not* a party to the suit in that Court, alleging that the tenure was not transferable, and seeking to have his right to possession vindicated against the pretended transferee, is entitled to complain in the Civil Court, and to ask protection against the probable injurious consequences to himself of the Collector's decree.

Phear, J.—We are of opinion that the Civil Court had jurisdiction to entertain and try this action. It may be that the Court would have no power to set aside the decree and sale by the Revenue Court unless they were respectively void against the present plaintiff for fraud, but this is not the principal remedy which the plaintiff asks. He says, besides, that the tenure sold was not transferable, and he seeks to have his right to possession vindicated against the pretended transferee. He, as a third person, *not*

a party to the suit in the Collector's Court, is entitled to complain in the Civil Court that he has been wronged by the proceedings of the parties to that suit, and to ask protection against the probable injurious consequences to himself to arise from the decree in that suit, so that, whether he is entitled to have the Collector's decree set aside or not, his cause of action is one which the Civil Court was right in entertaining.

The special appellant contends that the Lower Appellate Court has wrongly come to the determination that the tenure in question was not transferable. It seems to us that this is a finding of fact with which we cannot interfere under the circumstances of the case, as there was evidence upon which the Court could judicially arrive at its conclusion in reference to this issue.

We, therefore, dismiss this appeal with costs.

The 17th February 1868.

Present:

The Hon'ble G. Loch and J. B. Phear, *Judges.*

Jurisdiction—Suit for rent in kind—Intervention.

Case No. 1056 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 19th February 1867, affirming a decision passed by the Moonsiff of that District, dated the 18th December 1866.

Gholam Mahomed Akbur and others (Defendants), *Appellants,*

versus

Radha Kishen Mohunt (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboo Promothonath Banerjee for Respondent.

In a suit for rent paid in kind, in which defendant did not deny plaintiff's right as landlord, but in which intervenors appeared and objected that the Civil Court had no jurisdiction, and pleaded, also, that defendant was their tenant, and paid rents to them—

HELD (by Loch, J.) that neither defendant's appropriation of the rent, nor the fact of his disputing plaintiff's share, nor the act of the intervenors in raising a question of right, altered the nature of the suit, or took it out of the cognizance of a Revenue Court.

HELD (by Phear, J.) that, whatever might have been the case before the intervention, as soon as the intervenor was made a defendant, and issues of right and title were raised by the Court between him and the plaintiff, there was matter which the Court had jurisdiction to decide.

Loch, J.—THIS was a suit for rent paid in kind, which the plaintiff alleged that the tenant (defendant) had appropriated, and for the value of which he brought the present suit in the Civil Court.

The defendant did not deny the plaintiff's right to rent as landlord, but contended that plaintiff claimed more than his share, which was only 1 anna and 4 dams, instead of 1 anna 12 dams, as stated by the plaintiff.

The special appellants appeared as intervenors, and objected that, the suit being one for rent, the Civil Court had no jurisdiction; and they further pleaded that the defendant was their tenant, and paid rents to them. They were made defendants in the case.

The first Court overruled the objection of want of jurisdiction raised by the intervenors, on the authority of some judgment passed by the Zillah Judge in a similar case, and proceeded to try the merits of the case and the rights of the parties, and gave a modified decree for the plaintiff.

The intervenors then appealed again, urging that the Civil Court had no jurisdiction to try a rent-case. The Principal Sudder Ameen, without disposing of this objection, and refusing to enter into question of the right, gave the plaintiff a decree on the ground that he had proved his possession of the share he claimed.

The intervenor comes up in special appeal, urging the same objection of want of jurisdiction in the Civil Court to try the case, and I think this contention is valid. The suit, as originally brought, was for rent in kind, or the value of that portion of the tenant's crop payable as rent to the plaintiff which the defendant had appropriated. Such appropriation did not alter the nature of the suit, as the first Court apparently considered it to have done, so as to give the Civil Court jurisdiction; and the fact that defendant disputed the amount of the plaintiff's share would not take the case out of the cognizance of the Revenue Court, for that question might have been disposed of, for the purposes of this suit, by the Collector's

Court. Nor did the act of the intervenor, when he interfered, and was made a defendant, and raised the question of right, give the Court jurisdiction, for his so doing did not alter the nature of the suit between the plaintiff and defendant. The first Court should, of its own motion, have rejected the plaint, and probably would have done so, had the plaint been properly examined when first put in. Subsequently, when the case proceeded to hearing, the Moonsiff, misled by some decision of the Zillah Judge, though evidently hesitating as to the jurisdiction of his Court to try the case, determined to dispose of it. On appeal, the Principal Sudder Ameen neglected his duty in not disposing of the objection urged by the intervenor. He determined not to try any question of right, and thus the suit was reduced to its original limits, *viz.*, a claim for rent, which was a suit he had no jurisdiction to try.

I think that the decisions of the Lower Courts should be set aside and declared to be void, as having been passed without jurisdiction; but, as the intervenor would not have been injured had he kept himself out of Court, I think the parties other than the defendant (tenant) may be left to pay their own costs throughout, the tenant (defendant) receiving his from the plaintiff.

Phear, J.—In this case, the plaintiff sued in the Civil Court for half the produce of certain land belonging to him as mokurrureedar, and cultivated by the defendant (ryot) at a rent payable in kind.

The special appellant was not sued, but appeared and asked to be made a party on the ground that plaintiff was not, as he said, mokurrureedar; that, in fact, there was no mokurrureedar, but that he himself was zemindar; and that the rents claimed by the plaintiff were due to him. He sought to be made a party in order to object to the jurisdiction of the Court to entertain a suit for rent.

The first Court, exercising the discretion vested in it by Section 73 of Act VIII. of 1859, made the applicant a defendant, and raised two issues of right and title, *viz.*, the 3rd and 5th, between him and the plaintiff. But eventually the Court declined to adjudicate on these issues, and gave a decision in favor of the plaintiff as against the original defendant.

On appeal, the Lower Appellate Court affirmed this decision, and also held that it was unnecessary to determine the issues of right between the plaintiff and the special appellant (defendant).

The special appellant now urges, *first*, that the suit being a suit for rent was not cognizable by the Civil Court; and, *second*, that, if the Court had jurisdiction over the subject of suit, it ought to have decided the issues raised between him and the plaintiff.

I am of opinion that, inasmuch as the special appellant was made a party to the suit at his own request, and not by the act of his opponent, or of the Court alone, the objection to the jurisdiction does not come well from his mouth; but I further think that it is without foundation. Whatever might have been the case before the special appellant became a party to the suit, as soon as he was made a defendant, and issues of right and title were raised by the Court, on his own allegations, between himself and the plaintiff, it seems to me there was manifest matter in dispute between the parties, which the Court had ample jurisdiction to entertain and decide.

I therefore think that the first ground of special appeal altogether fails.

The second ground, however, constitutes, I think, a valid objection to the decision of the Lower Appellate Court, and I would send back the case accordingly for re-trial, in order that the 3rd and 5th issues settled by the first Court may be determined, and that the decision of the Court may be made to accord with the result.

The 17th February 1868.

Present:

The Hon'ble W. Markby and Dwarkanath Mitter, *Judges.*

Costs—Scale where one has been needlessly made a party.

Case No. 69 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 29th September 1866.

Kasheenath Sein (one of the Defendants), *Appellant.*

versus

Chunder Monee Debee (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Nilmonee Sein* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

One of several judgment-debtors, jointly liable under a decree, having paid a larger amount than was due as between herself and her co-defendants, brought a suit to recover from them the excess paid by her. One of the defendants having paid more than his share, the claim against him was dismissed by the Principal Sudder Ameen, who nevertheless, on the ground that it was necessary to make him a party, awarded him no costs.

HELD that it was not necessary to make this defendant a party, and that costs should not have been refused to him.

HELD, also, that the scale on which costs should be awarded to him depends on what plaintiff claims against him, and that he is entitled to costs on the usual scale on the amount for which the suit was brought.

Markby, J.—WITH regard to the first point, namely, as to whether the appellant in this case is entitled to his costs, our opinion is that he is so entitled.

The plaintiff and defendants were jointly liable under a decree, and the plaintiff having paid a far larger amount than was due as between herself and her co-defendants, this suit was brought for the recovery, from the defendants, of the amount so paid by the plaintiff in excess of her share of the liability.

The defendant, whose case is now under consideration, had paid into Court rather more than the full amount of his share. The Principal Sudder Ameen, upon this being shown, dismissed the claim as against this defendant, the present appellant, but, upon the ground that it was necessary to make this defendant a party to the suit, awarded him no costs. The Principal Sudder Ameen says: "It appears that, as defendant No. 2 "paid Rupees 208-4 in execution of the decree on the 19th of April 1866, he has paid "Rupees 2-12-2-3 in excess of the liabilities "in respect of his own share; consequently, "the said defendant (No. 2) is no way liable "for this claim. As this party was liable "under the original decree, it was indispensably necessary that he should be made a "defendant; consequently he (defendant "No. 2) is not entitled to recover any costs; "he must bear his own costs."

Now, in an ordinary case, where we saw that the Lower Court had exercised its discretion as to granting or refusing costs, we should be very slow to interfere. But in this case costs have been withheld entirely upon a misconception. It was not necessary to make this defendant (appellant) a party to the suit: the plaintiff, as the result has shown, had no claim against him, and he could in no way be affected by the result of the proceedings.

We think, therefore, that the decision of the Lower Court, so far as it refuses costs to the present appellant, must be reversed, and this appeal be decreed with costs and interest.

The other question that has been raised is, upon what scale is the defendant entitled to his costs? Now, that depends upon what the plaintiff claims against him. All that could be due under any circumstances from this defendant was the actual amount of his share. But the plaintiff has asked for much more; she seeks by her plaint to obtain a judgment against every single defendant for the whole amount of contribution, and as the plaintiff alone is to blame for the manner in which she has brought her suit, we think that the defendant (appellant) is entitled to costs on the usual scale, that is, as on a suit for Rupees 10,446-15-11.

The 18th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Objection that a deposition was misapprehended—Grounds of appeal—Objection not noticed—Legal presumption.

Case No. 1043 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 21st February 1867, reversing a decision passed by the Deputy Collector of that District, dated the 30th August 1866.

Kazee Amalooddeen (Plaintiff), *Appellant*,

versus

Shaikh Ezah (Defendant), *Respondent*.

Baboo Poorno Chunder Shome for Appellant.

Baboo Opendur Chunder Ghose for Respondent.

So obvious an objection as that the Lower Court misapprehended the real meaning of a deposition ought to be certified in the written grounds of appeal.

Where a Lower Appellate Court does not notice an objection in the grounds of appeal which is not shown to have been pressed upon the Court, it may be legally presumed that it was on that account that the objection was not noticed.

Bayley, J.—THIS special appeal by the plaintiff is substantially against a finding of fact by the Lower Appellate Court both as to the pottah and as to the dakhilahs. The pleader urges as to the defendant's pottah, that the Lower Appellate Court itself rejected the testimony of the witnesses to it, and should not, therefore, have found its genuineness; and that the decision to which the Lower Appellate Court refers as assisting to prove the pottah was not one in which the genuineness of that document was in issue. But upon this point we observe that the Lower Appellate Court does not rely on that decision, but on the conduct of the party after it, *viz.*, that notwithstanding that decision, and the fact that the rent recorded in that pottah was paid and received for many years under it, no steps were taken to get the pottah set aside. This is one item of evidence which the Lower Appellate Court relies on in coming to the conclusion of fact, and as one so weighty as to preponderate over that against the pottah.

As to the defendant's dakhilahs, the Lower Appellate Court states that defendant deposed they were genuine, and that this is not disproved. It is now urged (though not so in the petition of special appeal) that such is not the real meaning of the deposition. If so, we think so obvious an objection ought to have been certified in the written grounds of special appeal.

Lastly, it is said that the Lower Appellate Court did not notice an objection in the grounds of appeal, that the witnesses who gave the dakhilahs were not called by the first Court. But we are not shown that this objection was really pressed upon the Lower Appellate Court; and we may, therefore, legally presume that on that account it was not noticed.

We dismiss the special appeal with costs.

The 18th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges*.

Evidence—Admissions—Written statement.

Case No. 1007 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 14th February 1867, reversing a decision passed by the Deputy Collector of that District, dated the 31st August 1866.

Radha Churn Chowdhry (Plaintiff), *Appellant*,

versus

Chunder Monee Shikdar and others (Defendants), *Respondents*.

Baboos Kalee Mohun Doss and *Romesh Chunder Mitter* for Appellant.

Baboos Sreenath Doss and *Bungshee Dhur Sein* for Respondents.

Where defendant's written statement is referred to as evidence in plaintiff's favor, the whole of it becomes evidence in the suit, and the Court can, in its discretion, attach thereto, or to any portion thereof, so much value as seems to it fit.

Phear, J.—IN the opinion of the Lower Appellate Court, the evidence produced by the plaintiff failed to make a *primâ-facie* case in favor of his claim for arrears of rent at the rate of Rupees 80 per annum.

But the defendant in his written statement admitted that he was tenant to the plaintiff, alleging, however, at the same time, that his rent was Rupees 25, and that he had paid the whole of it for the time covered by the plaint, except Rupees 13.

Dealing with this written statement of the defendant as evidence in the cause, the Lower Appellate Court came to the conclusion that the defendant did hold of the plaintiff at Rupees 25. It also considered that defendant's allegation of payment was supported by a certain dakhilah put in by him, and accordingly gave the plaintiff a verdict for Rupees 13 only.

On special appeal, it is objected that the Lower Appellate Court discredited the plaintiff's evidence for reasons which are not good; that it gave insufficient reasons for differing in opinion from the Court of First Instance relative to the value of certain evidence put in by the defendant; that the dakhilah relied upon by the Lower Appellate Court was not proved; and, finally, that the Lower Appellate Court was wrong in giving a decree according to the terms of the defendant's written statement without trying whether the payment pleaded by him was proved or not.

We are of opinion that none of these objections can be sustained. No sufficient reasons have been put before us to justify our interfering, on special appeal, with the conclusions which the Lower Appellate Court drew from the plaintiff's evidence. And, inasmuch as those conclusions left the plaintiff without a case, the suit must have been dismissed had not the Lower Appellate Court referred to the written statement of the defendant for evidence in the plaintiff's favor. This being so, as admissions, if used at all, must be received entire, the whole of the written statement of the defendant so referred to became evidence in the suit, to which, or to any portion whereof, the Court could in its discretion attach just so much value as seemed to it fit. (*See* Rajah Nil Monee Singh Deo *versus* Ramanoogra Roy, 7 Weekly Reporter, page 29.) It seems to us clear that the Lower Appellate Court did, in fact, believe the whole of this written statement, and, therefore, that its decision is supported by evidence which is unimpeachable in special appeal. These remarks dispose of the whole of the objections of the special appellant.

We dismiss the appeal with costs.

The 18th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Ejectment—Co-proprietors as tenants.

Case No. 1590 of 1867.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 8th October 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 13th January 1866.

Pran Kishore Gossain and others (Plaintiffs), *Appellants,*

versus

Dinnobundhoo Chatterjee and others (Defendants), *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Baboo Bungshee Dhur Sein for Respondents.

Proprietors are not entitled to oust their co-proprietors from lands which the latter have, as tenants, brought into cultivation.

Jackson, J.—This is a suit to obtain possession of certain lands which are admittedly in defendants' possession, and which have been cultivated by defendants and turned by them from waste land into cultivated land. The Judge, on appeal, has found that the plaintiffs never have been in possession of these lands, and are not entitled to oust the defendants and take khas possession of them as against the defendants. The plaintiffs and the defendants are co-proprietors. The plaintiffs may have some right to rent, but they are not entitled to oust their co-proprietors, who have, as tenants, brought this land into cultivation.

Appeal dismissed with costs.

The 18th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Section 246, Act VIII., 1859.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 29th March 1867, affirming a decision passed by the Moonsiff of Russoolgunge, dated the 21st September 1866.

Gokool Ram Deb (Plaintiff), *Appellant,*

versus

Ram Soondur Surma and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Rajendurnath Bose* for Appellant.

Baboo Annund Gopal Palit for Respondents.

The provisions of Section 246, Act VIII., 1859, are prospective, and do not apply to proceedings in execution under the old procedure.

Kemp, J.—It is very clear that both the Lower Courts are wrong in holding that the suit is barred because not brought within one year from the date of the order passed under Section 246 of Act VIII. of 1859.

How the plaintiff, as the Judge observes, "is attempting by a side wind to get over "Section 246," we fail to see.

The order alluded to was passed in 1857, before Act VIII. was in operation; and the provisions of Section 246 are prospective, and do not apply to past proceeding, in execution under the old procedure. Moreover, the order alluded to was not respecting possession: the judgment-debtor satisfied the debt, and the summary proceedings, as a matter of course, fell in.

We have been asked to try this case here on a point of law which is not raised in the special appeal. The plaintiff avers he was in possession up to 5th Bysack 1268, when he was forcibly ejected by the defendants. The case is remanded for trial upon the pleadings raised by the parties.

Costs to follow the result.

The 19th February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Enhancement of rent—Surrounding rates—Section 17, Act X., 1859—Declaratory decree before rent is due.

Case No. 2083 of 1867.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 26th of June 1867, reversing a decision of the Deputy Collector of that District, dated 29th September 1866.

Bogdonath (one of the Defendants), *Appellant,*

versus

Ramjoy Dey (Plaintiff), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Sreenath Banerjee for Respondent.

That a tenant is holding at a rent lower than *surrounding rates* is not a sufficient ground to be specified in a notice of enhancement; the words "surrounding rates" being not tantamount to the ground of enhancement indicated in Section 17, Act X., 1859.

A declaratory decree that the defendant is holding at a certain rate of rent before any rent is in arrear is not sufficient to compel payment at that rate when the rent becomes due, without a fresh suit.

Peacock, C. J.—The Judge has made a mistake in this case. He has not tried whether the pottah of 1195, which was one of the pottahs upon which the defendant relied, was or was not genuine. If it was genuine, then the defendant is entitled to hold at the rates fixed in that pottah, which was a

mokurruree grant. The Judge having remanded the case to try whether the pottah of the 15th of Aghran 1211 was a genuine one, the Deputy Collector found that that pottah was not genuine; but he stated that, although that pottah was not genuine, still the defendant, having held at a uniform rate for 20 years, was not liable to enhancement. The Deputy Collector says: "Upon "the evidence now brought before me, I am "of opinion that the conclusion arrived at "by me at the first hearing regarding the "validity of the pottah is erroneous; but I "still hold that a kubooleut at enhanced "rent cannot be claimed, as it is evident, "and, in fact, it is not disputed, by the plaintiff. that the defendant has held the land "for upwards of 20 years at a uniform payment of rent."

The Judge, with reference to that remark, says that, "as the defendant only pleaded "that his tenure was created in 1195 "Mughee, the presumption which the law "allows of a uniform payment of 20 years "would be rebutted by the defendant's own "pleadings, were such payments proved."

The Judge is under a mistake in supposing that the defendant alleged that his tenure was created only in 1195; for, although the defendant relied upon the pottah of that year, he did not allege that that was the origin of the tenancy, but on the contrary he stated that he and those from whom he claimed had been holding for 100 years at 10 rupees and 8 annas.

It is said that the finding of the Deputy Collector as to uniform holding for 20 years and upwards was beyond his power, inasmuch as the case had been remanded to him merely for the trial of a particular issue, *viz.*, whether the pottah of the 15th of Aghran 1211 was genuine or not. But still it would have had to be tried whether the defendant had held for upwards of 20 years at a uniform rate, inasmuch as the pottah of 1195 does not appear to have been the origin of the tenancy, inasmuch as it refers to a previous holding by the father. The decision of the Judge must be reversed. It is unnecessary for us to remand the case to the Judge for a trial of the issues to which we have referred, as we think that, whatever might be the result of such trial, the plaintiff would not be entitled to suceeed.

The only ground specified in the notice of enhancement, as it appears from the plaint (the notice itself not being in the record), was that the defendant was holding at a rent lower than *surrounding* rates. We think that that notice was not sufficient, inasmuch as it does not show that the tenant was holding at a rate lower than the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent. The words "surrounding rates" are not at all tantamount to the ground of enhancement specified in the 1st Clause of Section 17 of Act X. of 1859. These words clearly have no reference to the class of ryots by whom the surrounding rates were paid.

We are both agreed as to this objection; but for myself I may say that I should not be prepared, in a suit praying that the defendant might be decreed to execute a kubooleut at the rent of 42 rupees 8 annas, to hold that the defendant could be decreed to execute a kubooleut from a later period than that asked for, and at the rate of 32 rupees. The present, at most, is merely a suit for a declaration of right as to the amount of rent which the plaintiff was entitled to receive from the defendant. If we are at all to depart from the relief sought for as plainly expressed by the plaint, *viz.*, that the defendant should be decreed to execute a kubooleut at a specific rate from a specific date, and to treat the suit as one for a declaration of the rate of rent which the defendant was liable to pay, and not for relief, it appears to me that no sufficient ground is shown in the plaint why the plaintiff should have such a declaratory decree, instead of waiting until rent should be in arrear, and then asking for the relief to which he was entitled. If we were to give a declaratory decree that the defendant was holding at a certain rate of rent before any rent was in arrear, such decree would not compel the defendant to pay the rent when it became due: at least the payment could not be enforced by executing that decree, and it would be necessary to have a fresh suit to compel him to pay rent at the rate at which he was, by the former decree, declared to be holding.

Two suits instead of one would therefore probably become necessary, *viz.*, one declaring the rate of rent which the plaintiff was entitled to receive, and the other to enforce payment of arrears at that rate.

It appears to us that, instead of remanding this case to the Judge to try the points which he has omitted to try, the decree

should be simply reversed, and we think the respondent must pay the costs of this appeal and the costs of defendant (appellant) in both the Lower Courts.

The 19th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson,
Judges.

Remand—Fresh issues—Further evidence—Section 128, Act VIII., 1859.

Cases Nos. 185 to 198 and 201 of 1867.

Regular Appeals from a decision passed by the Judge of West Burdwan, dated the 23rd April 1867.

Messrs. R. Watson & Co. (Plaintiffs),
Appellants,

versus

Kunhye Bahadoor and others (Defendants),
Respondents.

Messrs. R. T. Allan and *J. S. Rochfort* and *Baboo Bhowanee Churn Dutt* for Appellants.

Baboo Kishen Kishore Ghose for Respondents.

When fresh issues are fixed by the Appellate Court and remanded to the Lower Court to be tried, the parties are entitled to have a day fixed for the reception of any further evidence which they may wish to adduce thereon.

Under Section 128, Act VIII. of 1859, the parties, though not entitled as of right to adduce fresh documentary evidence after the issues in the case are settled, may yet tender such evidence, stating the grounds upon which it was not tendered at an earlier stage; and the Judge may receive or reject such evidence; but the grounds on which he acts should be stated on the record.

Jackson, J.—THESE fifteen cases were remanded to the Lower Court by the High Court on the 13th June 1865. The decision of the High Court is to be found at page 73, Volume III., Weekly Reporter. The High Court laid down certain issues, and directed the Lower Court to enquire into them and decide upon the claim of the plaintiff according to the judgment arrived at on those issues. The Judge of Bancoorah first took up these cases again on the 13th November. As certain of the defendants had died while the cases were before the High Court, the plaintiff asked that their representatives might be made parties to the cases. The Judge allowed this, and directed that notice be served on those defendants to appear at the next hearing of the cases, which he fixed for the 20th December. On that date, the plaintiff asked the Judge to allow an adjournment to enable him to put in documentary evidence, and to produce oral evidence upon the issues which the High Court had sent down to be tried. We cannot find any special order passed on the record of these cases on the 20th December. But the Judge records at a later date, *viz.*, the 22nd September 1866, when the cases again came before him and a further application was made to him to receive evidence, that, to the best of his recollection, he had rejected the plaintiff's applications of the 20th December, because he did not consider further evidence necessary, as the High Court, in remanding these cases, had given no orders to take further evidence, and such fresh evidence, if taken, would not be trustworthy, as the cases had been pending for ten years. As regards the documentary evidence offered, the Judge states that he examined what was offered, and rejected it as useless and not bearing upon the points to be determined.

The Judge, having taken up these fifteen cases and eight other cases of an exactly similar nature on the 20th December 1865, decided the eight cases on that day on the evidence already upon the record, and passed no further orders upon the remaining fifteen, it being considered unfair to the plaintiff to require him to appeal all the cases. Those eight cases were decided as test cases, and the Judge gave out that he would decide the remaining fifteen cases on the merits according as the High Court decided the appeals from his decisions on the first eight cases. The appeals to the High Court preferred by the plaintiff on those eight cases did not refer to the merits of the cases, but

only to the order of the Judge refusing the plaintiff's application to be allowed to put in oral and documentary evidence upon the issues. Those appeals were rejected because the Judges of the High Court were of opinion that, if the plaintiff desired to adduce fresh oral evidence, he was bound to have taken measures to have his witnesses in attendance on the 20th December, the day fixed for the further hearing of these suits; and, on review, the same Judges held that it had not been shown to them that the documentary evidence rejected by the Judge was not of the nature he described. While these cases were pending in the High Court, fresh applications were made to the Judge asking him to receive further evidence, but they were disallowed. And, finally, these fifteen cases were again taken up on the 23rd April 1867, and decided upon the evidence which was already upon the record.

The plaintiff again appeals in these fifteen cases, and states that from the orders of the Judge, dated the 22nd September 1866, it is evident that the 20th December was not fixed for the hearing of evidence in these cases, as the Judge stated in those orders that he was unable to receive fresh evidence without the direct orders of the High Court.

We think that, when the High Court remanded these cases to the Judge for a trial of certain issues, it did not intend to shut out the parties from producing their evidence upon those issues. The Judges of this Court on the former appeals supposed that the Judge had fixed the 20th December for the hearing of such further oral evidence; but the orders of the Judge of the 22nd September 1866 show distinctly that he did not fix the 20th December for the hearing of such oral evidence, and that he would not have recorded such evidence, even if the witnesses had been present. Indeed, the Judge goes further, and adds that he would not have believed those witnesses whatever they might have said, and he makes this remark before he knows anything at all about the witnesses or what their evidence might be. We think that the orders of the Judge of the 22nd September 1866 show that the plaintiff had not an opportunity given to him to produce further oral evidence upon the issues as framed by the High Court, and that the Judge refused to receive such oral evidence upon the ground that he was not at liberty to receive it without the direct orders of the High Court. If, then, the Judge should have received that evidence, and was in error in refusing to receive it, we think that these cases should be remanded to him to fix a day for the reception and hearing of such evidence. We have no doubt that when fresh issues are fixed and are sent down to a Court to be tried, the parties are entitled to have a day fixed for the reception of any further evidence which they may wish to adduce upon those fresh issues. We think, therefore, that the Judge was in error in considering that further special orders were necessary before he could receive evidence upon the issues which he was directed to try.

As regards the documentary evidence, it is not shown to us that the Judge was in error in rejecting it as irrelevant. Indeed, it does not appear from the record of what that documentary evidence consisted. The Judge, in rejecting that evidence, does not appear to have complied with the provisions of Section 128, Act VIII. of 1859. The parties are not as of right entitled to adduce fresh documentary evidence after the issues in the case are settled; but they may tender such evidence, stating the grounds upon which it was not tendered at an earlier stage of the case, and it remains for the Judge to pass orders upon such applications according to the law. The Judge may receive the evidence or may reject it, but the grounds upon which he acts should be stated on the record.

With these remarks, we remand these cases to the Judge with directions that he will fix a day for the hearing of the oral evidence of the parties, and, after hearing such evidence, will record a further decision upon the issues which he was directed to try, and will return the records to this Court with such decision, when further orders will be passed by this Court upon these appeals.

The 20th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Decree of adjudication according to compromise —Refusal of Civil Court to execute—Appeal.

Case No. 64 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 22nd February 1867.

Ruttunessur Chatterjee (Plaintiff), *Appellant,*

versus

Gooroo Churn Chatterjee and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Baneenath Bose* for Appellant.

Baboos Annoda Pershad Banerjee and *Doorga Doss Dutt* for Respondents.

Where a Civil Court refuses an application to execute a decree given on the terms of a petition embodying certain conditions of compromise, applicant's proper course is to appeal from the order of refusal, and not to proceed by a regular suit, though he has a right of action on his decree.

Bayley, J.—In this case plaintiff appeals. Plaintiff had formerly got a decree to the effect that his suit should be held to be adjudicated according to the terms of a petition embodying certain conditions of compromise accepted by both parties.

Plaintiff applied for execution of this decree, but the Principal Sudder Ameen held (erroneously, as that officer now admits) that plaintiff's application could not be granted. Plaintiff did not appeal in the Miscellaneous Department against this erroneous order of the Principal Sudder Ameen. But he brought this regular suit for possession of 2 annas of real and of personal property, according to the conditions of compromise. There appears in the schedule of the plaint a claim for mesne-profits.

The Principal Sudder Ameen held that the subject-matter of this suit had already been duly adjudicated by the decree given on the terms of the compromise, and that no such suit could lie. The Principal Sudder Ameen, accordingly, dismissed plaintiff's suit with costs.

We are of opinion that the plaintiff's proper course would have been to have appealed from the Principal Sudder Ameen's order refusing execution, and not to have proceeded by this regular suit. But at the same time, we think, as a matter of law, that the plaintiff has a right of action on his decree given on the terms of the petition embodying the conditions of compromise. We must, therefore, reverse so much of the Principal Sudder Ameen's order as is opposed to this. But we think it is a case where this decree now given to plaintiff should be with all costs in favor of defendants.

As to plaintiff's claim for mesne-profits accruing before the compromise, we think that these would have been provided in the compromise had they really been properly due; and that the fact of their being not so provided is strong evidence of their not being due, or, if due, of their having been somehow satisfied. We think, therefore, they cannot be now claimed.

Our order is that plaintiff do obtain a decree of his right according to the terms of the petition embodying the conditions of compromise and the decretal orders thereon, and for nothing more or less; and that he pay his own and defendants' costs in both Courts.

The 20th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Sale of minor's property—Onus as to the bona fides of the transaction.

Case No. 1086 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 31st January 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 10th May 1866.

Roop Narain Singh and others (Plaintiffs), *Appellants.*

versus

Gugadhur Pershad Narain and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Poorno Chunder Shome* for Appellants.

Baboos Kishen Succa Mookerjee and *Ashootosh Chatterjee* for Respondents.

When a person, after attaining majority, questions any sale of his property made by his guardian during his minority, the burden lies on the person who upholds the purchase, not only to show that, under the circumstances of the case, either the guardian had the power to sell, or that the purchaser reasonably supposed he had such power, but, further, that the whole transaction, so far as regarded the purchaser's part in it, was *bonâ fide*. Following the principle laid down by this Court in the case of *Kanye Lall Juhoree* versus *Kaminee Dabee*, it was held that, when either the person who sells labors under disqualification, or the purchaser stands in a fiduciary relation to the owner of the property, the *bona fides* of the dealing cannot be presumed, but must be made out by the purchaser.

Phear, J.—In this case, two sons seek to set aside certain alienations of landed property made by their mother during their minority. The plaintiffs' claim was dismissed in both the Lower Courts, and they now appeal specially.

It appears that, on the death of the father, four mehals, which may be conveniently designated mehals *A*, *B*, *C*, and *D*, descended to his sons; of these, *B*, *C*, and *D* were in the hands of mortgagees, under zur-i-peshgee leases granted by the father, while *A* was unincumbered. The mother took charge of and managed the property on behalf of the minors. In this state of things, a suit was brought against her as representative of her deceased husband by a creditor of his, in which a decree was passed for the sum of Rupees 25,000. It is admitted by the plaintiffs' Counsel that the property inherited by his clients was liable to discharge this judgment-debt. In execution of this decree, the mehal *A* was attached and put up for sale, but was bought in by the widow for the sum of Rupees 25,000, on the ground that this sum was much below its real value, and that, consequently, it would be causing a waste of the plaintiffs' property to let the mehal go at this price. She then sold mehals *B*, *C*, and *D* to their respective zur-i peshgeedars for the three several sums of Rupees 6,000, Rupees 4,551, and Rupees 9,500; and with the margin which remained after satisfying the zur-i-peshgeedars in regard to the amount due to them under their mortgages, she paid off the judgment-debt of Rupees 15,000, thus preserving mehal *A* untouched, and clearing off all the debts of the deceased by the sacrifice of the burdened mehals *B*, *C*, and *D*. It is the alienations of *B*, *C*, and *D* in this transaction which the plaintiffs impeach; and they contend that the facts which have just been set out do not establish either the actual legal necessity of the sales in question, or that the purchasers themselves, after proper enquiry, were reasonably led to believe that such necessity did exist. They, therefore, urge that the judgment of the Lower Appellate Court, holding that the alienee defendants had sufficiently justified their purchases, is wrong in law.

We think that, so far as concerns the necessity of a sale (of a portion at least of the property in suit), there were materials enough before the Lower Appellate Court to support the finding at which that Court arrived. But the necessity of sale does not alone dispose of the whole of plaintiffs' cause of complaint. When a person, after attaining majority, questions, as he has a right to do, any sale of his property made by his guardian during his minority, the burden lies on the person who upholds the purchase, not only to show that, under the

circumstances of the case, either the guardian had the power to sell, or that the purchaser reasonably supposed that he had such power, but, further, that the *whole* transaction, so far as regarded the purchaser's part in it, was *bonâ fide*. In cases where the guardian is himself under no personal disqualification, and the purchaser is a stranger to the property, probably this *bona fides* should, in the absence of evidence to the contrary, be presumed as soon as the legal propriety of a sale is made out. But it is otherwise, when either the person who sells labors under disqualification, or the purchaser stands in a fiduciary relation to the owner of the property.

In the case before us, both those contingencies occur. The guardian and vendor was a purdah lady, and the purchaser was a zur-i-peshgeedar bound to account strictly to the owner for the rents and profits of the land which was sold. The principle that in the class of cases last mentioned, the purchaser must make out the *bona fides* of his dealing has been distinctly laid down by this Court in the case of *Kanye Lall Juhoree* versus *Kaminee Dabee*, reported in the *Englishman* newspaper of March 28th, 1867, where it was said: "A Hindoo *purdah* woman "is entitled to receive in this Court that pro-"tection which the Court of Chancery in "England always extends to the weak, igno-"rant, and infirm, and to those who, for any "other reason, are specially likely to be im-"posed upon by the exertion of undue influ-"ence over them. The undue influence is "presumed to have been exerted, unless the "contrary be shown. It is, therefore, in all "dealings with those persons who are so "situated, always incumbent on the person "who is interested in upholding the transac-"tion to show that its terms are fair and "equitable. The most usual mode of dis-"charging this *onus* is to show that the lady "had good independent advice in the mat-"ter, and acted therein altogether at arm's-"length from the contracting party." The Court quoted various English authorities in support of the position which it thus took up. It then went on to add: "Further, for "the like reason, the same burthen of proof "lies on any one who stands before the "Court in reliance upon a contract made "with any one, whether *purdah-nusheen* or "other, towards whom he is in any fiduciary "position relating to the subject of contract."

Here, in the case before us, the defendants, or their predecessors in the title, dealt in regard to the purchase of the mehals which are the subject of suit with a *purdah-nusheen*, and they also, at the same time, stood in the position of accounting parties to the person whom that lady represented, relative to the rents and profits derived by them from the same mehals. They are, therefore, for a double reason, under the obligation to show that their respective purchase-transactions were fair and equitable. It seems to us that this, under the circumstances which attend the present action, involves the making out that the zur-i-peshgeedar purchasers gave reasonably sufficient consideration for the mehals which they respectively bought, and which are now sought to be recovered. Only part of the consideration-money passed into the hands of the guardian; the remainder came back to the purchasers themselves to cover the debt said to have been due to them in respect of the zur-i-peshgee loans. The defendants, therefore, in order to enable the Court to get at what was the actual amount of the purchase-money, must make out what was properly due under this head at the time of the sale, and this can only be done by production of proof of the zur-i-peshgeedar's accounts for the time of their usufructuary possession; for if the rents and profits then received more than covered the amount of interest payable, the balance would be applicable to reduction of the capital debt. No attempt has been made by the defendants to render an account of any sort; and therefore they have not discharged the burden which lies upon them to establish the honest dealing of the purchasers in the sales which the plaintiffs impeach. They cannot rightly complain of the hardship of this burden, for all purchasers of property belonging to a minor, or from a person under disability, and, in particular, persons in fiduciary situations purchasing the property of those whose trustees they are, must know at the time of purchase that they will be obliged by law to defend their acts whenever the purchases may be afterwards questioned by those entitled to do so; it is, therefore, their own fault if they do not take care to preserve the requisite evidence for the purpose.

In the absence of the evidence which we have just referred to, as necessary to the defendants' case, inasmuch as the burden of proof on this point is upon them, we might decree the plaintiffs' suit at once. But we think that the ends of justice will be better served by remanding the case to the Lower Appellate Court to try whether

e purchases of the three mehals, which e sought to be set aside by the plaintiffs, any of them, were fair and equitable, d in particular to take accounts of the ceipts and profits of the respective zur-i-shgeedars from the said mehals during e time they had possession of them under e zur-i-peshgee lease. If the amount of ese receipts and profits in reference to ch zur-i-peshgee lease should prove to ve exceeded the total amount of interest e thereunder, then the excess should be plied to the reduction of the capital debt, d therefore to a like extent the consider-ion-money paid should be taken to be iminished.

The case is remanded accordingly.

The 20th February 1868.

Present:

he Hon'ble F. B. Kemp and E. Jackson, *Judges.*

laintiffs with separate interests—Joint decree for damages.

Case No. 2832 of 1866.

pecial Appeal from a decision passed by the Judge of Bhaugulpore, dated the 31st July 1866, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 15th August 1865.

Trilokenath Jha and others (Defendants), *Appellants,*

versus

Hur Dutt Khurhuree and others (Plaintiffs), *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

Where plaintiffs with separate interests sue for and obtain damages, the decree should not be a joint decree for a lump-sum, but should apportion the damages.

Kemp, J.—THE objections taken in this special appeal are—

1st.—That the plaintiffs ought not to have brought one action, their interests not being common, and their tenancy not being joint.

2nd.—That the Principal Sudder Ameen has given no opinion on the evidence in assessing the damages.

We think that this suit ought not to have been admitted in its present shape; but as it went to trial, and came up in special appeal before this Court without this objection being pressed, it is now too late to urge this plea. Under Section 350 of Act VIII. of 1859, it would be wrong to reverse the decision of the Lower Court owing to this defect in the procedure, as it does not affect the merits of the case.

But we think that the decision of the Principal Sudder Ameen in its present form cannot stand. He has given, in the suit of a number of ryots who admittedly have separate interests, a joint decree for a lump-sum of damages. It may be that one of the plaintiffs will take out execution and recover the whole sum; it may also happen that one of the co-plaintiffs may die without leaving heirs, and his quota of the damages may be recovered by a party who is not entitled to it.

The case must go back to the Lower Appellate Court to apportion the damages amongst the plaintiffs. This being done, the execution of the decree passed by the Court will be easy, and there will be no further litigation as between the co-plaintiffs.

The 20th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Levy of cess—Declaratory decree.

Case No. 856 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 23rd January 1867, affirming a decision passed by the Moonsiff

of that District, dated the 23rd July 1866.

Bhugeeruth Shikdar (Plaintiff), *Appellant,*

versus

Ram Narain Mundur (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

A Government lessee is not entitled to sue for a declaration of his right to levy a cess upon a jotedar who grazes his cattle on his own jote, within the precincts of the lessee's mehal, there being no contract between them whereby defendant is bound to pay such a cess.

Kemp, J.—THE judgments of both the Lower Courts are quite unintelligible. From the pleaders on both sides, we have gathered the nature of the suit.

It appears that the plaintiff (special respondent) has taken a mehal in Pergunnah Colgong from the Government. This mehal is called the Bainsoandah. The plaintiff under this lease claims to levy a tax, which he calls rent, on all parties grazing their cattle within the precincts of his mehal.

In the first instance, he sued the defendant for rent. His suit was dismissed by the Revenue Authorities.

He now comes into the Civil Court for a declaration of his right to levy a rate in the shape of rent on the defendant, and has got a decree.

The defendant urges that he has his own jote, and that he grazes his cattle on that jote. There is no contract between him and the plaintiff whereby the defendant is bound to pay a cess for grazing his cattle.

If the cattle of the defendant trespass on the plaintiff's land, he has his remedy under the Trespass Act; but clearly he is not entitled to bring this suit for a declaration of his title to levy a cess on the defendant, irrespective of the consideration of any contract and when the defendant has a jote of his own on which he grazes his cattle.

The Court could not fix the rate of cess which must be the subject of contract between the parties, and in this case there has admittedly been no contract.

The decision of the Lower Appellate Court is reversed, and this appeal decreed with costs and interest payable by special respondent.

The 20th February 1868.

Present:

The Hon'ble W. S. Seton-Karr and W. Markby, *Judges.*

Res adjudicata—Section 2, Act VIII., 1859.

Case No. 1999 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 27th May 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th January 18[illegible]

Nufur Chunder Paul Chowdhry (Plaintiff), *Appellant,*

versus

Luckhee Monee Dabee and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Nursingh Chunder Mitter* for Appellant.

Baboo Rajendur Nath Bose for Respondents.

Certain property having been sold in execution of a money-decree against the representative of a mortgagee, a suit was instituted and a decree obtained in setting aside the sale as being that of land in which mortgagee had no interest. The holders of the original money-decree then again brought a suit to obtain a declaration that the said property was liable to be sold in satisfaction of the said decree.

HELD that, the matter in issue having been heard and determined by a Court of competent jurisdiction, the suit was barred by Section 2, Act VIII., 1859.

Markby, J.—IN this case it is unnecessary to give any opinion on the point raised

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the appellant, because the respondents have taken a cross-objection which disposes of the case.

The respondents' cross-objection is that the suit is barred under Section 2 of Act VIII. of 1859, because the same point was tried and decided between the same parties in a previous suit.

The origin of this litigation was as follows:—

The present plaintiff brought a suit on a mortgage-bond, on the 1st of March 1861, against Jeebun Koomaree and Gyadeen, the representatives of Shoboodra, the mortgagee under the bond, and, on the 1st of August 1863, obtained a money-decree against those defendants. The plaintiff executed this decree in 1865 against certain properties, and caused them to be sold.

Immediately afterwards, the defendants in this suit brought a suit against the plaintiff in this suit to set aside that sale, and successfully established their right to have that sale set aside.

The judgment said in effect: Under this decree, it is impossible for you, Modoo Soodun, to sell this property, because it is in form a decree against a certain person as representative of Shoboodra only, who had not any interest in the land sought to be taken in execution. True, the Court goes on to say that possibly a better or more effectual decree might have been obtained on the mortgage-bond, and that the bond-holder might take proceedings for that purpose in another suit; but that observation in no way bears on the present discussion. What the plaintiff now asks in this suit is to obtain a declaration that the same property is liable to be sold in satisfaction of the same decree; that is to say, the person who was the defendant in the former suit sues to reverse that which was decided against him in that former suit. Under such circumstances, Section 2 clearly applies, the matter in issue having been heard and determined by a Court of competent jurisdiction in a former suit between the same parties.

The decree of the Court below must, therefore, be set aside, the plaintiff's suit must be dismissed with all costs, and this special appeal, likewise, be dismissed with costs and interest.

The 24th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Reviews of judgments specially appealed—Pendency of special appeal no ground for delay—Sections 376 and 377, Act VIII., 1859—Court's right to correct its records—Extra-judicial advice.

Case No. 1068 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 21st February 1867, reversing a decision passed by the Deputy Collector of that District, dated the 31st December 1863.

Mr. L. T. Lucas (Defendant), *Appellant,*

versus

W. Stephen and others (Plaintiffs), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Mohinee Mohun Roy* for Appellant.

Mr. C. Gregory for Respondent.

The mere fact that a special appeal has been admitted in the High Court against a decretal order of a Lower Appellate Court prevents any party to the suit, no matter whether or not he be the party who preferred the special appeal, from having the right, under Section 376, Act VIII., 1859, of applying to the Lower Appellate Court for a review of the judgment upon which its decree was passed.

Where an application for review is not made within the 90 days provided by Act VIII. of 1859, the pendency of a special appeal is not "a just and reasonable cause" for the loss of time, such as the Court to which the application is made is bound to arrive at under Section 377 before it can entertain the application at all.

Every Court has a right to correct its formal records in such a way, if needed, as will make them represent truly the decision which was intended to be judicially expressed.

A Judge should not recommend future litigation, or advise particular modes thereof.

Phear, J.—The history of this case, by no means exceptional in its character, very well shows what a small amount of finality is possessed by the decree of a Civil Court in this country. The plaintiff, a zemindar, instituted the suit, so far back as the 22nd July 1862, to obtain an enhancement of the rent of an *ousut* talook held of him by the defendant.

The decision of the Deputy Collector, the Court of first instance, was given on the 31st December 1863. It was appealed against to the Judge. The Judge on the 3rd June 1864 remanded the case to the Deputy Collector with the direction that he should

take evidence as to the prevailing rate of rent, and come to a decision as to what was a fair and proper rate.

Against this order of remand the plaintiff appealed specially to this Court; and a Division Bench, on the 9th December 1864, holding that the Judge's order was improper, sent the case back to the Judge with these words: "The Judge will retain it on his own "file, and proceed to fix a fair and proper "rate, referring an issue for a finding to the "Lower Court, or taking further evidence "and deciding the point without such evi-"dence."

On this remand, difficult of interpretation as it no doubt was, the Judge again entertained the case, and passed his decision on the 17th November 1865. Upon this, the defendants brought the case for a second time to this Court by special appeal. The Division Bench before which this appeal came to be heard dismissed it on the 27th June 1866; and one of the learned Judges who constituted the Bench, in delivering his judgment, said, with reference to one of the grounds of special appeal then before the Court: "This, I think, is no ground for "special appeal. It may be a ground—a "proper ground—for application to the "Judge to review his judgment and to correct "the inadvertence, if any. I see no reason "why the appellants should not be permitted "to apply to the Judge now to make the "requisite correction."

The defendants, acting upon this suggestion, applied to the Judge for a review of his judgment upon several grounds, including that which had been presented to this Court as a ground of special appeal; and the Judge, after hearing argument, made the following order:—

"This is an application for review of "judgment on the ground that uncultivated "lands have been assessed by the decree. "It seems that this is the case, though "apparently a mistake. The Ameen de-"ducted certain lands as uncultivated; yet "it is now shown that those lands have "been included in the assessment. The "appeal will therefore be re-heard."

A hearing on the admitted review took place accordingly, and the Judge gave his decision on the 21st February 1867 in these words: "There has been error, I "find, in the calculation. The notice and "the plaint mentioned the cultivated lands "only as those he wished to be assessed: "*8dr. 8ka. 18gs. 1c. 2kr.* are now shown "to be waste, and to have been so for a "long time. This amount must, therefore, "be deducted from the total lands to be "assessed as shown in the last judgment. "I may remark that this does not give the "defendant any right to keep these lands "always waste. The plaintiff may, I pre-"sume, serve him with another notice con-"cerning those lands; and if he does not "choose to bring them into cultivation and "to cultivate them, he should be required "to give them up to a more diligent culti-"vator. I also find I omitted to mention "that the rate I fixed, *viz.*, Rs. 29-6-0 "'(erroneously written for 19-6-0),' was "calculated in sicca rupees, as that is the "rate which is shown to have been paid "for other lands. With these corrections "the former judgment will stand. The "appeal is again decreed in these terms "with costs in proportion."

The defendants now appeal, specially, against this decision, and thus this suit for the enhancement of rent, at the expiration of just five and a half ($5\frac{1}{2}$) years from the date of its institution, comes a *third* time before this Court.

The grounds of special appeal are three in number. The *first* complains that the observations which the Lower Court has recorded in respect of the waste lands are extra-judicial, uncalled for, and erroneous. The *second* and *third* in effect object that the Judge did not, at the re-hearing in review, properly try the case on its merits.

On the other hand, the plaintiffs (special respondents) raise the preliminary objection that the Judge had no power to grant a review, and consequently that all the proceedings in review were without jurisdiction. They also urge that, even supposing proceedings in review could be legally taken under the circumstances of the case, still the Judge improperly exercised his discretion in admitting the review, because the application was made after the expiration of 90 days from the time when judgment was delivered, and no sufficient cause was shown for the delay.

The force of the special respondents' first objection depends upon the degree of limitation which ought to be given to the words, "a decree from which no special "appeal shall have been admitted," as they stand in Section 376 of Act VIII. of 1859; for it is admitted that the Civil Courts of this country possess no power of granting a new trial, re-hearing, or review of any case

once decided by them, except such as is given them by this Section. The portion of the Section which is applicable to a case such as the present, brought, as it was, into the Judge's Court by way of appeal, runs thus when read by itself: "Any person considering himself aggrieved by a decree of a "District Court, in appeal from which no "special appeal shall have been admitted "by the Sudder Court" (*viz.*, High Court), "and who, by the discovery of new matter "or evidence which was not within his "knowledge, or could not be adduced by "him at the time when such decree was "passed, or from any other good and sufficient reason, may be desirous of obtaining "a review of the judgment passed against "him, may apply for a review of judgment "by the Court which passed the decree."

Unless, therefore, the applicant for review before the Judge fell within the scope of these words, the Judge had no jurisdiction to entertain his application. Then comes the question—Was the decree by which the applicant considered himself aggrieved when he applied to the Court, which passed it, for a review of judgment—was that decree one from which no special appeal had then been admitted by the High Court? If the word "decree," as here used, is equivalent to "decretal order," the answer must, I apprehend, be in the negative, for the applicant had, previously to applying for review, himself preferred a special appeal against the order of the Judge which hurt him; in other words, against the whole decretal order, for it was indivisible, and that special appeal had not only been admitted, but had been heard and disposed of. Indeed, I do not see how any other meaning than "decretal order" can be attributed to a decree which is spoken of as capable of being appealed against. The only alteration is, that *decree* may mean the *judgment*, written or oral, which is delivered to justify the decretal order of the Court; but in this sense it cannot be said to be the subject of appeal; it may be impeached and shown to be erroneous, and in this way an appeal against the decretal order may be maintained. But it seems to me that it would be inaccurate in such a case to say that the appeal was an appeal against the judgment as distinguished from the decretal order.

It is said on behalf of the special appellants that the effect of Section 376 is to give a party to a suit a right of application for review of *judgment* upon any ground, whether of law or fact, which has not previously been matter of adjudication in an Appeal Court. This would be so probably, if the words, "from which no special appeal "shall have been admitted," were qualified by the addition of "upon grounds identical with those upon which a review is "sought." But, in the absence of any qualification like this, I think the mere fact that a special appeal has been preferred and admitted in the High Court against a decretal order of a Lower Appellate Court prevents any party to the suit, no matter whether or not he be the party who preferred the special appeal, from having the right, under Section 376, of applying to the Lower Appellate Court for a review of the judgment upon which its decree was passed. This construction, no doubt, draws an apparently arbitrary line of division between cases which are otherwise seemingly in all respects alike entitled to the equity of the Section. For instance, there appears to be no assignable reason why, if reviews on the ground of the discovery of new evidence should be allowed at all, they should not be allowed after a special appeal on a point of law has been had, as well as before. The hardship of precluding all opportunity of a review, as well as the equity and justice to be effected by it, is as great in the one case as in the other; but it seems to me that, however harsh the result may be, the words which the Legislature has used will naturally bear only the construction which I have mentioned.

This conclusion is, I think, much countenanced by the ostentatious reticence of the Madras High Court in the case of *ex-parte* Bashzagarube Wazuder, 1 Stokes, page 254, and is directly supported by a Full Bench of the late Agra Sudder Court in Mussamut Khoorshed Begum *versus* Syed Hadee Ali and another—S. D. A. (N.-W. P.), 1865, p. 40. This latter case is singularly parallel with that which is now before us. It had twice come up to the Sudder Court on appeal, and both appeals had been dismissed. But on the occasion of the last of the two appeals, the Judges who dismissed it said: "We are, "however, of opinion that the decision of the "Principal Sudder Ameen is open to very "grave objections, which, we think, might "fairly be urged in an application to the "Court of first instance for a review of judgment. We further hold that, as this Court "has refused to go into the merits on appeal, "a review is not barred, on the ground of an "appeal having been unsuccessfully preferred, by the wording of Section 376 of the

"Civil Procedure Code." According to this suggestion, a review was applied for and obtained; but, on appeal from the judgment on review, it was objected that the review was without the authority of Section 376, and the full Court of four Judges held that the objection was valid. The Court said: "The "terms of that Section only authorize a re-"view of decree of a Court of original juris-"diction from which no appeal shall have "been preferred to a superior Court, or of "a decree of a Zillah Court from which no "special appeal shall have been admitted by "the Sudder Court; and as no exception or "distinction is made in regard to cases in "which the appeals may have been disposed "of otherwise than on the merits, it is infer-"rible that in all cases whatever in which a "regular appeal has been preferred, or a spe-"cial appeal shall have been admitted, a re-"view of judgment cannot be granted by "the Court of first instance, or the Court of "Regular Appeal, respectively." The spirit of this decision, if not the letter, entirely governs the present case.

For the foregoing reasons, I think that the hearing, in review, upon which the decree now specially appealed from was given, was had without jurisdiction, and that consequently the decree itself is void.

But, even had jurisdiction existed in the Lower Appellate Court to entertain the application for review, I should have considered the admission of it to be an improper exercise of judicial discretion. The application was not made within the 90 days, and absolutely no reason was given for the delay. In fact, none could have been suggested under the circumstances of the case other than that meanwhile the special appeal had been pending. But this, in my opinion, would not be "a just and reasonable cause" for the loss of time, such as the Court to which the application is made is bound to arrive at, under the provisions of Section 377 of Act VIII. of 1859, before it can entertain the application at all. To allow such a cause to be just and reasonable would, in truth, contravene the very object for which the opportunity of obtaining a correction of a judgment by review is given, and would exhibit a grave deviation from those principles of guidance which, the Privy Council declared in Maharaja Moheshur Sing *versus* Bengal Government* (7 Moore's Indian Appeals, p. 283), should govern every Court in the matter of granting a review of its judgments. I would, therefore, on this ground alone, reverse the decision of the Lower Appellate Court, and reject the application for review.

Consequently, whether or not it was within the jurisdiction of the Lower Appellate Court to entertain the application for review, in my opinion the judgment of the Lower Appellate Court, which is now specially appealed against, falls to the ground, and the decree of the 17th December 1865, which was modified by it, ought to be affirmed.

This decision does not in any way touch the right, which I presume to be incident to every Court, to correct its formal records in such a way, if needed, as will make them re-represent truly the decision which was intended to be judicially expressed when the decision was delivered. In this way blunders of the pen may be set right; and if any such exist in the decree of the Lower Appellate Court, passed on the 17th December 1865, it is not yet too late for that Court to repair them.

In the view which I have taken of the case, I have been led to think that it ought to be disposed of as I have indicated, quite independently of the merits of the defendant's grounds of special appeal. But at the same time I think the matter of his first ground should not be passed by entirely without observation. It does not appear to me to afford reason of itself alone for interfering with the judgment of the Lower Appellate Court, had that judgment been otherwise sustainable; still those remarks of the Judge, to which it refers, were so entirely outside the issue which he was determining, and were so unjudicial in their character, that I feel bound to say that it is unfortunate they should have been made. Words like these might have been appropriate enough had the Judge been the legal adviser of the plaintiff, responsible to him for any mistake of opinion; but amounting, as they did, to recommendation of future litigation with regard to a disputed right, they seem to me to have been exceedingly unbecoming in the mouth of the presiding Judge of the Appellate Court, to which the suit, if instituted according to the advice given, would eventually come. No doubt, it may sometimes happen that, where a plaintiff has mistaken his remedy, a Judge may, without mischief, while deciding adversely to him, also point out to him his right course, but

* *See* 3 W. R., P. C. cases, p. 45.

I believe that it will rarely or never be found consistent with strict impartiality that the Court should take the opportunity of delivering a judgment in favor of the plaintiff to tell him how he may win a future cause in the same Court. I think there should be no order relative to costs.

Bayley, J.—I concur in the view that Section 376, Act VIII. of 1859, will not allow a review by the Lower Appellate Court in cases decided in appeal here.

I also think no good and sufficient cause is shown in this case for an application for a review not having been made within 90 days. I will only add that it has always been our instruction to subordinate Courts not to advise modes of litigation, although they might, in showing judicially that a party had mistaken his remedy, state also that such party might, *if so advised*, seek for redress under other provisions of the law than those first and erroneously looked to.

The 24th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Intervention under Section 77, Act X., 1859—Bona fides.

Case No. 1092 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 11th March 1867, affirming a decision passed by the Deputy Collector of that District, dated the 5th September 1866.

Woomesh Chunder Dutt (Objector), *Appellant,*

versus

Bhugoban Chunder Roy (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter and *Nilmonee Sein* for Appellant.

Baboo Woomesh Chunder Banerjee for Respondent.

An intervenor, under Section 77, Act X., 1859, must not only show that he received rent, but that his receipt was *bonâ fide.*

Phear, J.—This case must go back to the Lower Appellate Court. The suit was brought to recover arrears of rent, and the present special appellant intervened under the provisions of Section 77 of Act X. of 1859. It thereupon became the duty of the Court to determine, as between the plaintiff and the intervenor, whether or not the latter had "actually and in good faith received and enjoyed" the rent in question "before and up to the commencement of the suit."

The Court of first instance appears to have tried this issue properly, although its judgment is very meagre and unsatisfactory. It decided adversely to the intervenor.

On appeal, the Lower Appellate Court said: "I think the Lower Court's order must "be affirmed, though not quite on the same "ground. It was not necessary that the in-"tervenor should show that his receipt of rent "was a *bonâ-fide* one: as long as he showed "the receipt at all, that would be sufficient, "but I do not think he has proved it in this "case." These words exhibit an entire misconception of the issue which lay between the plaintiff and the intervenor, for the Legislature has expressly (and on grounds which are obvious) made *bona fides* a material element in the right of the intervenor to appear in the suit. However, if the Judge is correct in his finding that the intervenor never received rent from the defendant at all, the misapprehension of law which he has displayed has worked no mischief in this case. But the Judge has made no reference to the evidence bearing on this point, although the record discloses that of more than one witness. The special appellant is entitled to have the opinion of the Judge expressed upon this evidence.

We remand the case, in order that the Judge may consider fully the evidence, *first*, so far as it concerns the actual receipt of rent by the intervenor; and, *secondly*, should this consideration lead him to alter the conclusion which he has as yet come to, then with reference to its effect upon the question of the intervenor's *bona fides* in receiving the rent. And in reference to this last question, should it arise, it is as well to observe that the matter of the alleged farming lease from the plaintiff to the intervenor may be most legitimately inquired into.

The 24th February 1868.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Suit for rent—Action for declaration of title.

Case No. 1134 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 27th February 1867, reversing a decision passed by the Moonsiff of that District, dated the 14th August 1866.

Dhonaye Mundul (Defendant), *Appellant,*

versus

Arif Mundul and others (Plaintiffs), *Respondents.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Anund Chunder Ghossal for Respondents.

A, suing *B* for arrears of rent on the allegation that *B* held an outbundee jote from him in certain lands of plaintiff's jote jumma, obtained a decree for rent for one year, the period for which he sued. *B* then brought an action in the Civil Court for a declaration of his right to the jote jumma in question, alleging that he held the land direct from the zemindar, and was not *A's* ryot; *A* pleading that the Civil Court had no jurisdiction after the Revenue Court had declared *B* to be his ryot.

HELD that the Revenue Court's decree was not conclusive as to the question of title, *i. e.*, as to whose right it was to have the particular jote jumma as his property.

Bayley, J.—IN this case it appears that the party now defendant formerly sued the now plaintiff for rent in the Revenue Courts on the allegation that plaintiff held an outbundee jote from defendant in certain lands of defendant's jote jumma. The defendant got a decree for rent for the period for which he sued.

Plaintiff now sues for a declaration of his right to the jote jumma in question, which defendant had alleged to be his.

The defendant pleaded that the Civil Court had no jurisdiction after the Revenue Court had declared plaintiff to be defendant's ryot by giving a decree for arrears of rent. And on the merits the plaintiff alleged that he held the land direct from the zemindar, and was not defendant's ryot.

The first and the Lower Appellate Court both held that they had jurisdiction, as the Revenue Court had only adjudicated a question of arrears of rent for one year, and not the general question of title, *i. e.*, whose was the jote jumma right.

The first Court, on the merits, held that plaintiff had not sufficiently proved the jote jumma right he set up; while, on the other, defendant had shown that it was his.

The Lower Appellate Court differed on the merits from the first Court, and held that plaintiff had established his right, and gave him a decree accordingly.

Defendant appeals specially, and urges—

First.—That there is no jurisdiction in the Civil Court to try the case, and to hold that plaintiff is not defendant's ryot, when the Revenue Courts have already held the contrary.

Secondly.—That the burden of proof has been wrongly put on defendant (special appellant).

We do not think either of these objections good.

The suit in the Revenue Courts was not conclusive on a question of title, *i. e.*, as to whose right it was to have the particular jote jumma as his property; and there was a conflict of the title under which plaintiff and defendant respectively claimed. Moreover, the substantial part of the decree in the Revenue Court was that plaintiff was liable to defendant for rent for the period claimed in that suit.

On the *second* point, we are clearly of opinion that there is no error in law in the Lower Appellate Court as to the burden of proof. The Lower Appellate Court states that the *onus* lies generally on the plaintiff; still in this case plaintiff is considerably relieved of the *onus* of adducing *further* proof, because defendant admitted plaintiff's possession by his written statement, but raised the special plea that such possession of plaintiff was that of an outbundee ryot of his (defendant's).

In fact, however, we think that the Lower Appellate Court went fully into the evidence adduced by both parties, and, on weighing it, came to a finding of fact that plaintiff had quite established his right.

In this view, then, seeing no reason to interfere in special appeal as on any error of law shown us in this case, we dismiss this special appeal with costs.

The 24th February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Attachment under Section 236, Code of Civil Procedure—Alienation of attached property—Section 240, Code of Civil Procedure.

Case No. 228 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 28th July 1867.

Monohur Lall and others (Defendants), *Appellants,*

versus

Juggomohun Lall (Plaintiff), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Baboos Kalee Mohun Dass and *Unnoda Pershad Banerjee* for Respondent.

If, during the pendency of a suit (which is eventually decreed in favor of the plaintiffs), a third party, in execution of a former decree against one of the plaintiffs, attaches the latter's share of the claim under Section 236, Code of Civil Procedure, any alienation of his share by that plaintiff, while such attachment is in force, is null and void under Section 240.

Hobhouse, J.—The facts are these: On the 4th June 1863, the plaintiff (respondent) got a decree against one Sheo Suhoy Patty for a sum now represented by Rupees 3,615, or thereabouts. On the 6th September 1866, this Sheo Suhoy and two other persons, the defendants (appellants), got a decree against the Court of Wards for a sum of Rupees 50,000, appellants being in the decree declared to be the sole judgment-creditors. The amount of this decree is still in deposit.

These facts being so, respondent sued in the Lower Court to recover the amount of his decree of the 4th of June 1863, out of the Rupees 50,000 in deposit, on the grounds, *first*, that the decree of the 6th September 1866 was collusive; and, *secondly*, that the alienation of Sheo Suhoy's half share in the decree was made at a time when, under Sections 236 and 240 of the Code of Civil Procedure, Sheo Suhoy was prohibited from such alienation, and so that the alienation made was null and void.

We find that there is no evidence of collusion; but, on the second ground taken, we think that the Court below has rightly decreed respondent's suit.

In the case decided on the 6th September 1866, Sheo Suhoy and the two appellants sued the Court of Wards to recover a sum of some 10 lakhs of rupees, appellants coming in as the purchasers of half of the amount claimed.

But, when the case came to be determined, Sheo Suhoy's claim was reduced to Rupees 50,000, and it followed that appellants' half of that claim was reduced to Rupees 25,000.

By a compromise, however, between Sheo Suhoy and appellants, the latter were, on the 4th September 1866, made the sole judgment-creditors by transfer to them of the whole sum, *viz.*, 50,000, which was decreed to Sheo Suhoy in satisfaction of his claim.

Intermediately, however, *i. e.*, on the 5th June 1866, when Sheo Suhoy was still proprietor of half, and appellants of only the other half of the claim made on the Court of Wards, respondent stepped in and attached Sheo Suhoy's half share, under Section 236 of the Code of Civil Procedure, as a debt due from the Court of Wards to Sheo Suhoy, and the usual prohibitory order was issued and remained in force at least until the 15th December 1866.

It follows, therefore, that when, on the 6th September 1866, Sheo Suhoy privately alienated his half share of the 50,000 rupees in question to appellants, he did so at a time when, under the provisions of Section 240, such alienation was null and void.

It is said, however, that the attachment was virtually withdrawn when respondent's execution-case was struck off on the 15th December 1866; but we think that, whatever may be the effect of a procedure to strike off upon an attachment generally, we need not now consider any such effect, because in this particular case the alienation took place before the procedure to strike off, and at a time when the attachment was in full force.

We are of opinion, then, that the private alienation to appellants of half of the 50,000 at a time when this half was made a subsisting attachment was null and void, and that the Court below was right in allowing respondent to execute his decree against the half in question.

This appeal is, therefore, dismissed with costs.

The 24th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Mokurruree pottah granted by Rajah of Tipperah —A female's membership not destroyed by marriage into another race.

Case No. 153 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 19th February 1867.

Roop Moonjuree Kooeree (Defendant), *Appellant,*

versus

Beer Chunder Joobraj (Plaintiff), *Respondent.*

Baboos Kalee Mohun Doss and *Chunder Kallee Ghose* for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

A mokurruree pottah, granted by a Rajah of Tipperah to a member of his family, is, by recognized custom, resumable on the death of the grantor; and a female member does not cease to be a member by marrying into another race.

Bayley, J.—PLAINTIFF in this case sues to resume and obtain possession of a certain tenure which defendant alleges is held on a mokurruree pottah given by the plaintiff's predecessor, and not liable to be resumed.

Plaintiff rests his case on the allegation that, by the custom of the family (that of the Rajah of Tipperah), it is provided that any grant of this nature made to a member of the Rajah's family is resumable on the death of the grantor. Plaintiff relies on a decision of the Sudder Adawlut, Select Report, Volume VI., page 270 (Huree Mala's case, 28th March 1837), to prove the custom.

Defendant's case, on the other hand, is that the Sudder Dewanny Adawlut decision, 28th March 1857, page 1375, distinctly rules that the custom restricting such grants to the life of the grantor is one which exists only as regards those who are *members of the family* of the Rajah of Tipperah; and that this defendant, having married into another race (*gotro*), was no longer a member of the family of the Rajah of Tipperah; and that consequently the pottah, which is otherwise admitted to be of the character of a valid mokurruree not resumable, is good as respects the defendant, who, by having ceased to be a member of the family, ceased, to be affected by the custom on which plaintiff based his claim.

The Lower Court gave plaintiff a decree. Defendant appeals.

After fully hearing the evidence and the arguments of Counsel on the case, I am of opinion that the case of Huree Mala, cited above, and that of the late Sudder Dewanny Adawlut of 1857, read together, rule that the power of resumption of such a mokurruree tenure as that now in suit exists only as against those who are members of the family.

But, at the same time, it is not shown to us that, by any recognized rule of Hindoo Law, such a lease as this, made after marriage, is one which by marriage ceases to be a gift to a member of the Tipperah Rajah's family, *i. e.*, of that character to which the custom allowing resumption by a successor to the Raj would not apply.

There is, further, no question that the substantial contention of defendant is not that there is no such custom, but that the custom only applies to members of the family, and that the grantee ceases by marriage to be a member of the family, and the grant consequently is not liable to resumption.

In this view, I would affirm the decision of the Court below, and dismiss this appeal with costs.

Phear, J.—On the whole, I am of opinion that the defendant in her written statement has admitted that all grants of such a nature as that of the grant which is sought to be resumed, when made by the Rajah of Tipperah to a member of his family, are, by recognized custom, voidable by his successor; that, in fact, the grantee takes subject to this condition. I also think that, in the absence of any evidence to show that "member of the family" in the wording of this admitted custom bears any meaning more restricted than that which this phrase usually bears, a daughter of the Rajah, whether married or not, comes within it. I, therefore, concur in the judgment of Mr. Justice Bayley.

The 25th February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges*.

Jurisdiction—Substitution of another's name for that of plaintiff—Withdrawal of suit—High Court's superintendence under Section 15 of 24 and 25 Vic., C. 104.

Appeal No. 13 of 1867.

Appeal under Section 15 of the Letters Patent of the High Court, dated 28th December 1865, against the judgment of the Hon'ble J. P. Norman and the Hon'ble W. S. Seton-Karr, Judges of the High Court, passed on the 29th January 1867, on motion on the petition of Chunder Kant Bhuttacharjee.

Judooputtee Chatterjee and others, *Appellants*,

versus

Chunder Kant Bhuttacharjee and others, *Respondents*.

Baboos Chunder Madhub Ghose and *Mohinee Mohun Roy* for Appellants.

Mr. R. E. Twidale for Respondents.

A Civil Court is not competent to order the name of a purchaser of the rights of the plaintiff in a suit to be substituted for that of the plaintiff, or, upon the application of the party so substituted, to allow the suit to be withdrawn.

Such an order, if made, is made without jurisdiction, and is not an order of that description in respect of which the Legislature intended either to give or to deny the right of appeal. But the order is one which the High Court may set aside in the exercise of the superintendence vested in it by Section 15 of 24 and 25 Victoria, C. 104.

The following are the judgments of the Division Bench:—

Norman, J.—Mr. Twidale, on the 26th of July 1866, obtained a rule calling on the defendants Brindabun Chunder Mookerjee and others to show cause (*inter alia*) why the order of the Principal Sudder Ameen of the 23rd April last should not be set aside, and why the plaintiffs should not be at liberty to proceed with the suit.

The applicants by their petition stated that the suit was one for the possession of certain land, which they claimed as heirs of their granduncle, against Brindabun Chunder Mookerjee and others; that the defendant Brindabun, having obtained an *ex-parte* decree under Act X. for the rent of other property, caused the right, title, and interest of the plaintiffs in the *suit now in question* to be put up for sale, and bought the same in the name of his nephew Judooputtee Chatterjee.

After the sale on the 3rd of April, the matter was brought to the notice of the Sudder Ameen in the presence of all the parties, by the purchaser applying to have his name substituted as plaintiff. The sale-certificate not being produced, no order was then made. But on the 23rd of the same month, in the presence of the plaintiffs, the defendants and Judooputtee, the purchaser, an order was passed by the Sudder Ameen to the effect that, "the case having been called on, upon inspection of the record it appeared that the rights and interests of the plaintiff in the suit had been sold in execution of a decree, and that the auction-purchaser, having put in a certificate of his purchase, had applied to have his name substituted, whereas the rights of the plaintiff, whatever they may be, are now seen to be in the auction-purchaser; therefore the order is that he be put in possession, and his name put in the register."

Later in the course of the same day, a proceeding was recorded by the Sudder Ameen, entitled "Chunder Kant Bhuttacharjee and others named *former plaintiffs;* on allegation of purchasing their right, Judooputtee," in which, after reciting that Judooputtee had applied for a postponement which the Court refused to allow, he ordered that for the present the suit should be dismissed, but that the party should be at liberty to re-institute the suit within the legal time; Judooputtee to pay half the costs of the defendants.

The plaintiffs were not in any way before the Court when this second order was passed.

Baboos Chunder Madhub Ghose and Mohinee Mohun Roy showed cause. They objected, *first*, that this Court had no jurisdiction to interfere, inasmuch as the plaintiffs had their remedy by appeal in the ordinary way; and, *secondly*, that the application being more than three months after the date of the order of the 23rd of April, being beyond the period allowed for an appeal to the Principal Sudder

Ameen, was not made within a reasonable time. I think that neither of these objections ought to prevail.

Mr. Twidale had argued that the right of the plaintiff in a suit is not liable to attachment and sale in execution. It certainly appears not to be moveable property, nor does it fall within any of the definitions of property liable to attachment and sale under Section 205 of Act VIII. of 1859. Mr. Twidale referred to a case reported amongst the Miscellaneous Appeals, W. R., 7th June 1865. (See also a case, *ib.*, 31st May 1865.) It is apparently not property either moveable or immoveable within the meaning of the term as used in Section 86 of Act X. of 1859. But I do not decide the case on that ground.

The 73rd Section of Act VIII. of 1859 empowers the Court at any hearing of the suit to direct that any person who may claim any interest in the subject-matter of the suit, or who may be likely to be affected by the result, may be made plaintiff or defendant, as the case may be.

And, no doubt, when the Sudder Ameen found that a sale of the plaintiff's rights had taken place in the Collector's Court, it may have been competent to him to permit the purchaser to appear as plaintiff to defend his supposed interest in the suit. But there is nothing in Act VIII., or in any other law that I ever heard of, which empowers a Judge, at the instance of a third party, to strike out the name of a plaintiff, or, in other words, to deprive a plaintiff of his right of being heard out in the suit, and, in fact, the plaintiff's name was never by any formal order actually removed from the record. He was not dismissed from the suit by the order which was passed in his presence on the 23rd of April. Whatever the Sudder Ameen's intention may have been, I think he cannot construe his order as one which he had no power whatever to make, unless he has expressed such to be his intention.

That being so, I think we must treat the plaintiff as still being a plaintiff on the record at the date of the second order; and, as that order was passed in the absence of the plaintiff, does not purport to be a decree against him, does not order him to pay costs, does not declare that he shall be dismissed from the suit, I think we can only treat it as an order which does not affect him or bind him in any way. The order that the suit should be dismissed must be construed as an order affecting only the parties in whose presence and by whose consent it was made.

The striking the case off the file was simply an act which the Sudder Ameen had no right to do until the plaintiff's case was disposed of by a decree for or against him.

As there was no decree, there is nothing for which the plaintiff was bound to appeal. In my opinion, the case is, in point of law as regards the plaintiff, still pending undisposed of in the Court of the Sudder Ameen. And therefore, by virtue of the powers, and in exercise of the duty cast upon the Court by the 15th Section of the 24 and 25 Vic., C. 104, of superintending all Courts which are subject to our Appellate Jurisdiction, I think we should order the Sudder Ameen to take and try this case as one which we find to be still pending and undisposed of in his Court, and that the defendants should pay the costs of this rule.

Seton-Karr, J.—In all that my learned colleague has written as to the sale of the plaintiff's rights, as to the supposed dismissal of his suit, as to his still being properly before the Lower Court, and as to the propriety of his having his case tried, I entirely concur.

What I doubt about is the power of our Court to interfere under the Section of the Charter quoted.

It is said that this power has been exercised by Divisional Benches on other occasions. This may be the case, but the reasons for such action are not before us, and that fact alone is no answer to my doubts as to whether the Charter was intended to sanction such a proceeding as that now contemplated.

My doubts are somewhat strengthened by the Full Bench decision in a case from Bhaugulpore, noted in the margin, in which it is ruled that our Court cannot do, by way of motion, what it cannot do by way of appeal; and that there was nothing in the Charter which induced the Court to think that it had power to give relief to the parties.

W. R., Vol. 5, page 25, Miscellaneous Rulings.

The case is not exactly on all fours with the case before us; but the reasons for non-interference would seem equally to apply.

It is thrown out that this Full Bench decision is open to question. That may or may not be so; but while it stands unrescinded, I do not think we can get over it by expressing mere doubts as to its soundness.

At any rate, the case before us is in principle so important that I think the matter should be referred to a Full Bench.

I want a full answer to my doubts as to whether, under the Charter, and not under any local law, we can give the relief, and exercise the interference necessary to what, I must admit, would be in this instance an act of justice.

Subsequent order by Seton-Karr, J.—I fully intended to dissent from my brother Norman's judgment in this case, and refused to be a party to making any order on the Sudder Ameen. The order passed was, therefore, that of Mr. Justice Norman alone, in which I did not join.

The judgments of the Court on the present appeal were delivered as follow:—

Peacock, C. J. (Macpherson, J., concurring).—In this case, Chunder Kant Bhuttacharjee and others sued Brindabun Chunder Mookerjee. Whilst the action was going on, the defendant, under an Act X. decree which he had obtained against the plaintiffs, caused the rights and interests of the plaintiffs to be sold, and the property was bought in the name of Judooputtee Chatterjee.

It was alleged that the purchase so made was made *benamee* for the defendant Brindabun; but it is said that that fact has not been proved. It appears to us that it makes no difference whether the purchase was *benamee* or not.

Afterwards an application was made by Judooputtee to have his name substituted in the suit for that of the plaintiff. Under Act VIII. of 1859, the Judge might possibly have allowed Judooputtee to be added as a co-plaintiff, in order that he might protect the rights which he had purchased under the execution; but I am not aware of any Section in Act VIII. under which the Court was authorized to substitute Judooputtee's name for that of the original plaintiff.

Subsequently, another application was made in the name of Judooputtee, under Section 97 of Act VIII., that he might be permitted to withdraw the suit with liberty to bring a fresh suit; and upon that application an order was made that the suit should be withdrawn. Thus, by the effect of the two orders, Judooputtee got the control of the suit, and, having got the control of it, he withdrew it altogether. Neither of these orders was one contemplated by Act VIII.

I have shown that, by the first order, the original plaintiffs' names ought not to have been withdrawn at all; and, if they had remained as co-plaintiffs with Judooputtee, Judooputtee could not, as one of several co-plaintiffs, have withdrawn the suit without the consent of the others. Neither order was one of that description in respect of which the Legislature intended to give an appeal to the next superior Court; nor was it one in respect of which they intended to declare that there should be no right of appeal. It is true that it was an order passed in the course of the suit prior to decree; and if it had been an order which the Court had power to make, it would have been one in respect of which the Legislature have declared by Section 363 of Act VIII. of 1859 that no appeal should lie prior to decree.

But the orders contemplated by Section 363 are orders which may be set right upon an appeal against the decree. The present order, as remarked by one of my learned brothers in the course of the argument, was not one which could be subsequently set right by appealing against the decree, inasmuch as it was one which, if binding, would prevent a decree from ever being made in the suit. It was an order which was made without jurisdiction.

It was also suggested by one of my learned brothers in the course of argument whether, if the Sudder Ameen had made an order that the suit should not be heard for 20 years, such an order would be binding. It appears to me that such an order, as well as the order in question, would be one over which this Court, in the exercise of the power of superintendence vested in it by Section 15 of the 24 and 25 Vic., C. 104, would have a control.

We think that the order of Mr. Justice Norman was correct, and that the order of the Sudder Ameen was properly set aside. The order will, therefore, be confirmed with costs of this appeal.

Jackson, J.—I am of the same opinion.

It appears to me that the order of the Sudder Ameen was passed without jurisdiction, and that the party aggrieved had no other remedy except by application to this Court under Section 15 of the 24 and 25 Vic., C. 104.

The Sudder Ameen appears to have fallen into an obvious error. On its being certified to him that a particular party had acquired,

by purchase, the rights of the original plaintiffs in the suit, he seems to have considered that the whole rights and *status* of those plaintiffs had been extinguished, and that the purchaser should be substituted for them.

Section 73, Act VIII. of 1859, gives the Civil Courts the fullest powers in respect of directing parties interested to be added as parties to a suit; but there is no provision, as already remarked by the Chief Justice, for striking out from the suit either plaintiffs or defendants.

The Sudder Ameen, in permitting the plaintiff to withdraw his suit, has passed an order which does not fall within the purview of Section 97 of Act VIII., inasmuch as he has allowed one plaintiff, without the concurrence of the other plaintiffs, to withdraw the suit in which all were before the Court.

I observe that, where an order was made plainly consistent with the terms of Section 97, and an appeal was laid against it (*see* the case of Doucett *versus* Wise, 1 Weekly Reporter, p. 322), this Court declared that it would not interfere with the discretion exercised in the particular case, but not that an appeal could not lie.

Here the case is very different; an order has been made which is not consistent with the terms of the law, and I, therefore, think that it is not only competent to this Court, but also the duty of this Court, to set aside on application that which had been irregularly done, and to require that to be done which the law requires should be done.

The 25th February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges*.

Alluvion—Section 4, Regulation XI. of 1825—Prior possession without title.

Appeal No. 14 of 1867.

Appeal, under Section 15 of the Letters Patent of the 28th December 1865, against a judgment of the Hon'ble C. B. Trevor and the Hon'ble F. A. Glover, Judges of this Court, dated the 31st January 1867, in Regular Appeal No. 276 of 1866, from the decision of the Judge of Dacca, dated the 21st May 1866.

Mohini Mohun Doss (Plaintiff), Appellant before the Division Bench, *Appellant*,

versus

Juggobundoo Bose and others (Defendants), Respondents before the Division Bench *Respondents*.

Baboo Sreenath Doss for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Under Regulation XI. of 1825, a right of property in land gained by alluvion from a river (the bed of which is not the property of an individual) is acquired in two modes: *first*, where the land is gained by gradual accession by the recess of the river, in which case it becomes the property of the person in possession of the estate to which the land is an increment; and, *secondly*, when a *chur* or island is thrown up on a large navigable river, and the channel between such *chur* or island is fordable at any season of the year, the accession is an accession to the land or tenure most contiguous.

The ownership of the old site does not give a title to re-formation.

The following are the judgments of the Division Bench:—

Glover, J.—The plaintiff in this case sued to recover possession of 2,400 beegahs of land situate in the resumed island Chur Muddun Shunker, as an accretion to his purchased Khas Mehal Kismut Kootubpore.

It appears that plaintiff's father bought this estate from Government in 1862; before that time, a considerable part of the land now in suit had accreted, and had been claimed by the defendants as belonging to their Mehal Mozufferpore.

The Deputy Collector, Baboo Ram Coomar Bose, who made a local inquiry in 1860, a few months after the *chur* made its appearance, recommended that the defendants should take the accretion, on the grounds that they were in possession, and that the alluvion was a re-formation of Mouza Mozufferpore on its original site, and that

Government should not interfere as owners of Khas Mehal Kootubpore, to which estate the new land had accreted. The Collector followed this recommendation, and released the land to the defendants on the 27th August 1860.

The Commissioner, however, refused his sanction, holding that, under Regulation XI. of 1825, the land, as an accretion, belonged to the Government Khas Mehal of Kootubpore, and directed an appeal to be made to the Judge as Special Commissioner; the plaintiff, who had in the *interim* purchased from Government the zemindary-right of Mehal Kootubpore, taking the latter's place in that appeal as petitioner.

The Special Commissioner rejected the application, on the ground that under the law, Government only was entitled to sue for resumption, and the plaintiff consequently brought his suit in the Civil Court.

The defendants replied that the disputed land was a re-formation on its original site of chur land, which had been released to them by the Special Commissioner in 1844, as the re-formation of their Mehal Mozufferpore, and that the release by Government in 1860, being prior to the plaintiff's purchase of Kootubpore, could not be affected by it; Government, the permanent holder of both estates, not being able to sell what it had already released to others.

The Judge, in a very short and by no means lucid decision, held that the land occupied the position of Mozufferpore, or released after the resumption-proceedings, and that it came up originally from the river as a small island which gradually joined on the plaintiff's estate of Kootubpore, after having been taken possession of by the defendants. He dismissed the plaintiff's suit accordingly.

The plaintiff now appeals on the general issue that the Judge has misapplied the law of alluvion, and that, as the disputed land is an accretion to his estate, he is entitled, under Regulation XI. of 1825, to take possession of it, the defendants' occupancy notwithstanding.

It appears to me that this contention is sound, and is in accordance with several rulings of this Court. In the case of Khetter Monee Dassee, plaintiff, appellant, *versus* Ranee Mon Mohini Dabee and others, 3 Weekly Reporter, page 51, it is distinctly laid down that mere proof of identity of site (without proof of ownership) is not sufficient to defeat the right by accretion which the law gives to an adjacent owner; and, again, in Mr. P. Kenny *versus* Bebee Sumeroonissa, 3 Weekly Reporter, page 68, that proof of re-formation on an old site will not suffice to establish a claim under Regulation XI. of 1825. When land has been completely diluviated, all claim to the site is gone, and all re-formations are governed by Clauses 1 and 3, Section 4 of that Regulation. There are several other rulings to the same effect, and I understand this principle to be the settled law on the subject.

Now, in the present case, it is admitted that the disputed lands were completely diluviated in 1859-60, and consequently that, even were the site completely identified, which is not the case here, the former owner would have lost his right.

But it is contended that the proceedings of the Special Commissioner in 1844 have given the defendant a special claim. I do not see the force of this argument. Granting that that officer did give some 1,900 beegahs to the defendants on the north side of the river as compensation for their losses on the south side, a grant which appears to me to have been wholly without warrant of law, still, as those lands have since entirely disappeared, the former owner would be in no better position than any other zemindar whose estate has been diluviated, and would have no claim to the reformed lands after alluvion, unless under some special circumstances which would distinctly prove his ownership.

It may be that the plaintiff is already in possession of all that he purchased from Government, whilst the defendants have suffered a loss of their entire mouzah of Mozufferpore; still this would not affect the former's right to take possession (under a fresh settlement of course) of any increment that the change of a river's course might join on to his parent estate.

If there were any sufficient proof of the Judge's statement that the disputed land first made its appearance after the second diluvion in 1861, as an island in an unfordable river, then the fact of the defendants having taken immediate possession of the same would suffice to defeat the present claim, notwithstanding the subsequent accretion; as the chur would then have belonged to Government, and Government only would have the right to sue for it. But I can find no such proof on the record. The Deputy Collector, who visited the spot

within six months of the re-formation, distinctly states that it joined on to the plaintiff's mouzah of Kootubpore. "*Lukt*" is the word used.

The oral evidence does not establish the fact; indeed, the only thing on which the Judge has apparently gone is the report of an Ameen who visited the spot six years after.

The map itself does not show it. There is, no doubt, to the north-east, a half dry "sottah," which is described in the evidence as a lake or pond; but there was no trace of this to the westward when the Deputy Collector visited the spot within a few months after accretion, nor is there anything to show that it was ever more than a local accumulation of water on the spot where the remains of it still exist.

It is further contended that, as Government was a party to the proceedings of 1844, which proceedings gave the defendants 1,900 beegahs more or less at or about the place where the disputed lands are now situated, the appellant, who bought the Government's right, is equally bound, and cannot object to a decision which only replaces the defendants in the position then given to them by the Special Commissioner; but this argument altogether ignores the fact that whatever rights the defendants as owners of Mouzah Mozufferpore once had on the opposite chur land have been swept away by the diluvion of 1859-60, and that the appellant has now a fresh *locus standi* under Regulation XI. of 1825, which is not affected by any order passed under a different state of circumstances.

For these reasons, I think that the appellant has made good his objections to the Judge's decision, and that the appeal should be decreed with costs.

Trevor, J.—It appears to me that the Judge is quite correct in the judgment at which he has arrived. He finds that the land is contiguous to the plaintiff's estate, and it is his opinion that it did not form as a gradual accretion to the plaintiff's estate, but that it came up a small island, and afterwards was joined on to the plaintiff's estate after being taken possession of by defendant. The circumstances of the locality, taken together with the evidence, seem to me also to render this the probable opinion; and as the land has thus formed, Government, and Government alone, was entitled to it, and not the zemindar of Kootubpore, to whose land it ha working from without, now in part joined.

Under this view, the argument of the plai iff drawn from the Regulation XI. of 1825 w not apply. The land is no accretion to h estate: it is an island taken possession of l a party, who may, or may not, as again the ruling power, have a valid title, b who, as against the plaintiff, is entitled hold it, the more specially as he holds decree of the Special Commissioner releasi to him beegahs 1,600 of land in this localit The defendant has, it is true, more th that quantity in his possession; but this immaterial in the view as to the mode accretion adopted by me. I would, ther fore, though I have the misfortune to diff from my learned colleague, dismiss th appeal with costs.

The judgment of the Court on the preser appeal was delivered as follows:—

Peacock, C. J.—There are two modes under Regulation XI. of 1825 by which a man may become entitled to land gained by alluvion from a river the bed of which is not the property of an individual. *First*, where the land is gained by gradual accession by the recess of the river. In that case, the land formed is an increment to the tenure of the person to whose land or estate it is annexed, and the person in possession of the estate acquires a right of property in the increment co-extensive with the property which he has in the estate to which it is joined, and the increment is liable to be assessed to the Government revenue. The *second* mode of acquisition is under Clause 3, Section 4, when a chur or island is thrown up on a large navigable river and the channel between such chur or island and the shore is fordable at any season of the year. In that case, the accession is declared to be an accession to the land or tenure which is most contiguous to it.

There was a *third* mode in which it was once thought that land might be acquired, *viz.*, by re-formation upon an old site. But in a Full Bench case* it has been decided that the ownership of the old site does not give a title to the re-formation.

In the present case, the defendant entered upon the land which is the subject of the suit, claiming it as a formation upon an old site, called Mozufferpore; even if he had proved (which he did not) that the land

* *See* 3 W. R., Civil Rulings, p. 51.

was re-formed upon the old site of Mozufferpore, according to the Full Bench decision to which I have referred, he would not have been entitled to it.

The defendant is not the owner of any portion of the land to which the increment in dispute is now in most part annexed, nor of any portion of the estate which was contiguous to the land when it was an island. The defendant is merely in possession without title.

Mr. Justice Trevor considered that, although the land sought to be recovered in the suit is contiguous to the plaintiff's estate Kootubpore, it did not belong to him, because it did not form as a gradual accretion to that estate, but came up in the first instance as a small island, and was subsequently, and after the defendant had taken possession of it, joined to the plaintiff's estate Kootubpore. But, as it would have become the plaintiff's property, if the defendant had not taken possession of it, the fact of the defendant's taking possession without title could not alter the plaintiff's right.

If the land was not gained by gradual accession, the question is—Was it gained by its having originally formed as an island, and having subsequently become annexed to the estate, which now belongs to the plaintiff?

If, when the island first formed, the river Bawor was not fordable between the plaintiff's estate, which formed that part of the shore which was nearest to the island, the island might according to Clause 3 have been disposed of by the Government. If, before the Government disposed of it, the river between the plaintiff's estate Kootubpore and the island became fordable, then, according to Clause 3, it would belong to the plaintiff as the owner of Kootubpore.

At the present time, the river is not fordable between the plaintiff's estate Kootubpore and that which was originally an island, but the river between the plaintiff's estate and the chur has been filled up, and a large portion of that which was an island has now become annexed to Kootubpore, and has ceased to be an island altogether.

At the time when the island was first formed, and, I believe, even after it had become partially annexed to Kootubpore, the estate Kootubpore was a khas mehal belonging to Government. The defendant being in possession of the land which had been formed, a question arose between him and the Revenue Authorities, whether he was liable to be assessed for it to the Government revenue. The Deputy Collector considered that, as it had formed on the old site of Mozufferpore, he was not liable to be assessed; but the Deputy Collector by that decision never intended to convey to defendant the property in the land, if it belonged to Government, as part of his Khas Mehal Kootubpore, nor had the Deputy Collector the power to decide, between the Government and the defendant, whether the defendant, as the former owner of the old site of Mozufferpore, had or had not a valid title to the land which had been formed. The superior Revenue Authorities did not agree with the Deputy Collector in his view that the land was not assessable to the Government revenue; and, whilst that matter was under the consideration of the Revenue Authorities, the plaintiff purchased Kootubpore from the Government.

If the increment belonged to Kootubpore, and the conveyance, from the Government, of Kootubpore was such as to pass the land which belonged to Kootubpore as an increment, the land in dispute passed to the plaintiff, and he is entitled to recover it from the defendant, who is a mere trespasser.

The defendant to-day contends by his pleader that, even if he is a trespasser, the conveyance of Kootubpore to the plaintiff did not pass the increment; and that, consequently, the plaintiff has no better title than he has; that the right still remains with the Government; and that the plaintiff is not entitled to turn him out.

The grounds of this contention are that the conveyance to the plaintiff was only of the Mehal Kootubpore, and consequently did not pass the increment which belonged to Kootubpore, but had not been assessed to the Government revenue.

But it turns out that the conveyance from the Government to the plaintiff has not been put in evidence. It is admitted that the plaintiff is entitled to the zemindaree of Kootubpore, and that he is in possession of it; and in the absence of any evidence to show that the conveyance from the Government to the plaintiff of Kootubpore was so worded as not to pass the increment, or that it expressly reserved the increment to the Government, it must be presumed that the person who is now the owner of Kootubpore is entitled to the same interest in the increment which he has in the estate to which it has become annexed. If he has a lawful title to the possession of Kootubpore, he has, *primâ facie*, a lawful title to the in-

crement, and to recover possession of it from the defendant.

It will be a question between the plaintiff and the Government, in which the defendant has no interest, whether the plaintiff is liable to be assessed to the Government revenue in respect of the increment.

For the reasons above given, we think that the judgment of Mr. Justice Trevor must be reversed with costs, and that the decree of the Lower Court must also be reversed with the costs of the appeal to this Court, and that the plaintiff is entitled to a decree for possession of the land in dispute, with the costs of the suit in the Lower Court.

The 25th February 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Sale by Hindoo widow of husband's property to satisfy joint-debt of her husband and herself.

Appeal No. 15 of 1867.

Appeal under Section 15 of the Letters Patent of the High Court, dated 28th December 1865, from the judgment of the Hon'ble J. P. Norman and the Hon'ble W. S. Seton-Karr, Judges of the High Court, dated the 2nd of May 1866, in Special Appeal No. 2506 of 1867, from a decision of the Judge of Sylhet, dated 6th June 1866, affirming a decision of the Moonsiff of that District, dated 8th June 1865.

Goluck Chunder Paul (Plaintiff), Respondent before the Division Bench, *Appellant,*

versus

Mahomed Rohim and others (Defendants), Appellants to the Division Bench, *Respondents.*

Baboo Nulit Chunder Sein for Appellant.

Baboo Anund Gopal Palit for Respondent.

Where a decree is obtained against a Hindoo widow, as guardian of her son as well as in her own right, for a debt contracted jointly by her and her husband, the husband's property is liable to satisfy the whole decree; and the wife is, therefore, entitled to sell as much of the estate as is necessary to raise the full amount of the debt.

The following are the judgments of the Division Bench :—

Norman, J.—I AM of opinion that the decision of the Lower Court is erroneous, and ought to be reversed.

It appears that Nobodoorga, the plaintiff's mother, was sued in her own capacity and as guardian of her infant son, Goluck Chunder, on a bond which had been executed by herself and her husband, and a decree obtained against her. In execution of this decree, the property now in dispute, which was a share standing in the name of Nobodoorga benamee for her husband, was attached. In order to prevent the sale under the decree of this share separately, Nobodoorga joined with Nobin Chunder Paul, to whom the other 8 annas belonged, in selling the whole to the defendant's predecessor in title. It is apparently not suggested by the plaintiff that in so doing she was not dealing with the property so as to prevent it from being sacrificed. She was discharging a debt which the whole of her husband's property might have been made liable to satisfy, and she was acting under the immediate pressure and compulsion of the attachment of this very property to satisfy the decree.

Applying the principles enunciated in the case of Hunooman Pershad Panday *versus* Baboo Munraj Koonwaree (6 Moore's Indian Appeals 392-418) to the present case, it seems clear that the purchaser was not bound to look beyond the decree and attachment, under the pressure of which the widow was selling.

From the statement of the vakeels on both sides, there seems strong reason to suppose that the Judge is not warranted by the evidence in assuming it to be shown what, if any, part of the debt was originally due from Nobodoorga. But I do not rely on that; I would reverse the decision of the Court below, and dismiss the suit with costs.

Seton-Karr, J.—This case was remanded to the Judge on the 5th of April 1866, on the appeal of the plaintiff, because the Judge was somewhat misplaced the *onus*. The plaintiff claimed some lands as once forming a part of his father's estate, which lands had been sold by his mother during his minority, and had been purchased by the defendant. The case was somewhat peculiar, and the Judge was directed to find, first, whether the lands claimed had formed part of the estate of the plaintiff's father; and then, if he proved his father's title, whether the sale by the *mother was made for purposes sanctioned by the Hindoo Law*.

The Judge has now found that the land was possessed by the plaintiff's father as his mourosi right, and that the plaintiff has succeeded to it by inheritance. This finding refers to the first point decided by the order of remand, and the Judge then goes on to find that "the sale by the plaintiff's mother was for the payment of her own debt and of her husband's equally, and I find *on that evidence* (*i. e.*, that produced by the defendants and by the plaintiff) that one-half the sale was for legal objects, that is, for the husband's debts, and that to that extent the plaintiff cannot recover; but, as regards the other 4 annas of the property sold, I do not find that the sale was made for purposes sanctioned by Hindoo Law, and, therefore, that it was unnecessary and illegal."

In special appeal, the pleader for the defendant, who thus loses one-half of his purchase, attempts to argue that the decision of the Judge as to one-half of the property sold being for the debts of the mother is not based on any legal evidence. I do not find that this ground, or anything like it, is taken in the written grounds of appeal. The case has already been once up on special appeal, when it was fully argued; and, if the appellant had intended to dispute the Judge's finding as not based on any legal evidence, he should have been very careful to enter it clearly in his grounds of special appeal.

I am of opinion, therefore, that this plea should not be listened to, and that in such a case we should not relax the wholesome rules regarding the admission of special appeals.

Of the two points taken in the written grounds, no argument is adduced on the second: but on the first it is stated that, "when the decree under which the property was sold does not specify that one-half of it was against the plaintiff's father, and the other half was not so, the Judge was wrong in holding that the sale with regard to one-half of the property was not for a necessary purpose."

The pleader attempts to argue on this, that, as the decree was passed against both parties, *viz.*, the mother and the plaintiff as minor, after the death of the husband and father, the whole of the sale should stand good.

Neither the written grounds, nor the argument attempted to be based upon it, are wholly in accordance with the facts of the case.

It appears that the father was indebted, and the creditor sued his widow on a bond, and obtained thereon a simple money-decree.

On this, the property being attached and put up for sale, the widow and a cousin of the minor, one Nobin Chunder Paul, whose interests are quite distinct, parted with her properties by a deed of sale, the deed stating that there was no other way to clear off the debt.

It is thus not accurate to say that the property was sold under a decree, or that *anything whatever as to the property was specified in the decree*, which was for a simple money-debt and bound no property in particular.

It is true that the property of the debtor which passed to his son by inheritance was liable to satisfy that decree, and that all of it might have been sold to satisfy the father's debts, and that the respondent may urge that the private arrangement was made as the best way of freeing the property. But all the argument appears to me to be put on one side by the positive finding of the Judge that the private sale was effected in part for the debts of the father, and in part for the debts of the mother, which she had no right to incur. In fact, the only plea raised in the written grounds of appeal seems to me wholly beside the question—not to touch the decision of the Judge at all.

Into this finding, as it seems to me, we have no right to enter, as it is not called in question as legally erroneous in the written grounds of appeal.

I observe, too, that, though the mother was sued as a widow and guardian of her son, the decree in the bond-case simply passed against her, and the respondent urges that the widow in the private sale sold the property in her own capacity, and that she cannot be held to have bound or parted with the minor's interests for her own debts.

I do not, however, go so far as to admit that the respondent has at all made out that no part of the property ought to have been sold.

On the whole, then, I am of opinion that on the decision of the Judge the contention of the appellant does not properly arise. He was, moreover, a purchaser from a Hindoo widow, and was bound under all the precedents—Hunooman Panday's included—to exercise reasonable caution, and the Judge finds practically as a fact not impugned, except verbally, that the widow too took advantage of the pressure to part with one-half of the property for purposes of her own extravagance.

I would confirm the decision and dismiss the appeal with costs.

The judgment of the Court on the present appeal was delivered as follows:—

Peacock, C. J.—I think this is a very clear case. The widow was sued as guardian of her son, representing the father; and she was also sued in her own right. The debt was a debt contracted jointly by her and her husband, the father of the petitioner. In that suit, the plaintiff recovered a decree. As between the plaintiff in that suit and the petitioner in this suit, who is the heir of the husband, the husband's property was liable to satisfy the whole decree, and the wife was, therefore, entitled to sell as much of the estate as was necessary to raise the whole debt.

Under these circumstances, the purchaser had a good title as against the plaintiff in this suit to the whole of the property which he purchased; and the judgment of Mr. Justice Norman is correct in reversing the decision of the Lower Court, and dismissing the suit with costs. Those costs include the costs of the special appeal to the High Court.

The appellant will, in addition to the costs already awarded, pay the costs of the appeal to this Court from Mr. Justice Norman's judgment.

The 25th February 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson and A. G. Macpherson, *Judges.*

Mahomedan widow's dower—Lien on husband's estate—Limitation—Clauses 12 and 16, Section 1, Act XIV., 1859.

Appeal No. 16 of 1867.

Appeal under Section 15 of the Letters Patent of the High Court, dated 28th December 1865, from the judgment of the Hon'ble J. P. Norman and the Hon'ble W. S. Seton-Karr, Judges of the High Court, dated the 1st of May 1867, in Regular Appeal No. 94 of 1866, from the decision of the Principal Sudder Ameen of Patna, dated the 28th December 1867.

Woomatool Fatima Begum (Plaintiff), Respondent before the Division Bench. *Appellant,*

versus

Meerunmun-nissa Khanum (Defendant), Appellant before the Division Bench, *Respondent.*

Mr. R. E. Twidale and *Baboos Onookool Chunder Mookerjee* and *Tarucknath Sen* for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

HELD *by the Divisional Bench.*—The widow of a Mussulman in possession of her husband's estate under a claim of dower has a lien upon it, and is entitled to possession, as against those entitled as heirs, till her claim is satisfied.

Should the widow, in such a case, be deprived of possession by a decree in favor of heirs who take with notice of her claim to dower, and more particularly

where her right to sue has been expressly reserved, the heirs take subject to a lien of which the property is not divested by the decree.

If the widow, under such circumstances, sued to establish the lien, her suit would come under Clause 16, Section 1, Act XIV. of 1859; if she sued to declare that landed property was subject to the lien, her suit would come under Clause 12

HELD *by the Appellate Bench.*—In a case in which a Mahomedan widow had, after many years of possession as above, been compelled to make over 1-6th of her estate to her mother-in-law, and then sued her mother-in-law for 1-6th of her dower without interest, she was entitled to recover her claim without deduction on account of wasilat.

The following are the judgments of the Division Bench :—

Norman and Seton-Karr, JJ. (dated the 11th March 1861).—THIS is a suit by Woomatool Fatima Begum, widow of Tussudduck Hossein, to recover from Mussummat Janee Khanum, the mother of Tussudduck Hossein, Rs. 15,000, alleged to be due from the defendant on account of Mohr Mowajjul, or dower, which had been payable to the plaintiff on the death of her husband, under the following circumstances :—

Tussudduck Hossein died in 1845. On his death, the whole of his property came to the possession of the plaintiff, who held the same as in lieu of dower, alleging that it had been given up to her by an ikrarnamah executed by Tussudduck Hossein in 1835; and that the surrender had been confirmed by an ibrarnamah or deed of relinquishment executed by the now defendant.

The now defendant having brought a suit for her share of the property, as the mother and an heiress of Tussudduck, declaring the alleged ibrarnamah and ikrarnamah to be fictitious, obtained a decree in the Court of the Principal Sudder Ameen of Tirhoot, on the 30th of September 1859. This decree was affirmed by the Judge on appeal in March 1860, and the Judge's decision was upheld by the late Sudder Court on special appeal on the 5th of June 1862, the Court finding that the two deeds were not proved.

In execution of this decree, the defendant obtained possession. The plaintiff now sues for dower, treating her cause of action as having arisen on the 8th of September 1862, when the plaintiff obtained possession under the decree of 1859.

The defendant objected that the suit was barred by limitation.

The Principal Sudder Ameen overruled this plea, holding that the cause of action must be deemed to have arisen from the final decision, whereby the plaintiff was thrown out of possession.

For the defendant, in appeal before this Court, Baboo Kishen Kishore Ghose argued that the cause of action in a suit for dower is the breach of contract to pay the dower; that this cause of action accrues when the dower becomes payable, *viz.*, in this case, on the death of the plaintiff's husband in 1845; that the defendant having dispossessed the plaintiff under a decree of Court, in a suit in which the defendant, if she had any right in respect of her dower, might have successfully asserted it, this ouster cannot be treated as a wrong giving the plaintiff a fresh right of suit.

There is a conflict of decisions in the cases in the late Sudder Court on the subject of the right of a dowress to take and hold possession of her husband's property under a claim of dower, and as to the period of limitation in suits for dower. It is convenient that we should examine first the principles of Mahomedan Law as laid down in the books of authority, and then consider the cases so decided.

In the Serjjyah it is said: "There belong "to the property of a person deceased, four "successive duties to be performed by the "Magistrate : *first*, funeral ceremony and "burial, &c. ; next, the discharge of his just "*debts* from the whole of his remaining "effects ; then, the payment of his legacies "out of a third of what remains after his "debts are paid ; and, lastly, the *distribu-* "*tion of the residue amongst his successors,* "*&c.*" We may observe that the dower due from the estate of a deceased Mussulman is a debt which, with reference to questions of priority, stands exactly on the same footing as any other debt of the deceased. (See Macnaghten's Precedents of Marriage, &c., Case XXIII., page 274.)

In Macnaghten's Principles of Mahomedan Law, it is said, Chapter 1. Section 1, Para. 5: "Debts are claimable before lega- "cies, and legacies (which cannot, however, "exceed one-third of the testator's estate) "must be paid before the inheritance is "distributed." (See also Case XXIII., Macnaghten's Precedents of Marriage, &c., page 274.)

In Macnaghten's Precedents of Inheritance, Case XVI., page 94, it is said: "If "the amount specified as dower exceed the "value of the estate, the heirs will not

"be entitled to succeed to any part of it; "but the whole will appertain to the wife "in virtue of her claim of dower. If the "amount specified fall short of the value of "the estate, the proceeds must, in the first "instance, be applied to satisfy the claim "of dower." Several authorities are cited, and the writer proceeds: "These quota-"tions are sufficient to show that liquidation "of debts precedes the distribution of the "estate to the heirs."

In Macnaghten's Precedents of Debts and Securities, Case X., the question was put: "A man dies being indebted to his wife "for her dower. Has she a lien on the per-"sonal property left by her husband in satis-"faction of such dower in preference to "the other heirs?"

"*Answer.*—If the other heirs pay the "widow the amount of her dower, she has "no claim on the property left by her "husband, except for her legal share of the "inheritance; and if they do not pay her "the amount of her dower, she has, in the "first instance, a *prior claim, on account "of her dower*, on the property left by her "husband, whether real or personal. The "residue, after her claim is satisfied, will "be divided between her and the other "heirs, according to their respective shares "of inheritance."

In Macnaghten's Precedents of Marriage, &c., Case XXIV., page 275, it is said: "There is a distinction between money and "other property in cases of dower, *viz.*, "that the widow is at liberty to take the "former description of property, over "which she has absolute power; but, as to "the other property, she is entitled to a "lien on it as security for the debt, and it "does not become her property absolutely "without the consent of the heirs or a "judicial decree. Where the debt is large "and the property small, the former neces-"sarily absorbs the latter, in spite of any "objection urged by the heirs, who, until "they pay the debt, have no legal claim "against the creditor in possession to deliver "up the estate."

The lien of the widow for her dower, whether prompt or deferred, is declared to exist in Case XXXII., Macnaghten's Precedents of Marriage, &c., page 285.

These texts and cases seem to us to establish the position that the widow of a Mussulman in possession of her husband's estate under a claim of dower has a lien upon it as against those entitled as heir and is entitled to possession of it as against them till her claim of dower is satisfied.

The cases of Gholam Hossein Ali *versus* Zeniab Beebee, 1 Select Reports, page 48; Wajeeb-oonnissa Khanum *versus* Mir Hossein Ali, 1 Select Reports 266 (*see* the *futwa* of the Law Officer in the Note, page 268); Mahomed Noor Buksh *versus* Budun Chund Beebee, Sudder Dewanny Adawlut Reports, 1852, page 885; Special Appeal 152 of 1862 before Sir Barnes Peacock, Chief Justice, and Mr. Justice Kemp; Syed Atahur Ali *versus* Altap Fatima and others, decided 6th February 1863 (not printed); and the case in the Privy Council in Ameer-oonnissa *versus* Moradoonissa, 6 Moore's Indian Appeals, page 222, appear to have been decided in accordance with the above principle.

It was argued in the last-named case that the plaintiff was the heir-at-law, and, as the deed of dower was disputed, he was entitled, by the Mahomedan Law, to be put in possession of the deceased's real estate, the widow's remedy being to establish the deed of dower by a suit at law. But their Lordships did not accede to that argument.

The case is not quite conclusive of the question now before the Court, because there the contract was between Sheas, and the rights of creditors as against heirs of the Shea sect appear to be somewhat larger than in the case of Sunnies. (*See* the *futwa*, 6 Moore's Indian Appeals, pp. 219 and 220; and compare Macnaghten's Precedents of Marriage, &c., Case XXIV., page 275, and Case XXXVIII., page 290.) According to the Shea doctrine, the creditor has power to sell landed property to an amount sufficient to satisfy the dower without recourse to the public authorities. According to the Sunnie doctrine, the creditor has simply a lien on any land of the debtor, and cannot take them over so as to acquire an absolute title in satisfaction of the dower, without the consent of the heirs, or a decree of Court.

In the cases of Mussummat Wujeerun *versus* Mahomed Hossein Khan, 7 Select Reports, page 34; and Ranee Buksh Beebee *versus* Nadir Beebee, 3 Select Reports, page 59, cited in the case before the Privy Council; Beebee Salamut and Sheik Moula Buksh, 5 Weekly Reporter, page 194, when the Court gave possession to the heirs, leaving the widow to establish her right to dower by a suit, the Court appears to have over-

looked the fact, that in depriving the widows of possession, they were destroying a lien given them by Mahomedan Law. No authority from any book of Mahomedan Law was cited in support of the course taken by the Court in these cases, and apparently no *futwa* of the Law Officer was called for on this point. The same observation applies to the case of Sheik Beebee *versus* Ranee Buksh Beebee, 5 Select Reports, page 105. In Altafoon-nissa *versus* Soorma Khatoon, Sudder Adawlut Reports, 15th June 1860, page 634, the Court refer to passages in pages 275 and 290 of Macnaghten's Precedents. But they wholly failed to observe that, although, according to the passages cited, the widow could not be deemed to hold under an absolute and proprietary title, she might still be entitled to retain possession by virtue of her lien.

We are strongly disposed to think that these five cases are in conflict with the principles of Mahomedan Law; if, indeed, the earlier cases were not in effect virtually overruled by the case in the 6th Moore's Indian Appeals already referred to. However that may be, we think we may hold that, when a Mahomedan widow, who has actually obtained possession of the estate of the deceased husband, has been deprived of possession by a decree in favor of heirs who take with notice of the existence of her claim to dower, and more particularly where her right to sue to establish her claim to dower has been expressly reserved, we may treat the heirs as taking the property subject to a lien which is not divested by the decree. The maxim applies "*actus curiæ neminem gravabit.*" In the case of Mahomed Koor Buksh *versus* Buddun Chund Beebee, Sudder Dewanny Adawlut Reports, 1852, pages 885—890, the lien was enforced as against a purchaser from the heir.

If this is so, the cause of action in the present suit, which, when closely examined, may be properly termed a suit to give effect to the lien of the plaintiff on the share of the defendant, may very well be treated as having arisen either from the date of the final decree by which possession was adjudged to the defendant in accordance with the view taken by the Principal Sudder Ameen, a Mahomedan Law Officer of very considerable experience, and in accordance with the case of Mussummat Wuzeerun Beebee *versus* Mahomed Hossein Khan, Sudder Dewanny Adawlut Reports, 1856, page 841, or rather from the date on which the defendant took actual possession of the estate under the decree as suggested by the plaint.

The right of lien and the right to come to Court to pray to have the lien established are causes of action which may be quite distinct from the right to sue for the original debt in respect of which the lien was created. It is no new doctrine that a lien may remain in full force, though any right of action in respect of the claim for which it was created has long been barred by limitation.—(*See* the English cases, Higgins *versus* Scott, 2 Barnewall and Adolphus 413; *Ex-parte* Broomhead, 16 Law Journal, Queen's Bench, 355; Barton *versus* Tottersall, 1 Russell and Mylne 237.)

The suit to establish the lien would apparently come under the 16th Clause of Section 1, Act XIV. of 1859, in this particular instance.

If the suit had been to declare that landed property was subject to the lien, it would come under Clause 12. In either case the suit is in time.

The defendant obtained possession in September 1862. We think that the plaintiff has a cause of action against the defendant in respect of her dower, which is not barred by limitation, and, therefore, would dismiss the appeal so far as regards this point.

We will hear the parties on the other points, if necessary.

Norman, J.—The appellant's vakeel has now been heard on the merits in this case. He attempted to show that the evidence did not justify the Principal Sudder Ameen in finding that the plaintiff's dower was fixed at a lakh of rupees and one gold mohur.

The marriage of the plaintiff with Tussudduck Hossein took place as long ago as 1835; a number of respectable witnesses—relatives of the family, present at the marriage—have deposed that the dower was that alleged by the plaintiff.

The defendant's case is, that the plaintiff's dower was Rupees 5,000. His witnesses are said by the Principal Sudder Ameen to be persons of mean condition, and one of them actually goes on to state that the plaintiff immediately before the death of her husband Tussudduck relinquished her dower.

If we had simply to choose between the evidence of the plaintiff's witnesses and those of the defendant, and to say which appear to be more worthy of credit, we should have no hesitation in agreeing with the Principal Sudder Ameen that the witnesses of truth are those of the plaintiff. But the case does not rest there. The plaintiff's husband died in 1845, only ten years after the marriage; and from the time of his death the plaintiff remained peaceably in undisturbed possession of the entire property of her husband for six years. Some proceedings were then taken, which resulted in a reference to arbitrators, who decided in favor of the plaintiff's right to remain in possession of her deceased husband's property to satisfy her claim for dower. It is said that the award was void. Be that as it may, there is the broad fact that for upwards of twelve years no suit in Court was brought by the husband's heirs to contest the plaintiff's right to hold possession to satisfy her dower.

It is utterly impossible to suppose that persons in the position of the appellant, who was the mother of Tussudduck Hossein, would have omitted to sue for her share of the inheritance, if the case now set up by her were true.

A document, a copy of a petition, dated the 27th of June 1845, appears to have been admitted by the Principal Sudder Ameen, on which, we think, we ought not to rely, because it was received irregularly in the Lower Court.

The issues were fixed on the 11th of July 1865; the witnesses were examined in Court on the 1st and 2nd of August according to Section 183.

The case ought to have *been then and there heard out, and judgment pronounced either then, or at some future day, without any fresh hearing.*

The Principal Sudder Ameen, however, adjourned the case from time to time till the 6th of December. On the 2nd of December, the document in question was presented to the Court with a petition by the plaintiff's pleaders, alleging that on enquiry this document had been hit upon, and that it had not been in the possession of the plaintiff at the time when the other documents were filed.

At this time, the whole case having been closed, no fresh evidence should have been admitted. No sufficient excuse was shown for the non-production of the document at the final hearing, so as to justify its reception under Section 128. The plaintiff does not expressly state in her petition that she was not personally aware of its existence. The defendant has a right to say that she had no opportunity of enquiring into its genuineness, or of giving evidence to show that it had been originally got up to serve a particular purpose.

We do not rely on this document, but from the other evidence in the case we are quite satisfied that the Principal Sudder Ameen has come to a right conclusion as to the amount of the plaintiff's dower.

Baboo Dwarkanath Mitter, however, objected that the decree should not have been for the full amount of Rupees 15,000 as claimed. I think that contention well-founded. The plaintiff, having been in possession of the property of her deceased husband for many years for the satisfaction of her claim for dower, may probably have realized a large portion of the amount due to her from the collections; and, consequently, the defendant, who took her share as one of the heirs of Tussudduck Hossein, subject to the plaintiff's lien for dower, and whom the plaintiff has sought to fix in this suit with liability to the extent of 1-6th of the dower, as charged on the 1-6th of the estate of Tussudduck Hossein recovered by her, is liable only for the amount remaining charged on such share.

The decree of the Lower Court must be modified, and an account must be taken of the sums received by the plaintiff out of the collections in satisfaction of her dower.

She must, of course, be allowed all proper collection-charges, and all sums, if any, paid for the maintenance, repairs, or reasonable improvement of the property.

On the other hand, I think that her lien, according to Mahomedan Law, originally extended only to the amount named as dower. Dower, according to Mahomedan Law, is a debt which does not bear interest, and the ordinary lien of a Mahomedan widow appears, upon all the authorities, to be simply a lien to satisfy such debt. Sudder Dewanny Adawlut Reports, 1852, page 891, and Sudder Dewanny Adawlut Report, 29th November 1860, page 311, are referred to. In taking the account, no interest will be allowed to the plaintiff for the period of 12 or 14 years during which she was in quiet pos-

session, and realizing the amount of her dower from the property of her husband in the way she thought right and proper.

But from the time from which she was wrongfully deprived of possession and of the security for her dower and driven to her remedy in a Court of Law, *viz.*, from the date from which the now defendant recovered mesne-profits with interest against her, I think that interest at 12 per cent. should be allowed her under the provision of Act XXXII. of 1839, to be computed on the balance of dower then remaining unsatisfied. This is really no more than computing interest on one side of the account when it is computed on the other; and after ascertaining the amount of the balance of the entire dower with interest from the date last above mentioned down to the date of this decree, it will be declared that the defendant is liable to pay to the plaintiff 1-6th of the amount, so that such 1-6th does not exceed the sum sued for.

The decree will be modified accordingly, and the plaintiff and the defendant, respectively, will get their costs in all the Courts in proportion to the amount ultimately decreed and disallowed.

Seton-Karr, J.—This case was argued before us on the point of limitation in August last, and we subsequently decided, after a full hearing and consideration, that the plaintiff was not barred.

The case has now been heard on the merits, and I am quite clear that the decision of the Principal Sudder Ameen as to the extent of the plaintiff's dower is substantially right, and that it ought to be affirmed. The only remaining question is, whether the decision shall be added to or amended in any way.

At the close of the argument, a contention was raised by the pleader for the appellant, Baboo Dwarkanath Mitter, to the effect that the decree should not be affirmed for the full amount of Rs. 15,000 claimed as dower; but that a set-off should be allowed in favor of his client for the years during which the plaintiff had been in possession of the property as security for her dower, and had enjoyed the profits thereof. It was also urged that no interest should be allowed to the plaintiff for this period, or for any other, inasmuch as dower did not bear interest under Mahomedan Law. It was argued by Mr. Doyne, on the other hand, for the successful plaintiff, that, if this view were adopted, the plaintiff would get little or nothing; that this point was put forward at the last stage of the suit; and that, if this set-off were allowed, interest must be allowed to the plaintiff for the years during which she had been dispossessed by the defendant, and had lost her security for her dower.

I own that I feel very great difficulty in adopting the view urged by Baboo Dwarkanath Mitter which has found acceptance with my learned brother.

In the first place, the plea was never thought of until the last moment. It was never urged in the Lower Court, where the defendant flatly denied the version of the plaintiff as to the amount of the dower, and falsely urged that it was only 5,000 rupees, and not one lakh of rupees; as falsely adding that the plaintiff had remitted even this small amount. The years for which the plaintiff was in possession, and for which it is contended that she ought now to give an account, are, we are told, those from 1252 to 1264. It is tolerably certain that no person, at this period of time, could bring a suit to render the plaintiff accountable for the mesne-profits of those years, without being at once successfully resisted by the plea of limitation; and it is still more certain that an enquiry into such past and remote events, attended with an investigation into collection-charges, set-off, &c., would be a matter of the greatest difficulty and inconvenience, would last for months, or years, would protract litigation, and might be productive of no satisfactory result whatever to either party in the end.

It is said that this order is the natural result of our judgment confirming one in the plaintiff's favor.

But I do not quite see that this is so, inasmuch as the point was not properly or timely taken by the defendant, who always had set up a totally different and a false case.

Then, as to the interest which, on the other hand, it is proper to allow to the plaintiff for the later years, or those for which she has lost her lien on the property.

No such claim was ever preferred by the plaintiff till the very last stage of the appeal, and this in answer to Baboo Dwarkanath Mitter's plea of a set-off for wasilat; and there is, to me, a slight inconsistency in holding that a Mahomedan dower is not subject to interest, and then in granting in-

terest for the period during which the party claiming has been out of possession of that which represented her dower. This difficulty might perhaps be got over by treating the latter claim as a debt. But I think the best plan is to set off, in a broad way, the wasilat of earlier years against the interest of the later years, and to admit neither claim.

On the whole, looking to the stage at which these several pleas have been preferred; to the state of the main contention between the parties in the Lower Court, and on appeal; to the extreme difficulty of rendering accounts of so remote a date; and to the protracted enquiry, and perhaps fruitless litigation, which this measure would involve; I see so many doubts and difficulties in the way that I should prefer to simply endorse the judgment of the Principal Sudder Ameen after a full hearing, and without considering these various claims and counter-claims preferred so late in the day, I would simply dismiss the appeal with costs.

The judgment on the present appeal was delivered as follows:—

Peacock, C. J.—The plaintiff in this case sues the defendant, her mother-in-law, for 1-6th of her dower, the whole dower being a lakh of rupees. The Court has held that she was not barred by limitation, upon the ground that for many years, and within the period of limitation, she held the estate of her deceased husband in lieu of her dower.

The defendant in this suit, the mother of the deceased husband of the plaintiff, recovered possession of her share of his estate, and in 1863 obtained a decree against the present plaintiff for wasilat for 6 years, at the rate of 782 rupees per annum. But the plaintiff had been in possession of the land from the time of her husband's death in 1845. The defendant in this suit contends that, although in her suit for wasilât she was barred by limitation from recovering mesne-profits for more than 6 years, the plaintiff, if she is entitled to recover 1-6th of her dower against the defendant, must account to her for the mesne-profits of 1-6th of the estate for the whole period during which the plaintiff held possession, except that portion of the period in respect of which the defendant obtained a decree for mesne-profits; and the senior Judge of the Division Bench has held that the plaintiff is bound to account for 1-6th of the profits which she derived from the land during that period.

On the part of the plaintiff it is contended that she ought not to be bound to account for the profits of the land during the time she held it in lieu of her dower, and that such mesne-profits ought not to be set off against the principal sum due for dower, because, if the plaintiff had received her dower at the time when she ought to have received it, she would have been able to invest it, and would have received from such investment a larger sum than she received from profits of the land during the time she held it; and this is so.

The plaintiff does not ask to receive interest upon her dower, but she asks that she may not be compelled to account for the profits of the land during the time that she held it in lieu of her dower. If she had had a lakh of rupees paid to her when she first entered into possession of the land in 1845, she would not have been bound, according to the tenets of the Mahomedan religion, to keep it in a box and take out of the box from time to time as much as she had occasion to spend; but she would have been allowed to invest her money in the purchase of land and to have lived upon the rents of her estate, even if she was prevented by her religion from lending her money at interest. If she would have been prevented from purchasing Government securities and receiving interest from Government, instead of receiving it from an individual, there were many other modes in which she might have invested the money if she had received her dower. It would have been a poor investment in this country if this lady could not have realized from her money at least 5 per cent. An investment which would have given her 5 per cent. for her capital would have yielded 5,000 rupees a year; whereas, taking the profits of the whole estate at six times the amount of the wasilat assessed upon the 1-6th of it, she received only 4,692 rupees a year. If, therefore, she is to account for the profits of the land during the whole time that she held it in lieu of her dower, she will, in fact, have received nothing instead of receiving the Rupees 5,000 a year, which she would have received from the investment of her money, if paid to her on her husband's death.

It is clear that the defendant has no cause of action against the plaintiff to recover now the wasilat which in 1863 she was held to be barred from recovering. It is equally clear that it would be extremely

unjust and inequitable to allow her now to deduct it from the principal of the plaintiff's dower, which the plaintiff seeks to recover without interest.

It appears to me that the decision of Mr. Justice Norman ought to be reversed, and that the plaintiff ought to recover 1-6th of her dower without any deduction.

The decree of the Principal Sudder Ameen will, therefore, be affirmed with the costs of the appeal to the High Court and the costs of the appeal from the judgment of Mr. Justice Norman.

The 25th February 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Declaratory decree—Section 15, Act VIII., 1859.

Case No. 1164 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Manbhoom, dated the 7th March 1867, reversing a decision passed by the Moonsiff of that District, dated the 10th June 1866.

Kenaram Chuckerbutty (Defendant), *Appellant,*

versus

Dinonath Panda (Plaintiff), *Respondent.*

Mr. M. L. Sandel and *Baboo Onookool Chunder Mookerjee* for Appellant.

Baboo Taracknath Sein for Respondent.

In order to entitle a plaintiff to a bare declaration of right under Section 15 Act VIII., 1859, he must make out, to the satisfaction of the Court, some act done by the defendant, which is hostile to and invades that right, and which would justify an injunction or a decree for damages, or a decree for delivery of possession being passed against the defendant, if the Court had so thought fit to exercise its discretion.

Bayley, J.—The special appellant urges two objections before us:—

1st.—That there is no cause of action shown in plaintiff's plaint.

2nd.—That the *onus* has been improperly put on the defendant.

On the *first* point, we thought it proper to give permission to the pleader to argue it, although it is not taken in the written grounds of special appeal. He cites to us certain cases referred to in Broughton, 2nd edition, in the notes to Section 15, Act VIII. of 1859, and to Weekly Reporter, Volume VIII., 20th June 1867, pages 64 and 65.

On this *first* point, I am of opinion that the objection is good. The plaint states no overt act of hostility or attempt to take adverse possession from plaintiff. It is not asserted that there is anything except some vague feeling of injury to plaintiff's right, from defendant's having caused a certain demarcation to be made by the survey-officers. To these officers, plaintiff, with full notice of the survey-proceedings in the mehal, never preferred any objections at the time; and, in fact, the defendant only did what the law required him to do, *viz.*, be present and point out the lands and estates to the survey-officers. Plaintiff does not show that he has lost, or is about to lose, anything he had. The case, page 300, Sudder Dewanny Adawlut Reports, 1857, 28th February, cited by plaintiff's pleader, is really in support of defendant's objection.

On the *second* point, I am clearly of opinion that the Lower Appellate Court substantially found it as a fact established by plaintiff's witnesses, and not rebutted by defendant, that plaintiff had a title to the lands in suit. But as the first point carries a verdict in favor of defendant (special appellant), it is needless to proceed further. I would decree the special appeal, but under the circumstances each party should pay his own costs.

Phear, J.—I concur in Mr. Justice Bayley's decision, and I only wish to add that I adhere to the opinion relative to the proper construction of Section 15 of Act

VIII. of 1859, which I have more than once elsewhere expressed, and which is reported in Cazee Muzhur Hossein *versus* Dinobundhoo Sein and others, Bourke, page 8, Promothonath Ghose *versus* Judoonath Sein, 1 Indian Jur., N. S, page 293, and other places. It seems to me that this Section gives the Court power to make a mere declaration of right without anything more, only in those cases where the facts proved before it are such that it would have been able to give consequential relief had the plaintiff asked for it and the Court seen fit to grant his prayer. In other words, the plaintiff, in order to entitle himself to a bare declaration of right under this Section, must make out, to the satisfaction of the Court, some act done by the defendants, which is hostile to and invades that right, and which would justify an injunction or a decree for damages, or a decree for delivery of possession being passed against the defendant, if the Court had so thought fit to exercise its discretion. In this case, it does not appear that the defendant has done anything whatever which can give the plaintiff a cause of action against him. No doubt, when challenged by the plaint, he is ready to deny the plaintiff's claim. But this denial by itself does not give the plaintiff a right of suit if he had it not before, although, of course, it may afford some evidence of its existence.

The 25th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Jurisdiction—Attachment in execution under Act X.—Tender of payment—Sale for arrears under Act VIII. (B. C.), 1865.

Case No. 1723 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 10th May 1867, affirming a decision passed by the Moonsiff of that District, dated the 29th December 1866.

Mr. Henry Buckland (Defendant), *Appellant*

versus

Ashoo Chowdhrain (Plaintiff), *Respondent.*

Baboo Bhuggobutty Churn Ghose for Appellant.

Baboo Kalee Kishen Sein for Respondent.

The purchaser of a tenure at an auction-sale in execution of a Civil Court's decree, offered to pay in certain arrears of rent on account of which the tenure was at that time attached and about to be sold under a decree in a suit under Act X. of 1859. The Assistant Collector refused to receive payment, and the tenure was again sold under the Law, Act VIII. of 1865, B. C.

HELD that the purchaser's remedy was by appeal to the Collector, Commissioner, and Board of Revenue.

Jackson, J.—THE plaintiff in this suit purchased, on 22nd August 1865, a tenure at an auction-sale in execution of decree in the Moonsiff's Court. The tenure was at that time attached and about to be sold for arrears of rent due under a decree in a suit under Act X. of 1859. The plaintiff offered to pay in those arrears. The Assistant Collector refused to receive them. The tenure was then again sold on 30th August 1865 under the terms of the Bengal Law, Act VIII. of 1865. The plaintiff now sues in the Civil Court to recover the tenure. Both the Lower Courts have decreed the plaintiff's claim, holding that the Assistant Collector should have received the money tendered by the plaintiff.

On special appeal, it is asserted that the Civil Courts had no jurisdiction to entertain the suit. Under the Bengal Council Act VIII. of 1865, the plaintiff's remedy was by appeal to the Collector, Commissioner, and Board of Revenue. The law having pointed out his remedy, we think that the plaintiff should have acted as the law directs, if he was injured by the orders of the Assistant Collector. As he has failed to do so, and the sale has taken place, the precedent of the Full Bench of this Court, Weekly Reporter, Volume V., page 20, applies to the case.

The Lower Court's decisions are reversed, and the plaintiff's suit dismissed with all costs.

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The 25th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Damages—Injuries received by minor—Guardian's right of suit.

Case No. 1658 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 22nd May 1867, reversing a decision passed by the Moonsiff of that District, dated the 21st August 1866.

Modhoo Soodun and another (Plaintiffs), *Appellants,*

versus

Kaemoollah Biswas (Defendant), *Respondent.*

Baboo Khettur Mohun Mookerjee for Appellants.

Baboo Debendro Chunder Ghose for Respondent.

A father, as guardian of his minor son, can sue to recover damages for personal injuries received by the son.

Jackson, J.—We think that the Principal Sudder Ameen is in error, and that the father, as guardian of his minor son, can sue to recover damages for personal injuries received by the son. The Principal Sudder Ameen states that there are numerous precedents to show that the father cannot sue for such damages, but he has not quoted any of them. The vakeel for respondent, in support of the decision, cannot quote any, but admits that the Lower Court is wrong in law. We know of no such precedents. It would be far more satisfactory if the Principal Sudder Ameen in future, when he alludes to precedents, quoted them. We reverse the decision and remand the case for trial of the remaining points raised on the appeal. The costs of this appeal to be paid by the respondents.

The 26th February 1868.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Suit dismissed without trial—Res adjudicata—Sec. 2, Act VIII., 1859.

Case No. 2066 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 24th June 1867, affirming a decision passed by the Moonsiff of Satkhirah, dated the 4th October 1866.

Shokhee Bewah and others (some of the Defendants), *Appellants,*

versus

Mehdee Mundul and others (Plaintiffs), and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellants.

Mr. R. E. Twidale for Respondents.

A suit on the same cause of action, and between the same parties, as a former suit which was summarily dismissed without being tried on its merits, is not one on a cause of action which "has been heard and determined by a Court of competent jurisdiction in a former suit."

Seton-Karr, J.—The only point pleaded before us is, that the plaintiff's claim should have been considered as barred by Section 2 of Act VIII. of 1859. It is clear, indeed it is admitted in the plaint, that the plaintiff brought a suit against the same defendant on the same cause of action, for what are, practically, the same lands.

In the former suit, the Moonsiff, on the case being remanded to him, said that there appeared to be some variance between the plaint, which alleged the jote to be in Pathurghatta, and the map, and a statement of the plaintiff's pleader to the effect that the jote lay in two other villages. On this ground, the Moonsiff, in the former suit, summarily dismissed the plaintiff's suit, but expressly said that he did not go into the

merits, and that "it would be contrary to the rule of the Court to do so." No doubt, this was a very unsatisfactory way of dealing with the case, and the plaintiff might and ought to have appealed against that decision, when he would doubtless have obtained a proper trial on the merits.

But it is perfectly clear that the case has *not been tried on the merits*, and, therefore, though the present suit is a suit on the same cause of action, and between the same parties, it is not one on a cause of action which has been *heard and determined* by a Court of competent jurisdiction in a former suit.

In this view, it seems to us that the Principal Sudder Ameen was legally right in holding that there had been no trial on the merits on the point really at issue in the former proceedings; and this view seems to be supported by the case quoted in Broughton's edition of Act VIII. under the Section in question.

This appeal, therefore, which is not pressed on us on any other ground, is dismissed with costs and interest.

The 26th February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Definition of the term "Hearing of the appeal" in Section 358, Act VIII., 1859—Withdrawal of appeal—Powers of Appellate Court.

Case No. 1183 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 29th March 1867, reversing a decision passed by the Moonsiff of that District, dated the 30th August 1866.

Ram Pershad Ojha and others (Plaintiffs), *Appellants,*

versus

Bhurosa Koonwar and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Mohinee Mohun Roy* for Appellants.

Baboos Chunder Madhub Ghose, Hem Chunder Banerjee, and *Nil Monee Sein* for Respondents.

The mere calling up of a case to be heard does not mean the same thing as the hearing of the case in the sense of Section 348, Act VIII., 1859.

An Appellate Court has authority to permit an appeal to be withdrawn.

Loch, J.—On this appeal being called up, the special appellant stated that he wished to withdraw the appeal. The respondent then informed the Court that he had filed a petition under the provisions of Section 348 of Act VIII. of 1859, and wished the case to go on in regard to his appeal.

After hearing argument and considering the terms of Section 348 of the Code of Civil Procedure, we think the respondent is not entitled to be heard, as the special appeal is not before the Court. Looking at the law, we think the only construction that the words "upon the hearing of the appeal" will bear is that the appellant must have opened his case, and, by so doing, asked the Court to give him some relief. It is then, and then only, that the hearing commences. The mere calling up a case to be heard does not, as contended by the respondent, mean the same thing as the hearing of the case. The intention of the law evidently was that when the case was being heard—or, as expressed in the law, upon the hearing of the case—the respondent might take any objection to the decision of the Lower Court, &c.

It has been urged that an appellant cannot withdraw an appeal; that, while the law provides for the withdrawal of suit, it nowhere provides for the withdrawal of appeals. We think this argument is untenable. The Appellate Court has, under Section 37, Act XXIII. of 1861, all the powers vested in the Courts of original jurisdiction; and, if the latter can permit a suit to be withdrawn, the former has authority to allow an appeal to be withdrawn.

The special appeal is allowed to be withdrawn, but the respondent will get his costs.

The 26th February 1868.

Present:

The Hon'ble W. Markby and Dwarkanath Mitter, *Judges.*

Limitation—Fraudulent accounts—Section 33, Act X., 1859.

Case No. 1971 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 27th May 1867, affirming a decision passed by the Deputy Collector of Jungeepore, dated the 22nd January 1867.

Dhunput Singh Doogur (Plaintiff), *Appellant,*

versus

Ruhman Mundul (Defendant), *Respondent.*

Mr. R. T. Allan for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

In a suit against an agent for moneys received on plaintiff's account, in which defendant set up a plea of limitation, plaintiff sought to extend the period of limitation on the ground that fraudulent accounts were delivered—

HELD that the Judge should have found specifically when the fraud was first known to the plaintiff; limitation in such a case running (under Section 10, Act XIV., 1859) from the date of knowledge of the fraud, not merely from that of suspicion of the fraud or of delivery of accounts.

Markby, J.—THE plaintiff in this case sued his agent in the Collector's Court for moneys received on his account. The defendant set up a plea of limitation. Both the Lower Courts held that the suit was not brought within one year of the termination of the agency, and on that ground dismissed the suit.

Upon appeal by the plaintiff, two objections have been taken: first, it is said that the date of the determination of the agency was wrongly fixed in Choitro 1271, for on that occasion the defendant was only suspended. Now, it is true that suspension may be a very different thing from dismissal, but we think that in this case the Judge uses the word "suspension" in the sense of dismissal, for the plaintiff himself in his plaint makes use of the expression *uboshur*, which implies a complete removal.

The other objection is this. The plaintiff sought to extend the period of limitation on the ground that fraudulent accounts were delivered, and that the suit was brought within one year from the time when the fraud was first known to him, and the appellant now complains of the way in which this part of the case has been disposed of. The Judge says: "No special "limitation on the ground of fraud can be "allowed, since the fact of suspension is "evidence of the discovery or the suspicion "of fraud." We are of opinion that this is not a satisfactory finding. A specific date was stated by the plaintiff as the time when he discovered the fraud, and the Judge should have found specifically when the fraud was first known to the plaintiff. The Judge says that at the suspension there was a suspicion of fraud, but this is a very different thing from knowledge, and it is knowledge, not suspicion, which is spoken of by the Statute (Section 33 of Act X. of 1859) which applies to this case.

It has, however, been further contended that, as it is found as a fact that the accounts were delivered before Sawun 1272, the suit, which was not commenced till Bhadro 1273, is manifestly too late. It is argued that, when the accounts were delivered, the plaintiff had the means of knowing that a fraud had been committed, and that, when he had the means of knowledge, he must be taken to have known of the fraud. But we cannot give our assent to either of these propositions. An inspection of the accounts would in many cases give no information as to the fraud, which might be only discoverable by comparing the accounts with other sources of information. Nor are means of knowledge, and knowledge in a general sense, identical. Suppose a large mass of papers and accounts to be handed over by an agent to his employer

it may be that by a long, careful, and patient examination of these, a fraud would be discovered, and the employer has, therefore, in his hands the means of knowledge. But how can it be said that means of knowledge is in such a case equivalent to knowledge? On the other hand, we do not at all mean to hold that a man is at liberty carelessly to shut his eyes to information within his reach, and in this or other way means of knowledge may sometimes be very properly said to be equivalent to knowledge.

We have no doubt that this is the true explanation of the expressions used by Mr. Justice Morgan in the case which has been cited from the 3 Weekly Reporter, Act X. Rulings, 121. It could not have been intended to lay down as an abstract proposition that, when fraudulent accounts are delivered, the suit must be brought within one year from the date of delivery, for the Act makes a most clear distinction between the delivery of the accounts and the discovery of the fraud, which distinction a decision in the sense contended for would wholly annihilate.

The case will, therefore, be remanded to the Judge to try the question whether fraudulent accounts were delivered by the defendant to the plaintiff, and, if so, when the fraud was first known to the plaintiff, and he will dispose of the question of limitation in accordance with this finding.

The 27th February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Notice under Section 216, Act VIII., 1859—Section 20, Act XIV., 1859—Limitation.

Case No. 318 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 29th August 1867, reversing an order passed by the Principal Sudder Ameen of that District, dated the 16th March 1866.

Obhoy Churn Dutt (Judgment-debtor), *Appellant,*

versus

Modhoo Soodun Chowdhry (Decree-holder), *Respondent.*

Baboo Tarucknath Sein for Appellant.

Baboos Ashootosh Dhur and *Tarucknath Dutt* for Respondent.

A notice under Section 216, Act VIII. of 1859, calling upon a debtor to show cause why a decree should not be executed against him, is a proceeding within the meaning of Section 20, Act XIV. of 1859, and the debtor's period of limitation for a new trial runs from the date of service of such notice.

Loch, J.—This case was remanded by the High Court on the appeal of the present special appellant, with direction to the Lower Court to determine two points: *1st*, whether the petitioner was entitled to a re-hearing of his case under Section 119; and, *2nd*, should this point be given against him, the Court should determine from evidence whether the notice, alleged to have been issued after execution was applied for in October 1863, was served according to law.

The respondent purchased a decree obtained by Mr. Runsay against the special appellant on 28th March 1862, and had his name substituted in September 1863. On 17th September 1863, he applied for the service of notice under Section 216, and the report of the Nazir, dated 9th October 1863, shows that it was served. On 17th February 1864, the decree-holder was directed to proceed with the execution of his decree, and, failing to take any steps, it was struck off on 28th April 1864. The present application was made on 12th December 1865, and on the issue of notice the debtor appeared and urged that no notice had been served upon him before the *ex-parte* decree was obtained, and he, therefore, prayed that the case might, under the provisions of Section 119, be admitted to a re-hearing; and he further denied that any steps to execute the decree had been taken till the present proceedings in execution were issued, and having made this application for a re hearing of the case within 30 days after process for enforcing judgment had been taken, he was entitled to have it admitted.

On remand, the Courts below have found that the notice under Section 216, returned by the Nazir on 9th October 1863, was duly served; that there was no ground for discrediting the witnesses on this point; and

that, as no application for re-hearing had been made till 1866, the applicant was clearly out of Court.

It is now contended before us that a notice under Section 216 is not a process to enforce judgment as contemplated in Section 119 The words of the law are : "The defendant "may apply within a reasonable time not ex-"ceeding 30 days after any process for enforc-"ing the judgment has been executed." By the Full Bench Ruling of 11th September 1866, VI. Weekly Reporter, page 99, it was held that the issue of a notice by the Court under Section 216 was a proceeding within the meaning of Section 22, Act XIV. of 1859, to enforce, or to keep in force, a decree; and the Full Bench Ruling of 3rd February 1868,* quoted by special appellant in support of his plea, is not in any way opposed to the view taken by the Court in its previous ruling. In the latter judgment, the Court held that process of attachment, and not actual sale, of the debtor's property was a process in execution, and the period of 30 days would begin to count from the date of attachment; and the rule laid down by the Court was "that, as soon as execution of "some process or writ against the defend-"ant has apprised him of the fact of the "decision, he is bound thereupon to "apply to the Court within 15 days (in "Act X. suits, and 30 days in suits "before the Civil Courts) for a new trial." Now, the notice under Section 216, calling upon the debtor to show cause why the decree should not be executed against him, gave him ample notice of the fact of a judgment existing against him which was about to be enforced; and we think he was bound to have applied for a new trial within 30 days from the service of such notice, and that he cannot excuse his neglect in not so applying by pleading that no writ was issued for the attachment of his property or person. We concur, therefore, with the Judge that special appellant is not entitled to a new trial.

The plea of limitation is urged against the execution of this decree, but as the proceedings taken in 1863 have been held to be *bonâ fide*, and the present application is within three years from that time, this plea must also be rejected. The appeal is dismissed with costs.

* See *supra*, p. 236.

The 28th February 1868.

Present :

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Measurement by proprietor of a farmed estate—Section 9, Act X., 1859.

Case No. 1850 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 10th June 1867, reversing a decision passed by the Deputy Collector of that District, dated the 28th March 1867.

Ranee Krishto Motee Debia ((Plaintiff), *Appellant,*

versus

Ram Nidhee Sircar and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Baboos Nubo Kishen Mookerjee and *Lukhee Churn Bose* for Respondents.

A proprietor of an estate is not barred from measurement by the fact of its being leased to a third party; nor is a proprietor bound, under Section 9, Act X., 1859, to show that he is in actual receipt of the rents at the time when he applies to measure the land.

Seton-Karr, J.—THE decision of the Judge in this case is erroneous in law.

The plaintiff sought the assistance of the Court to measure a mehal, and was resisted by the ryots on the ground that the mehal was an ijara, and that the plaintiff, the applicant for aid in measurement, was not in the receipt of the rents.

The Deputy Collector overruled this plea, because the plaintiff was the admitted pro-

prietor of the mehal, and the ijara was about to terminate.

On appeal, the Judge ruled that the plaintiff not being at the time of his application in the receipt of the rents, and the mehal being leased to a third party, the plaintiff had no right to ask the aid of the Court.

In appeal before us, two decisions of this Court have been quoted by the respondent in favor of the Judge's decision: Weekly Reporter, Volume VII., page 415, and Weekly Reporter, Volume VIII., page 12. The latter of these decisions refers to Section 10 of Act VI. of 1862, and not to Section 9, which is now before us. The other decision, at first sight, might seem to countenance the contention of the respondent; but, on looking closely into that case, it appears that the judgment proceeded on the ground that the plaintiff was seeking to establish his actual title, which was disputed, under pretence that he had a right to measure the land, and the Judges held that "Section "9 was never intended to give a party a "right to sue for possession of land under "color of an assertion that he had a right "to measure."

In the case before us, the plaintiff's title and position are undisputed; he is the actual proprietor of the mehal; and we do not think that he was barred from measurement by a lease which, it appears in this instance, was on the point of terminating.

The decree of the Judge is set aside, and that of the Deputy Collector is restored, the appeal being decreed with costs and interest.

Mitter, J.—I wish to add that the words of Section 9 are clearly in favor of the special appellant. A man who is the admitted proprietor of a mehal is not bound to show that he is in actual receipt of the rents at the time when he applies to measure the land. The words "in receipt of the rents" have no reference to the first part of the Section, *i. e.*, to the words "proprietors of tenures and estates," but to the words "other persons," or other than those who are admittedly proprietors of the mehal or tenure within which the lands to be measured are situated. The conjunction "or" is disjunctive, and not copulate.

I concur in the order decreeing the appeal.

The 28th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mortgage—Contesting a mortgage, yet paying up mortgagee's lien—Onus probandi.

Case No. 1727 of 1867.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 28th February 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 27th January 1866.

Toolsee Dutt Misser and others (Defendants), *Appellants,*

versus

Brojo Mohun Thakoor and another (Plaintiffs), *Respondents.*

Mr. R. V. Doyne and *Baboo Romesh Chunder Mitter* for Appellant.

Mr. R. E. Twidale and *Baboo Unnoda Pershad Banerjee* for Respondents.

Where plaintiff, suing to obtain certain property unencumbered by a previous mortgage, pays into Court the amount due under the lien of defendant as mortgagee, and states that he has no objection to the sum being appropriated to the payment of that lien, he has no cause of action as against defendant.

Plaintiff alleging that an attachment subsisted, and that, therefore, the mortgage under which defendant claims is invalid, is bound to prove his allegation, and the *onus* is not discharged by showing that attachment was made some years previous to the alienation.

Kemp, J.—Several points have been taken by the learned Counsel Mr. Doyne for the special appellant. The special respondent wishes to obtain the property in dispute unencumbered by the previous mortgage. We find, on turning to the record, that the special respondent, the day after the present suit was instituted, paid into Court the amount due under the special appellant's

lien, and on being questioned by the Court, the special respondent stated that he had no objection to this sum being appropriated to the payment of the special appellant's lien. In fact, the mortgage of the special appellant having been fully satisfied by the voluntary act of the special respondent, the latter has no cause of action as against the special appellant, and the suit on that ground alone ought to have been dismissed, without going into the merits.

The Judge is, in our opinion, wrong in throwing the *onus* on the special appellant of proving that no attachment subsisted at the time his lien was created.

It is the allegation of the special respondent that an attachment subsisted, and that consequently the mortgage under which the special appellant claims is invalid. The plaintiff (special respondent) was bound to prove this; and he could have had no difficulty in doing so by moving the Court under the provisions of Section 138 of the Code of Civil Procedure to send for the proceedings in the execution-stage, which would have clearly shown when the attachment was made, and when it was withdrawn.

Any private alienation by sale, gift, or otherwise during the *continuance* of the attachment would be null and void under the provisions of Section 240, Act VIII. of 1859. But it does not follow that because attachment was made in 1862, that the attachment so made subsisted some years afterwards when the alienation was made. We also find that, although the *onus* was not on the special appellant, he offered evidence to prove that the attachment had been removed, which the Judge refused to receive. The plaint, too, does not raise the plea that the attachment was subsisting at the time of the alienation under which the special appellant claims, and that, therefore, such alienation is null and void. The Judge is also clearly wrong in holding that, because the mortgage-deed provides that, in the event of the mortgaged premises being sold, and not being sufficient to meet the debt, the person and other property of the mortgagor would be liable, the mortgagee must be considered to have waived his right under the mortgage, and that he cannot follow that property into whosoever hands it may have passed.

The decision of the Judge is reversed and the appeal decreed, the suit of the special respondent (plaintiff) being dismissed with costs in all the Courts bearing interest.

The 29th February 1868.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appointment of Peons—Act V. (B. C.), 1863.

Case No. 643 of 1867.

Miscellaneous Appeal from an order passed by the Officiating Judge of Backergunge, dated the 13th July 1867.

Gooroo Dyal Singh, *Petitioner.*

Baboos Chunder Madhub Ghose, Mohinee Mohun Roy, Sreenath Banerjee, and *Bungshee Dhur Sein* for Appellant.

By Act V. (B. C.), 1863, the appointment of peons is vested in the Nazir subject to the approval of the Judge, by whatever title designated (Sections 3, 12), and no superior authority is competent to control such appointments or to restrict the choice of the Nazir.

Jackson, J.—It seems to me that the interference of the Judge, and the wholesale removal of the five peons on the ground that the claims of certain abolished chuprassies had not been considered, was wholly unwarranted.

By the Bengal Act V. of 1863, the appointment of peons in the Civil Court is vested in the Nazir, subject to the approval of the Judge, by whatever title he be designated (Sections 3 and 12); and I am not aware that any superior authority whatever is competent to control such appointments, or to restrict the choice of the Nazir in any way whatever, the intention of the framers of the Act being manifestly that the selection of proper agents should rest with the person under whose direction they were to act.

The order of the Judge is, therefore, set aside.

e

The 29th February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Mahomedan minors—Letters of administration—Act XL. of 1858—Propinquity of relationship or fitness.

Case No. 519 of 1867.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 9th September 1867.

Akima Bibee, *Appellant,*

versus

Azeem Sarung, *Respondent.*

Baboo Poorno Chunder Shome for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Act XL. of 1853 comprises the cases of all minors not under the Court of Wards, and not being European British subjects, and acts irrespective of the Mahomedan Law, which can be no guide to the Civil Court in determining whether an applicant should or should not have letters of administration.

Section 7 looks as much to the fitness of the relative as to his propinquity, and when two relatives claim the right to administer, the Court is at liberty to disregard the latter qualification and look to the former.

Loch, J.—THIS is an application for letters of administration under the provisions of Act XL. of 1858. The petitioner is the uncle and father-in-law of Jaigum Bibee, the daughter of his brother Nuzzur Mahomed. Jaigum Bibee is still a minor, and before us her mother Akima objects to the applicant being made manager, as there appears to be a dispute regarding the share in the joint property to which each of the brothers was entitled.

Before us it is urged that, under the Mahomedan Law, the mother is entitled to the custody of her minor daughter till she arrive at puberty. This may be the case ordinarily, but it does not follow that, when marriage takes place, she would still be entitled to that custody. Be this as it may, the custody of the child is not the question before us, but the administration of her estate. Now, Act XL. of 1858 was enacted to make better provision for the care of the persons and property of minors not brought under the superintendence of the Court of Wards, and not being European British subjects. The law, therefore, comprises the cases of all minors not coming within one or other of these two classes, and acts altogether irrespective of the Mahomedan Law, and that law can be no guide to us in determining whether the applicant should, or should not, have the certificate prayed for.

It is then urged that, under the provisions of Section 7 of the Act, the *nearest of kin* to the minor is entitled, where there is no deed or will appointing a manager, to receive the certificate. But the law does not say so. It says that if there be no person entitled under a will, or if such person be unwilling to undertake the trust, and there is *any near* relative of the minor, who is willing and *fit to be entrusted* with the charge of the property, the Court may grant a certificate to such relative. The law looks as much to fitness of the relative as to his propinquity; and where two relatives claim the right to administer, the Court is, we think, at liberty to disregard the latter qualification, and look rather to the former.

From the evidence, it appears that the girl is living with her father-in-law, and the Judge, in giving him the certificate of administration, was probably led to do so from the consideration that he was better qualified than the mother to look after the property. We see no sufficient grounds for interfering with the order made in this case, and dismiss the appeal with costs.

The 29th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Limitation—Clause 16, Section 1, Act XIV., 1859—Sums overdrawn by a Gomashta—Set-off.

Case No. 1615 of 1867.

Special Appeal from a decision passed by the Judge of Dacca, dated the 8th April 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated 14th August 1866.

Kalee Kishen Paul Chowdhry (Plaintiff), *Appellant*,

versus

Mussamut Jugut Tara and others (Defendants), *Respondents*.

Baboos Romesh Chunder Mitter and *Bamachurn Banerjee* for Appellant.

Baboos Kallee Mohun Doss and *Kallee Kishen Sein* for Respondents.

In a suit against the heirs of a gomashta to recover the aggregate amount of certain sums of money overdrawn from time to time by the gomashta to the date of his death, less the salary due to the gomashta during the whole period of his incumbency—HELD (*by Kemp, J., dismissing the appeal*) that, in the absence of any stipulation between the parties that the salary of the deceased was to be set off at all against the items overdrawn, the claim for recovery of such of the items as were drawn more than 6 years previous to the institution of the suit was barred by Clause 16, Section 1, Act XIV., 1859.

Held by *Jackson, J., contra*.

Jackson, J.—THE plaintiff sues to recover the aggregate amount of certain sums of money from time to time taken by his gomashta from the year 1265 to the date of his death, deducting therefrom the total amount of salary due to the gomashta. The defendants are the heirs of the gomashta.

The fact of the money being taken, and of the salary being due, has been found by the Lower Appellate Court. But it is said that the Lower Appellate Court has erroneously applied limitation to the sums taken by the gomashta in the years 1265 and 1266. That Court has held that whatever was due at the end of the year 1266 is barred and must be deducted from the claim. The plaintiff contended that that sum is not barred as the salaries for the following years should have been set off against that sum.

It appears to me that this Court should not in any way favor the plea of limitation. When the law applies, it must have its course; but, if upon the ordinary system of taking accounts between master and servant, the salary of each year as it fell due would have been set off against the sums appropriated by the gomashta, it would be more consonant with equity to adopt that course of account than to hold that the salary of each year was to be set off only against the debt of each year, and thus allow a large portion of the debt to be barred from recovery. There does not appear to have been any misappropriation. The gomashta was allowed from time to time to take whatever sums of money he required from the treasury of his master. These had to be repaid; and it seems to be admitted that the first item from which the master would repay himself was the servant's salary. It seems to me that there was, in fact, a running account between the master and servant, and that, if the servant had overdrawn what was due for his salary in the year 1266, the sum which was due for his salary at the end of 1267 would be credited at the end of that year against what had been overdrawn at the end of 1266; and, if a balance still remained, that the amount due for the salary of the year 1268 would, at the end of the year 1268, be credited against that balance; and similarly, if a balance still remained, the salary for the year 1269 would, at the end of that year, be also credited against that balance, and similar credits of salary due at the end of each year, or whenever the salary fell due, would continue to be made against the oldest standing debt. If this is the correct view of the law, the manner in which the Lower Appellate Court has taken the accounts is erroneous. The principle in law upon which I think this is the correct mode of taking the accounts is the right of the creditor to appropriate sums, however paid, in reduction of debt to whatever portion of the debt he pleases, so long as the debtor does not distinctly state that the sums so paid are paid against a particular debt.

I would reverse the Judge's decision, and on the account, as I hold it should be taken, would find that no portion of the gomashta's debt is barred by limitation, and, therefore, I would decree the plaintiff's claim with all costs.

As there is a difference of opinion on the law, the opinion of Mr. Justice Kemp will prevail, and this appeal be dismissed with costs.

Kemp, J.—I cannot concur in the judgment of my learned colleague. I would confirm the decision of the Lower Appellate Court which, I may observe, confirms that of the Court of first instance.

The view taken by Mr. Justice Jackson of the application of the Statute of Limitation to the facts of this case as admitted between the parties or substantiated by reliable evidence is wholly different from the plea

raised by the plaintiff, special appellant, in the Lower Appellate Court.

I proceed to state briefly the nature of the suit as gathered from the pleadings, which I have consulted in the original vernacular.

The plaintiff is a mohajun. He sues the heirs of a deceased gomashta, by name Muthooranath Paul, on the allegation that the said gomashta overdrew from the funds of three *guddees* under his charge, at various dates, from the year of his appointment in 1265 to the date of his death in 1269, an aggregate sum of Rupees 1,645, omitting fractions. From this sum, the plaintiff gives credit, on account of salary during the whole period of the deceased gomashta's incumbency, Rupees 560, and his claim is for the balance or Rupees 1,085, date of institution of suit being 17th Chyet 1272 B. S.

In his plaint, the plaintiff states that, as there was no stipulated term within which the sums so overdrawn were to be repaid, his cause of action for the whole sum so overdrawn, which ranges over five years, arose on the day after the death of the gomashta, or on the 25th Bysack 1270.

Both the Lower Courts have held that Clause 16, Section 1, Act XIV. of 1859, applies to this suit, and that, on the date of institution of suit, *i. e.*, the 17th Chyet 1272 B. S., the moneys overdrawn in 1265 and 1266 were barred by lapse of time. A decree was given in part of the sum claimed or for sums overdrawn in the years 1267, 1268, and 1269, after deducting the salary due to the late gomashta for those three years up to date of death.

In appeal to the Judge, the plaintiff, special appellant, appealed on one ground alone, which I translate from his petition of appeal in the vernacular, *viz.*: "It is "not customary to recover in cash sums "overdrawn by a gomashta as long as he "is in the service. Muthooranath Paul was "in service up to date of his death, *ergo* "my cause of action arose from *the date* "*of his death*. The Principal Sudder "Ameen has overlooked this, and has cal-"culated the period from which limitation "runs from the date of each item over-"drawn."

Before us, the pleader of the special appellant abandons this plea altogether, and raises an entirely new one, which has found favor with my learned colleague.

I am clearly of opinion that, as there was no stipulation between the parties that the salary of the deceased gomashta was to be set off at all against the items overdrawn by him, much less that the salary due for the whole period of his service was to be set off against the oldest claim in point of date on account of sums overdrawn by him so as to evade the Statute of Limitations, the concurrent opinion of the Lower Courts which is based upon the pleadings and allegations before them is the correct one. I would dismiss this appeal with costs and interest.

The 2nd March 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Jurisdiction—Damages caused by illegal removal of crops.

Cases Nos. 1287, 1314, and 1451 of 1867.

Special Appeals from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 16th March 1867, reversing a decision passed by the Moonsiff of that District, dated the 15th December 1866.

Ram Jeebun Koyee (Plaintiff), *Appellant,*

versus

Shahazadee Begum and others (Defendants), *Respondents.*

Baboo Nuleet Chunder Sein for Appellant.

Baboo Sreenath Banerjee for Respondents.

A Court of Small Causes has jurisdiction in a suit for the recovery of damages under 500 rupees sustained by the illegal removal of crops, and no special appeal lies. A Lower Appellate Court should not decline jurisdiction in such a case, if, for the purpose of deciding upon plaintiff's claim, it is necessary to go into the question of the title of the zemindars, although the decree would be only binding *quoad* the subject-matter of the suit, *i. e.*, the value of the crops.

Bayley, J.—THE pleaders of both parties admit that these three cases will be governed by one and the same decision in special appeal.

The first objection is made by the respondent, and is, that, as this was a suit for the recovery of damages under 500 rupees

sustained by illegal removal of crops under a false pretence of legal distraint, the jurisdiction was that of the Small Cause Court, and no special appeal will lie. We think that, looking to the Full Bench decision of the 26th August 1863, page 127, there is no special appeal.

The plaintiff sues for crops wrongfully carried away. The Lower Appellate Court held it had no jurisdiction, as the circumstances of the case showed the title of two zemindars was involved. We think the Lower Appellate Court was wrong in declining jurisdiction. If, for the purpose of deciding whether plaintiff was entitled to a verdict, it was necessary to go into the question of the title of the zemindars, the Lower Appellate Court should have done so, although the decree would, of course, have been only good and binding *quoad* the subject-matter of suit, *viz.*, the value of the crops.

In this view, we, acting under Section 15 of the Charter, return the case to the Lower Appellate Court to be re-tried with reference to the above remarks.

The 2nd March 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Miscellaneous appeal—Sections 229 and 231, Code of Civil Procedure.

Case No. 543 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Jessore, dated the 3rd August 1867.

Gooroo Doss Roy (Decree-holder), *Appellant,*

versus

Punchanun Bose and another (Judgment-debtors), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Onookool Chunder Mookerjee, Sreenath Doss, and *Romanath Bose* for Respondents.

Where an enquiry has been held under Section 229, Code of Civil Procedure, and a regular appeal lies to the High Court under Section 231, a miscellaneous appeal cannot be entertained.

Hobhouse, J.—THERE has been some irregularity in the proceedings in this case; but in substance the Court below has held an enquiry under Section 229 of the Code of Civil Procedure, and a regular appeal lies to this Court under Section 331, and the case is not one, therefore, that we can entertain and determine as a miscellaneous appeal.

The case is, therefore, struck off the Miscellaneous Bench, and one month's time is given to appellant to appeal on full stamp to the proper Bench. Costs of this proceeding to follow the ultimate decision of the appeal.

The 2nd March 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Alienation of ancestral property.

Case No. 1229 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 16th March 1867, affirming a decision passed by the Deputy Commissioner of that District, dated the 7th July 1866.

Buraik Chuttur Singh and another (Plaintiffs), *Appellants,*

versus

Greedharee Singh and others (Defendants), *Respondents.*

Baboo Sham Lall Mitter for Appellants.

Baboo Bhowanee Churn Dutt for Respondents.

An alienation made by a Hindoo with the consent of his son cannot under the Mitakshara be questioned by the grandson.

Mitter, J.—THERE is no ground of special appeal in this case. If the petitioner was in existence at the time of the alienation in question, his claim is clearly barred by the Law of Limitation. If he was not, he cannot, under the Mitakshara, question an alienation made by his grandfather with the consent of his father. As to family-custom, the Lower Appellate Court has distinctly found that the petitioner gave no evidence to support his plea as based thereupon. We reject the appeal with costs.

The 2nd March 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Intervenor made a party at plaintiff's request.

Case No. 778 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 15th January 1867, reversing a decision passed by the Deputy Collector of that District, dated the 29th May 1866.

Sham Chand Ghose Mundul (Plaintiff), *Appellant,*

versus

Doya Moyee Mundulnee and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellant.

No one for Respondents.

When an intervenor in a suit to recover rent is made a party at the request of the plaintiff, the latter cannot afterwards, by special appeal, get rid of the effect of his own act.

Loch, J.—OBJECTION is taken to the order of the Judge making Kangal Mundul a party to this suit, which was brought by plaintiff to recover rent for 1271 at an enhanced rate after service of notice against Bukronath Mundul, the tenant, and another, the son of Kangal Mundul.

Kangal Mundul intervened, alleging that he was the real ryot, and that he held the lands in his son's name, and that Bukronath had no interest in nor possession of them.

The intervenor, at the request of the plaintiff, was made a party to the suit. The Judge is wrong in saying that he was made a party under Section 77 of Act X. of 1859. That Section is quite inapplicable to a case like this; but, as Kangal Mundul was made a party at the request of the plaintiff, the latter cannot now get rid of the effect of his own act.

On the evidence, the Judge finds that it is quite untrustworthy, and, therefore, we see no grounds for admitting the special appeal, which we dismiss.

The 3rd March 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch and J. B. Phear, *Judges.*

Mahomedan husband — Purchase of property in name of wife — A Judge's functions—Legal presumptions—Legal evidence.

Appeal No. 12 of 1867.

Appeal under Section 15 of the Letters Patent of the High Court, dated the 28th December 1865, against the judgment of the Hon'ble L. S. Jackson and the Hon'ble G. Campbell, Judges of the High Court, dated the 30th of July 1866, in Special Appeal No. 336 of 1866, from the decision of the Judge of Rajshahye, dated the 16th November 1865, reversing the decision of the Principal Sudder Ameen of that District, dated the 22nd May 1866.

Ranee Surnomoyee, Plaintiff (Appellant before the Division Bench), *Appellant,*

versus

Luchmeeput Doogur and others, Defendants (Respondents before the Division Bench), *Respondents.*

Baboos Sreenath Dass and *Bhuggobutty Churn Ghose* for Appellant.

Mr. R. T. Allan and *Baboos Mohinee Mohun Roy* and *Hem Chunder Banerjee* for Respondents.

Where a Mahomedan husband was found to have paid the purchase-money for a putnee-talook standing in the name of his wife, it was held that his having been in possession of the money was *primâ-facie* evidence that the putnee-talook belonged to himself, and not to his wife, and that presumption was not rebutted by the fact that he purchased the putnee in the name of his wife.

A Judge in this country is Judge both of law and fact; but if, in deciding upon the facts, he deals improperly with the presumptions which the law would raise, he commits an error in law which the High Court can correct in special appeal.

When a Judge decides without legal evidence, he commits an error in law.

The following are the judgments of the Division Bench:—

Jackson, J.—I HAVE intimated, in the course of the argument, the difficulty which I should feel in reversing or setting aside the judgment of the Lower Appellate Court. I cannot say in this case any more than I could say in a similar case which was before us to-day, that the judgment or decision of the Zillah Judge was altogether satisfactory. Still it appears to me indisputable that the Zillah Judge has, whether his reasons be conclusive or not, come to a positive finding upon the single issue of fact which is before us in the present case. That issue is whether the particular mehal now in dispute was acquired, as it purports to have been acquired, by Kaimunnissa Beebee or by her husband, who is one of the judgment-debtors. It is not, as it seems to me, a separate issue in the cause whether the purchase-money by which the property was acquired was the property of the husband or of the wife. But the source whence that money was derived is one test, and a very important test, as to the character of the purchase. It has been laid down by the Privy Council in a case* where a Hindoo family was concerned, that this fact (namely, the source whence the money was derived) is a material test; and, no doubt, in a joint Hindoo family, where the parties live in commensality and joint estate, the source whence the money is derived is of paramount importance with a view to determining the right to the property.

It appears to me that the estate of a Mahomedan husband and wife is essentially different from that of a Hindoo family.

A Mahomedan husband and his wife may have, and often do have, independent estates. To say in such a case that because the property stands in the name of the wife, and because the husband is indebted, we are to presume collusion or to presume benamee purchase; and to throw it upon the wife to prove substantively the purchase with her own funds would be, in my opinion, going to an extent to which our Courts have never gone, and cannot properly go. No doubt, in such a case, if evidence were adduced, which went to show that the purchase-money had been actually the money of the husband, as Judges of fact we should require something to be shown, and clearly shown, on the other side; and, if it were not shown, we should have little difficulty in coming to the conclusion that the property had been acquired by the husband.

Now, in the case before us, the special appellant's pleader has not contended that the state of proof in this case was such that the Judge was absolutely bound in law to find on behalf of the plaintiff. Although he has stated his objection over and over again, it has never taken that shape. His objection was that the Judge had not sufficiently investigated the case.

I believe that the Judge has as much investigated this case and considered the circumstances and conclusions upon them as he would do if we were to remand the case fifty times over. I am satisfied that the Judge has considered the case, and it seems to me perfectly clear that he has recorded an opinion which he must have meant to be unmistakeable.

That being so, and his opinion on the fact being final, I say (and I say it with some regret) that this Court on special appeal is not competent to disturb it.

I carefully refrain from saying what we should do with this case if we were trying the case in regular appeal or in the exercise of original jurisdiction. It would be superfluous and irregular to say so, because we have not looked and cannot look into the evidence. It appears that the Court of first instance relied on the evidence of the zemindar who granted the putnee to show that the tenure had been paid for by the husband out of his own private funds.

If we were to look into the evidence, we might possibly find that the zemindar had nothing on which to found this statement but his own conjecture. It is perfectly manifest that the lady, in whose name the property stands, being a Mahomedan and Purdanusheen, could not have gone personally to the zemindar to take a putnee.

Now, I do not see how it was possible for the zemindar to say that the money which the husband took was his own money, and not the money of his wife. It was alleged on the side of the plaintiff, and it may or may not be true, that, at the time when the money was paid, the husband was in insolvent circumstances. If he was so, it would be more probable that the money for this purchase had come from the wife than from

* Gopee Kisto Gosain *versus* Gunga Persad Gosain, 6 Moore's Indian Appeals 53.

the husband. However that may be, whatever our conclusions might have been if we had been trying the case as Judges of fact, I cannot too strongly insist on the position that a distinct finding of fact has been arrived at by the Court below, and that we are not competent to disturb that finding.

Campbell, J.—In my opinion, there is no sufficient finding of the Judge in this case. The finding is such that, if upheld in special appeal as sufficiently disposing of the case, a most dangerous precedent will be created.

The plaintiff is a creditor holding a decree against the husband, and the question in the suit, therefore, before us is, whether the property in dispute is really the property of the husband or the property of the wife. Upon that question I have no doubt that the issue might be, probably would be, properly stated to be simply, is the property that of the husband or that of the wife? But I cannot find that there is any clear decision of any kind upon this point. The Judge does not say: "In my opinion, the property is the property of the wife." He does not even say: "In my opinion, it is not the property of the husband." He simply says—at least I take his judgment, which is not even so far clear to mean this—it is not proved that the property is the property of the husband, which seems a kind of verdict of not proven. Now, the point of law in which I think the Judge is wrong is this. He lays down as it were this position of law, it is not enough that it should be proved that the money was paid by the husband, and that the husband, for the series of years since the purchase, has had the management and control of the property, because he seems to say that state of things is consistent with the possible hypothesis that the property may nevertheless have really belonged to the wife. It seems to me that the position of the Judge is so far wrong that, if it be shown in evidence that the husband paid the money for this property, and has since had the management and control of the property, then the *onus* is shifted, and it is for those claiming under the wife to show that, in reality, the wife had funds of her own, and that the property was the wife's.

It is only so far that I differ from my learned colleague.

I have said that probably the correct issue in this case may be whether the property was that of the husband or that of the wife. Towards finding that issue, I think that the ruling of the Privy Council establishes that the essential question which really represents the issue is—What is the source whence the money is derived? There is, no doubt, a certain distinction between a Hindoo and a Mahomedan family. As respects a Hindoo family, I should be inclined to hold, under the ruling of the Privy Council, whether in the case of a son or a wife, that the mere holding in the name of such a member of the joint family establishes no presumption of separate ownership, and that in such a case it would be for the member claiming separate property to prove it. In the case of a Mahomedan family, no such broad presumption of law can be set up. On the other hand, the custom of the country to which the Privy Council in their decision alluded is a custom in Bengal which is almost universal—to hold property benamee in the name of female relations and others.

It is a custom as prevalent among Mahomedans as it is among Hindoos, and so far, in reference to the custom of the country, that decision of the Privy Council wholly applies. Therefore, I would say that, although in case of a Mahomedan wife there is, in the first instance, from the fact of her holding the property in her own name, a very slight presumption that the property belongs to her, still, if it be proved that the money was paid by the husband, and that the property was under the control of the husband, then, as I have already stated, the *onus* would be shifted, and it would be for those claiming under the wife to prove that the property was the wife's.

In this case I have stated the matter a little more broadly than appears in the Judge's judgment, because his actual words are that "it is not sufficient to prove that a part of the money was paid by the husband." Now, I find that the Court of first instance, after going into the evidence, found in the most distinct way that part of the money had been paid by the husband, that the remainder had been remitted by him, and that the property remained in the management and control of the husband. I think that the Judge was bound to come to a distinct decision on the finding of the Lower Court; and as he has not negatived this part of the decision, and has accepted that finding as regards a portion of the money, his decision, at any rate, is in my view

insufficient in law. It seems to me that he has fallen into the error of considering this case as if it were a criminal case, as if the defendant had been indicted in a Criminal Court; and some of his expressions would seem even to imply that he thinks it necessary not only that it should be proved that the property was fraudulently held benamee by the wife, but that the transaction was a fraud on the particular creditor who now sues.

That seems to me to be a mistake. It appears to me that in a civil suit the Judge was bound to weigh the evidence equally and impartially, and to see on which side the scale preponderated. If there is strong evidence on one side, he should not lightly reject it, unless there is stronger on the other, specially after the first Court has given evidence to it. He should weigh the evidence on this side and that; not require one side to prove a case to demonstration.

These latter observations, however, are beyond the main point of law on which I have the misfortune to differ from my learned brother. In my opinion, so far as the Judge has found that part of the money was paid by the husband, the *onus* of proving that the property was nevertheless her own rests on the wife; and so far as he has not found whether the Lower Court was right in considering that the remainder of the money was also paid by the husband, he should find that fact.

Jackson, J.—The judgment of the Court, then, under Section 36 of the Letters Patent, will be that the special appeal is dismissed with costs.

The judgments of the Court upon the present appeal were delivered as follow:—

Peacock, C. J.—I agree entirely with Mr. Justice Campbell that the finding in this case by the Zillah Judge is such that, if upheld in special appeal as sufficiently disposing of the case, a most dangerous precedent will be created, and I may add that no judgment-creditor would ever be secure against fraudulent attempts on the part of his debtor to make away with his property, and by means of benamee transactions prevent it from being made available to satisfy his debts.

Mr. Justice Jackson says that the judgment is not altogether satisfactory to his mind, but he still considered — and he expressed his opinion with regret—that as the Zillah Judge, whether his reasons were conclusive or not, had come to a positive finding upon an issue of fact, this Court on special appeal was not competent to disturb the finding.

It appears to me, however, that there was a substantial error in law in the investigation of the case by the Zillah Judge, which may have, and probably has caused, an error in the decision of the case upon the merits. The decision of the Judge is so unsatisfactory that I am glad that we are not precluded from reversing, upon special appeal, his decision upon the facts, and ordering the case to be re-tried.

There are two grounds upon which the Judge erred in point of law. He was wrong, *first*, in holding that the mere fact of the judgment-debtors paying personally a portion of the purchase-money was immaterial to prove his ownership; and, *secondly*, in assuming, without any legal evidence of the fact, that the husband managed and looked after the property for his wife.

It was proved that the husband paid a portion of the purchase-money for the putnee-talook, and that he remitted the remainder of the money to the grantor. It might have been his money, or it might have been the money of his wife; but the fact of his being in possession of the money was *primâ-facie* evidence that it belonged to himself and not to his wife. That being the *primâ-facie* evidence, was there anything to rebut it in the present case?

The only evidence—if evidence it could be called—was that he purchased the putnee in the name of his wife. But the Privy Council have laid down that the purchase of property in the names of other persons is so common in this country that it raises no presumption against the person who actually makes the purchase that the property was purchased otherwise than for his own benefit, and that the criterion in such cases is the quarter from which the money comes. (See Gosain *vs.* Gosain, 6 Moore's Indian Appeals 53.)

In this case there was no evidence that the wife ever employed the husband to purchase the property for her, or that any portion of the purchase-money belonged to her. In this respect also, this case is similar to the one which I have cited.

Under these circumstances, the presumption was, that the purchase was a benamee

transaction, and the Judge was wrong in point of law in considering that the mere fact of his paying the purchase-money was immaterial to prove his ownership.

In this country, a Judge is Judge both of law and fact; but if, in deciding upon the facts, he deals improperly with the presumptions which the law would raise, it is an error in law which this Court can set right in special appeal. If this had been the case of a Judge directing a Jury, and he had told them that, in determining the question of fact whether the purchase was made by the husband for his own benefit or for the benefit of the wife, it was immaterial to look at the fact that the husband himself paid the money, it would have been a misdirection in point of law, for which, according to the practice in England, a new trial would have been granted.

Upon the second ground, I also think that the Judge was wrong in point of law, inasmuch as there was no legal evidence to show that the husband was managing the property for his wife.

If the husband received all the rents of the estate, and applied them for his own use, the mere fact of his giving a receipt, if he ever did so, in the name of his wife, would be no more evidence to prove that he was managing the estate for her, than the fact of his taking the conveyance in her name was evidence that he was purchasing for her.

For these reasons, without going into others, it appears to me that the decision of the Judge must be reversed, and the appeal from the decision of the Principal Sudder Ameen re-tried upon the merits.

Mr. Justice Louis Jackson says: "I believe that the Judge has as much investigated this case and considered the circumstances and conclusions upon them as he would do if we were to remand the case fifty times over."

It is unnecessary for me to go to the extent of saying that I concur entirely in that remark. I am not sure that, if it were clearly pointed out to the Judge that he had not dealt properly with the presumptions, he might not come to a different conclusion upon the evidence if the case were sent back to him. But I still think that it will be more satisfactory and productive of less expense and delay to the parties, if, instead of remanding the case to the Judge for a re-trial, with, at least, the possibility of another special appeal to this Court, we exercise the power which we have of removing the regular appeal to this Court, and hearing the case now upon the evidence, in the same way as the Judge would have to do if we sent the case back to him.

Under these circumstances, having set aside the Judge's decision, and ordered a re-trial of the appeal from the Principal Sudder Ameen's judgment, I am of opinion that we ought to order the regular appeal to be removed to this Court, and try the case ourselves upon the regular appeal from the judgment of the Principal Sudder Ameen.

Loch, J.—I concur in the opinion which has been expressed by the Chief Justice, and I also think that it is advisable for us to try this case as a regular appeal from the decision of the Principal Sudder Ameen.

Phear, J.—I entirely agree with the Chief Justice, even to thinking that there are other reasons, besides those which he has specifically mentioned, which make the judgment of the Lower Appellate Court unsatisfactory and impeachable upon special appeal; but, as those which have been already dwelt upon are amply sufficient to justify the decision which we have come to, I do not consider it necessary now to go into the others.

The decision of the Judge is reversed, and the appeal from the judgment of the Principal Sudder Ameen is removed to this Court to be heard by way of regular appeal.

[The Court afterwards heard the regular appeal, and affirmed the decision of the Principal Sudder Ameen.]

The 3rd March 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Application under Act XL. of 1858—Limitation — Natural guardians — Party claiming adversely to minor.

Case No. 461 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 4th June 1867.

Puroma Soonduree Dossee and others, *Appellants,*

versus

Tara Soonduree Dossee, *Respondent.*

Baboo Nil Monee Sein for Appellants.

Baboo Nil Madhub Sein for Respondent.

The lapse of six years was held to be no sufficient ground for a Judge's refusal to enquire into the merits of an application for a certificate under Act XL. of 1858, that law providing no limitations as to the time within which such applications are to be made.

Where the will propounded by an applicant is a genuine document, the certificate prayed for must be granted, notwithstanding the existence of any "natural guardian," no discretion being left to the Court in such cases.

Where an application is made for a certificate under Act XL. of 1858, a party asserting certain rights adversely to the minor cannot be admitted as a party to the record, but must seek his remedy in a regular suit.

Milter, J.—THIS is an appeal against an order of the Zillah Judge of Rajshahye, refusing to grant a certificate of administration to the appellants under the provisions of Act XL. of 1858. The appellants' claim to the certificate in question was based upon a will alleged to have been executed in favor of the minor by his grandmother. The respondent came forward as an objector, urging that the properties covered by the will did not belong to the testatrix; that she (the respondent) had purchased half of those properties from the father of the minor, who was the real owner thereof; and that the will itself was a spurious document.

It is contended before us by the appellants that the reasons assigned by the Judge in support of his refusal to enquire into the genuineness or otherwise of the will propounded by them are bad in law. We think that this contention is sound. The mere fact that the application for the certificate was not made until after the lapse of six years from the death of the testatrix is not a sufficient ground for refusing to enquire into the merits of that application. Act XL. of 1858 does not provide for any limitations as to the time within which applications for certificates under that Act are to be made; and, were it otherwise, the interests of minors would have been seriously affected by the negligence of those who are entitled to represent them.

Nor is the Judge right in holding that he was not competent to enquire into the claim of the appellants to obtain the certificate when the "natural guardian" of the minor, *viz.*, his father, was alive. If the will propounded by the appellants is a genuine document, the certificate prayed for must be granted to them, notwithstanding the existence of any "natural guardian." The words of Section 7 of the Act are positive on this point. That Section says: "If it shall "appear that any person claiming a right "to have charge of the property of a minor "is entitled to such right by virtue of a will "or deed, and is willing to undertake the "trust, the Court *shall grant a certificate of* "*administration to such person.*" The words italicized clearly show that there is no discretion left to the Court in cases in which there is a testamentary appointment duly proved, provided the person appointed to the trust is willing to undertake it.

The last reason assigned by the Judge in support of his decision is equally untenable. He says that he could not enquire into the genuineness of the will, or into the power of the alleged testatrix to make it, without "trenching upon the jurisdiction of the ordinary Civil Courts." The Judge was fully competent to enquire into the genuineness of the will, because the Legislature has given him full powers to do so. As to any questions regarding the right of the testatrix to make the will, or regarding her title to the properties covered by it, we are of opinion that those questions need not be enquired into on an occasion like this; and the Judge's error on this point appears to have arisen from a total misconception of the position of the respondent, by whom they were raised. The respondent does not claim the certificate in her own behalf, nor does she appear as a friend or well-wisher of the minor, and therefore interested in seeing that an improper person is not selected to administer the trust. She claims certain rights adversely to the minor, and all questions upon which the determination of those rights depends must necessarily be reserved for adjudication in a regular suit. We think that, looking to the nature of the objections urged by her, she ought not to have been admitted as a party to this record. Her rights, whatever they are, cannot be in any manner prejudiced by any adjudication which the Court might make upon the right of the appellant to obtain the certificate in question; and it appears to us, therefore, that any interference on her part on the present occasion was altogether uncalled for. Suppose that the interests of the minor require that an action should be instituted against her for the properties she claims to hold by right of her purchase from the father of the minor; suppose, also, that there are no such special circumstances as would induce the Court to allow any relative of the minor to institute

transaction, and the Judge was wrong in [illegible] point of law in considering that the [illegible] fact of his paying the purchase [illegible] immaterial to prove his [illegible]

In this country, [illegible] of law and fact; [illegible] the facts, he de[illegible] sumptions whi[illegible] an error in [illegible] right in spe[illegible] the case of [illegible] he had [illegible] the que[illegible] chase [illegible] own b[illegible] it wa[illegible] the [illegible] it w[illegible] of [illegible] ti[illegible] f[illegible]

such an action without obtaining a certificate as required by Section 3 of the Act, can the respondent be permitted to come forward and say that no such certificate ought to be granted, inasmuch as the properties, with reference to which the intended suit is to be brought, do not belong to the minor, but to herself? We think that to allow her to intervene in such a manner and with such objections would be to defeat one of the very objects for which a certificate under Act XL. of 1858 is necessary.

For the foregoing reasons, we reverse the decision of the Judge, and remand the case to him for a fresh trial. The Judge will give to the appellants a reasonable opportunity to produce all their evidence, oral and documentary, and then dispose of the case according as he may find the will relied upon by them to be a genuine or a spurious document. The name of the respondent shall be struck off the record, and she shall have to pay to the appellants all the costs incurred by them down to the present moment, both here and in the Court below.

The 3rd March 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Sub-letting by a ryot with right of occupancy—Section 6, Act X., 1859.

Case No. 1720 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 29th April 1867, reversing a decision passed by the Deputy Collector of that District, dated the 16th February 1867.

Kalee Kishore Chatterjee (one of the Defendants), *Appellant,*

versus

Ram Churn Shah and others (Plaintiffs), *Respondents.*

Baboo Greesh Chunder Ghose for Appellant.

Baboo Chunder Mohun Ghose for Respondents.

A ryot with a right of occupancy does not, by sub-letting his land, lose his right; but the sub-lessee thereby gains no right.

Jackson, J.—We think the Judge is quite correct in law. He finds that the plaintiff is a ryot with right of occupancy, and, as such, is entitled to recover possession of his jote jumma. The first Court had found that he held no such right, and the contention on this appeal is to the same effect that he had no such right, because it was shown on the evidence that he had from time to time let out some portions of the tenure, and at times even the whole of it to other ryots. But Section 6, Act X. of 1859, distinctly alludes to the circumstance of a ryot with right of occupancy sub-letting his land, and does not declare that such ryot thereby loses his right, but that the sub-lessee thereby gains no right. It is very common all over the country for ryots who have rights of occupancy to sub-let in the bazar; but that gives the zemindar no right to dispossess the ryot with right of occupancy, as the zemindar here has done.

We dismiss the appeal with costs.

The 3rd March 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

A shareholder's right to sue an agent—Section 24, Act X. of 1859—Joint land-owner's suit for rent.

Case No. 237 of 1867.

Regular Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 21st May 1867.

Puddo Monee Dossee (Plaintiff), *Appellant,*

versus

Banee Kant Ghose and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Khettur Mohun Mookerjee* for Appellant.

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Baboo Ashootosh Chatterjee for Respondents.

In a suit by one of two shareholders to recover certain accounts and papers alleged to have been kept by her agents, it was held that a zemindar has a right, under Section 24, Act X., 1859, to institute such a suit, and that right is not taken away by the fact of his being one of several shareholders.

A suit like this stands upon different grounds from a suit by one of several joint land-owners suing separately for his rent.

Hobhouse, J.—THIS was a suit under Section 24, Act X. of 1859, and the plaintiff, one of two shareholders, sued to recover certain accounts and papers alleged to have been kept by her agents (the defendants) in the course of their employment as agents.

The Court below held that it was necessary that the other shareholder should be made a party to the suit, and that the suit would then lie in the Civil, and not in the Revenue, Courts, and dismissed the suit with costs.

In appeal before us, it is contended that the plaintiff, as zemindar, is entitled under Section 24 to sue, and that the fact of her having a shareholder does not necessitate her making that shareholder a party to the suit, nor does it deprive her of her remedy under the Section relied upon.

We think that this contention is sound. The words of the law are explicit, that the zemindar has a right of suit, and it is nowhere in the law declared, nor are there any decisions of the Courts, by which that right is taken away, simply by reason that the zemindar is only one of several shareholders.

We think also that those cases in which it has been ruled that one of several joint land-owners is not entitled to sue separately for his share of the rent stand upon different grounds from a suit like the present.

We, therefore, set aside the decision and remand the case to the Court below, with instructions that the Court do entertain and determine the suit on its merits.

If it should be found that the plaintiff is entitled to recover any accounts or papers, the Court can direct that such accounts or papers be filed in Court, and not returned therefrom; and that plaintiff be allowed to take such copies or otherwise to have such access to such accounts or papers as she may desire.

Costs to follow the ultimate decision of the case.

The 5th March 1868.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Jurisdiction—Deputy Collector's order rejecting an application to intervene—Section 77, Act X., 1859.

Case No. 1804 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 9th May 1867, reversing a decision passed by the Deputy Collector of that District, dated the 8th January 1867.

Khondkar Kefaetoollah (Objector), *Appellant,*

versus

Mahomed Kabel and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellant.

No one for Respondents.

Where a Deputy Collector rejects an application from a third party to intervene under Section 77, Act X. of 1859, a Judge has no jurisdiction, on that party's appeal, to remand the case to the Deputy Collector for re-trial with directions to make the intervenor a party.

Phear, J.—THIS is a suit for rent. It was brought originally before the Deputy Collector. A third party applied to be allowed to intervene under Section 77 of Act X. of 1859, but the application was rejected, and the suit between the plaintiff and defendant was decided on a matter of fact.

On this, the would-be intervenor appealed to the Judge, and the case was remanded to the Deputy Collector with directions that he should make the intervenor a party, and try the case afresh. This was done, and the Deputy Collector decreed in favor of the plaintiff. The intervenor again appealed to the Judge, who dismissed the plaintiff's suit; and against

such an action without obtaining a certificate as required by Section 3 of the Act; can the respondent be permitted to come forward and say that no such certificate ought to be granted, inasmuch as the properties, with reference to which the intended suit is to be brought, do not belong to the minor, but to herself? We think that to allow her to intervene in such a manner and with such objections would be to defeat one of the very objects for which a certificate under Act XL. of 1858 is necessary.

For the foregoing reasons, we reverse the decision of the Judge, and remand the case to him for a fresh trial. The Judge will give to the appellants a reasonable opportunity to produce all their evidence, oral and documentary, and then dispose of the case according as he may find the will relied upon by them to be a genuine or a spurious document. The name of the respondent shall be struck off the record, and she shall have to pay to the appellants all the costs incurred by them down to the present moment, both here and in the Court below.

The 3rd March 1868.

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The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Sub-letting by a ryot with right of occupancy—Section 6, Act X., 1859.

Case No. 1720 of 1867 under Act X. of 1859.

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Baboo Greesh Chunder Ghose for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

A ryot with a right of occupancy does not, by sub-letting his land, lose his right; but the sub-lessee thereby gains no right.

Jackson, J.—We think the Judge is quite correct in law. He finds that the plaintiff is a ryot with right of occupancy, and, as such, is entitled to recover possession of his jote jumma. The first Court had found that he held no such right, and the contention on this appeal is to the same effect that he had no such right, because it was shown on the evidence that he had from time to time let out some portions of the tenure, and at times even the whole of it to other ryots. But Section 6, Act X. of 1859, distinctly alludes to the circumstance of a ryot with right of occupancy sub-letting his land, and does not declare that such ryot thereby loses his right, but that the sub-lessee thereby gains no right. It is very common all over the country for ryots who have rights of occupancy to sub-let in the bazar; but that gives the zemindar no right to dispossess the ryot with right of occupancy, as the zemindar here has done.

We dismiss the appeal with costs.

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A suit like this stands upon different grounds from a suit by one of several joint land-owners suing separately for his rent.

Hobhouse, J.—THIS was a suit under Section 24, Act X. of 1859, and the plaintiff, one of two shareholders, sued to recover certain accounts and papers alleged to have been kept by her agents (the defendants) in the course of their employment as agents.

The Court below held that it was necessary that the other shareholder should be made a party to the suit, and that the suit would then lie in the Civil, and not in the Revenue, Courts, and dismissed the suit with costs.

In appeal before us, it is contended that the plaintiff, as zemindar, is entitled under Section 24 to sue, and that the fact of her having a shareholder does not necessitate her making that shareholder a party to the suit, nor does it deprive her of her remedy under the Section relied upon.

We think that this contention is sound. The words of the law are explicit, that the zemindar has a right of suit, and it is nowhere in the law declared, nor are there any decisions of the Courts, by which that right is taken away, simply by reason that the zemindar is only one of several shareholders.

We think also that those cases in which it has been ruled that one of several joint land-owners is not entitled to sue separately for his share of the rent stand upon different grounds from a suit like the present.

We, therefore, set aside the decision and remand the case to the Court below, with instructions that the Court do entertain and determine the suit on its merits.

If it should be found that the plaintiff is entitled to recover any accounts or papers, the Court can direct that such accounts or papers be filed in Court, and not returned therefrom; and that plaintiff be allowed to take such copies or otherwise to have such access to such accounts or papers as she may desire.

Costs to follow the ultimate decision of the case.

The 5th March 1868.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Jurisdiction—Deputy Collector's order rejecting an application to intervene—Section 77, Act X., 1859.

Case No. 1804 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 9th May 1867, reversing a decision passed by the Deputy Collector of that District, dated the 8th January 1867.

Khondkar Kefaetoollah (Objector), *Appellant,*

versus

Mahomed Kabel and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellant.

No one for Respondents.

Where a Deputy Collector rejects an application from a third party to intervene under Section 77, Act X. of 1859, a Judge has no jurisdiction, on that party's appeal, to remand the case to the Deputy Collector for re-trial with directions to make the intervenor a party.

Phear, J.—THIS is a suit for rent. It was brought originally before the Deputy Collector. A third party applied to be allowed to intervene under Section 77 of Act X. of 1859, but the application was rejected, and the suit between the plaintiff and defendant was decided on a matter of fact.

On this, the would-be intervenor appealed to the Judge, and the case was remanded to the Deputy Collector with directions that he should make the intervenor a party, and try the case afresh. This was done, and the Deputy Collector decreed in favor of the plaintiff. The intervenor again appealed to the Judge, who dismissed the plaintiff's suit; and against

such an action without obtaining a certificate as required by Section 3 of the Act; can the respondent be permitted to come forward and say that no such certificate ought to be granted, inasmuch as the properties, with reference to which the intended suit is to be brought, do not belong to the minor, but to herself? We think that to allow her to intervene in such a manner and with such objections would be to defeat one of the very objects for which a certificate under Act XL. of 1858 is necessary.

For the foregoing reasons, we reverse the decision of the Judge, and remand the case to him for a fresh trial. The Judge will give to the appellants a reasonable opportunity to produce all their evidence, oral and documentary, and then dispose of the case according as he may find the will relied upon by them to be a genuine or a spurious document. The name of the respondent shall be struck off the record, and she shall have to pay to the appellants all the costs incurred by them down to the present moment, both here and in the Court below.

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Sub-letting by a ryot with right of occupancy—Section 6, Act X., 1859.

Case No. 1720 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 29th April 1867, reversing a decision passed by the Deputy Collector of that District, dated the 16th February 1867.

Kalee Kishore Chatterjee (one of the Defendants), *Appellant,*

versus

Ram Churn Shah and others (Plaintiffs), *Respondents.*

Baboo Greesh Chunder Ghose for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

A ryot with a right of occupancy does not, by sub-letting his land, lose his right; but the sub-lessee thereby gains no right.

Jackson, J.—We think the Judge is quite correct in law. He finds that the plaintiff is a ryot with right of occupancy, and, as such, is entitled to recover possession of his jote jumma. The first Court had found that he held no such right, and the contention on this appeal is to the same effect that he had no such right, because it was shown on the evidence that he had from time to time let out some portions of the tenure, and at times even the whole of it to other ryots. But Section 6, Act X. of 1859, distinctly alludes to the circumstance of a ryot with right of occupancy sub-letting his land, and does not declare that such ryot thereby loses his right, but that the sub-lessee thereby gains no right. It is very common all over the country for ryots who have rights of occupancy to sub-let in the bazar; but that gives the zemindar no right to dispossess the ryot with right of occupancy, as the zemindar here has done.

We dismiss the appeal with costs.

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versus

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On this, the would-be intervenor appealed to the Judge, and the case was remanded to the Deputy Collector with directions that he should make the intervenor a party, and try the case afresh. This was done, and the Deputy Collector decreed in favor of the plaintiff. The intervenor again appealed to the Judge, who dismissed the plaintiff's suit; and against

this judgment the present special appeal is preferred.

It appears to us that the order of remand by the Judge was made without jurisdiction, and therefore void. Everything that has taken place since must fall with it, except so far as the parties have expressly or impliedly agreed to be bound by it. No sort of consent of this kind has been made out, and consequently we declare that the remand-order of the Judge, the second proceedings before the Deputy Collector which followed thereon, and the judgment which is now appealed against, are all void and inoperative. The original judgment of the Deputy Collector is affirmed. No costs.

The 6th March 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Execution of decrees—Procedure of our Courts —Section 284, Act VIII., 1859.

Case No. 432 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 6th July 1867, affirming an order passed by the Sudder Ameen of that District, dated the 1st December 1866.

The Maharajah of Burdwan (Decree-holder), *Appellant,*

versus

Sree Narain Mitter (Judgment-debtor), *Respondent.*

Baboos Juggodanund Mookerjee and *Chunder Madhub Ghose* for Appellant.

Baboo Woopendur Chunder Bose for Respondent.

Every Court is bound to execute its own decree, if it can, by process (when necessary) issued against the property or person of the judgment-debtor: it is only when the decree *cannot* be executed within the jurisdiction of the Court whose decree it is, that it may be sent to another Court for execution. There is no intermediate procedure between these two executions.

Phear, J.—THE Maharajah of Burdwan (special appellant before us) holds the decree in this suit, which was passed by the Moonsiff's Court of Beerbhoom, against three persons: Sitanath Sircar, Bissambur Singh, and Sree Narain Mitter. This decree appears to have been to the effect that Sitanath Sircar should pay to the plaintiff the amount decreed, but if the whole amount should not be realized from him and his property, then the balance should be recovered from Bissambur Singh and Sree Narain Mitter.

While the Maharajah is thus a conditional judgment-creditor of Sree Narain's in the Beerbhoom Court, Sree Narain also holds a decree against the Maharajah in the Court of the Principal Sudder Ameen of Burdwan.

In this state of things, the Maharajah petitions the Court of Beerbhoom, praying that the amount of the decree in the suit before us *namely*, Rupees 802-1-10, may be allowed to be treated as a set-off against the Rupees 844-11-4 covered by the decree of the Burdwan Court. Thereupon, the Moonsiff, after reciting that the debt had not been satisfied from the assets of Sitanath Sircar on their being brought to sale, and that consequently Sree Narain Mitter was liable for the balance, Rupees 277-1-4, made the following order:—

"That a copy of this proceeding be transmitted to the Principal Sudder Ameen of East Burdwan with an intimation to the effect that, in case the allegation of this decree-holder be correct, the sum of Rupees 277-1-4 be allowed as a set-off from the amount due to the debtor in this case, Sree Narain Mitter; that the above authority will oblige by sending a reply to the above; and that this proceeding be made over to the decree-holder's pleader."

Against this order, the Maharajah appealed to the Judge, on the ground that more than Rupees 277-1-4 ought, under the circumstances of the case, to have been allowed to him by the Moonsiff as set-off. Sree Narain, the judgment-debtor, did not appeal.

The Judge remarked that the order of set off passed by the Lower Court appeared to be illegal, but that no appeal was preferred against it. He then proceeded to dismiss the Maharajah's appeal before him, on the ground that "to allow execution to be taken out under the circumstances of the

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"case against the assets of Sree Narain "Mitter would be opposed to the decretal "order."

So far as we can understand the very concise judgment of the Lower Appellate Court, it seems that the Judge, while thinking the order of the first Court illegal, considered that, inasmuch as the party against whom it was made had not appealed, he could not interfere with it on that ground. Then treating the order as valid for the purposes of the Maharajah's appeal, he was of opinion on the evidence that the appellant had not made out that the decree could not be satisfied out of the assets of Sitanath Sircar, and, therefore, had not established his right, under the decretal order, to obtain any execution whatever against Sree Narain: consequently, the Maharajah could not be heard to complain that the amount for which execution was given him by the Lower Court was too small, and, accordingly, the Judge dismissed his appeal. If this be the correct view of the course which was taken by the Lower Appellate Court, we think that Court was generally right in its conclusions, except in one particular, namely, that it did not go far enough when it merely dismissed the appeal. The Maharajah was certainly ill-advised in coming to this Court to question the Judge's decision; for we are of opinion that, on these proceedings, he was not even entitled to have the benefit of the order which the first Court made in his favor, and which the Judge did not disturb.

We feel bound to say that we think the proceedings before the Court of first instance, together with the order thereon made by the Moonsiff, betray a grave misapprehension on the part of this gentleman as to the duty of a Court relative to the execution of decrees passed by it; and yet the Civil Procedure Act is very clear upon this point. Every Court is bound to execute its own decrees, if it can, by process (when necessary) issued against the property or person of the judgment-debtor. It is only when the decree *cannot* be executed within the jurisdiction of the Court whose duty it is to execute it, that it may be sent to another Court for execution (*see* Section 284 of Act VIII. of 1859). There is nothing in the Civil Procedures of our Courts intermediate to execution effected by the Court, which passed the decree, and execution by some Court to which the decree has been transmitted for that purpose on the ground just mentioned. In the present case, there is not a suggestion that the Moonsiff of Beerbhoom could not have executed the Maharajah's decree within the jurisdiction of his Court, had he been asked to do so. And if he could so have executed it, he had no warrant in law for sending it elsewhere for execution. But even supposing the facts were such that execution could not be had at Beerbhoom, then the Moonsiff should have sent the decree to Burdwan merely for execution in the manner prescribed by the 284 and following Sections of Act VIII. of 1859. The decree, when thus transmitted, would, for the purposes of execution, have become the decree of the Burdwan Court, and it would have fallen to that Court, instead of the Beerbhoom Court, to determine the question of set-off. Nothing of this kind has been done. But instead of it, the decree seems to have been assigned from the one Court to the other, with the view to its being then assigned back again, much after the fashion in which a Bill of Exchange is passed from hand to hand by endorsement. The whole proceeding was improper, and done without legal authority. It ought to be rendered inoperative from the commencement, and, for this purpose, we reverse the decision of the Judge so far as it has the effect of affirming the judgment of the first Court, and we reverse the order of the first Court altogether, with costs in all Courts to be paid by the special appellant to the special respondent. If satisfaction to any extent has already been entered up on Sree Narain's decree in the Burdwan Court, on the faith of the order which we have now reversed, he will be able to take steps in that Court to have his position rectified. And the Maharajah is alse free to seek, in a regular manner, execution of the decree which he holds in the Beerbhoom Court.

The 6th March 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Enhancement of rent — Increased value of produce—Rule of proportion.

Cases Nos. 2008 to 2010 and 2012 of 1867 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Rajshahye, dated the 23rd May 1867, reversing a decision passed

by the Deputy Collector of that District, dated the 31st January 1867.

Doorganath Shah and others (Plaintiffs), *Appellants,*

versus

Kazim Fakir and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Nuleet Chunder Sein for Respondents.

In a suit for enhancement of rent, where the expenditure is stationary, and the value of the produce has increased, the proper rule is, that the rate of rent to be paid shall bear to the old rate the same proportion as the present value of the produce bears to the old value.

Seton-Karr, J.—In these four cases, I am of opinion that the Judge had no good grounds for altering the decision of the first Court, and that he has not carried out the instructions of the majority of the Judges expressed in the well-known case reported at page 29, III. Weekly Reporter, Act X. Rulings, decided on the 19th of June 1865.

The finding of the first Court is that the value of the produce has increased two-fold by a gradual and progressive rise, and that this increase, which both parties accept, is clearly not the increase of years of unusual pressure or scarcity. The first Court finds also that the expenditure, which, it is said by the defendant, had increased as much as the value of the produce, has in reality not increased at all. If anything, it appears by the finding of the first Court to have decreased. In this state of things, if the expenditure is stationary, and the value of the produce has increased, then the proper rule will be that the rate of rent to be paid shall bear to the old rate the same proportion as the present value of the produce bears to the old value.

Adopting this rule, the plaintiff would be entitled to receive the rates allowed by the first Court. The appellant, however, agrees to take the rates admitted by the defendant for the various *bastoo* or homestead lands in the four cases, and the homestead lands will be assessed at those rates in each case.

With these exceptions, however, the decision of the Judge is set aside, and that of the Collector restored in all four cases.

The appellant will get his costs of these appeals.

Macpherson, J.—The Lower Appellate Court evidently misunderstood the remarks of the Court of first instance as to some portions of the increase being "accidental," and it was under this mistake that the Judge altered the order which had been passed. It appears to me that the decision of the first Court was right and should be affirmed, reversing the decree of the Judge.

By consent of Baboo Mohinee Mohun Roy, the original decree is to be altered by excluding the *bastoo* lands, and assessing them in each case at the rates admitted by the several defendants.

The 10th March 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Dispossession on date given in plaint.

Case No. 1367 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota-Nagpore, dated the 23rd March 1867, affirming a decision passed by the Assistant Commissioner of Manbhoom, dated the 19th July 1866.

Obhoy Churn Mahatah and others (Defendants), *Appellants,*

versus

Unnoda Pershad Mookerjee (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Sreenath Doss for Respondent.

It is not necessary for a plaintiff to prove that he was dispossessed on the date mentioned in the plaint.

Mitter, J.—* * * * * * * *

With reference to the third point, we do not think that it is absolutely necessary in a civil suit that the plaintiff should prove that he was dispossessed by the defendant on the precise date mentioned in the plaint. In the present case, the plaintiff having proved a title to the property in suit not barred by lapse of time, a decree has been very properly passed in his favor. We reject the special appeal with costs.

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The 10th March 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Enhancement of rent—Section 17, Act X. of 1859.

Case No. 1690 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 25th April 1867, modifying a decision passed by the Deputy Collector of Furreedpore, dated the 22nd February 1866.

Purmanund Sein and others (Defendants), *Appellants,*

versus

Puddo Monee Dossia and others (Plaintiffs), *Respondents.*

Mr. R. V. Doyne and *Baboo Bungshee Dhur Sein* for Appellants.

Mr. R. T. Allan and *Baboo Romanath Bose* for Respondents.

Where a ryot, who had taken a clearing lease for certain jungles at a *russuddee* jumma rising by degrees to 10 annas, which had been reached, and had been paid for some time, was sued for enhancement of rent, it was held that the mere fact of the ryot's produce having largely increased in value, and of his rent being materially below that paid for similar lands in the neighbourhood, were not sufficient grounds for enhancement of rent under Section 17, Act X. of 1859.

It is essential to a right to enhance under Clause 1, Section 17, that the higher rates in the neighbourhood should be paid by the same class of ryots, and by ryots with similar advantages.

Macpherson, J.—THIS suit was remanded by a Division Bench of this Court some time ago, in order that the Judge might decide "whether the respondent (the "plaintiff in the original suit) was entitled "to a kubooleut at an enhanced rate accord-"ing to his plaint on any of the grounds "which he may put forward under the "law."

The Judge has decided that the respondent is entitled to a kubooleut at an enhanced rate. But in special appeal it is argued that the Judge's decision is wrong as not showing that, under any of the clauses of Section 17 of Act X. of 1859, the appellants are liable to have their rent enhanced.

We think the appellants' contention is right, and that the judgment of the Lower Court should be set aside, and that the plaintiffs' suit should be dismissed.

The appellants are not liable to enhancement unless their case falls within the first or second Clause of Section 17: that is to say, unless—

1st.—The rate of rent paid by them is below the prevailing rate payable by the same class of ryots for land of a similar description and with similar advantages in the places adjacent; or unless—

2nd.—The value of the produce, or the productive powers of the land, have been increased otherwise than by their agency or at their expense.

The Judge's decision does not bring the case of the appellants within either of these clauses. The Judge finds in a vague way "both that the value of produce has "largely increased, certainly not less than "doubled; and, further, that the defendants' "rent is now materially below what is paid "for similar land in the neighbourhood:" and then he goes on to fix one rupee as a suitable rate for the appellants to pay with reference to the rates paid for similar lands in the neighbourhood, and to the special circumstances in which the appellants are situated. Such a finding as this is not warranted by Section 17, and is bad in law. The appellants' case is very peculiar, they being persons who many years ago took a clearing lease of certain jungles at a *russuddee* jumma, paying nothing for the first several years, and then paying a small rent rising by degrees to 10 annas. After having paid at the rate of 10 annas for some time, this suit to enhance the rate was instituted.

The Judge, in deciding that the rent should be enhanced to one rupee, apparently considered that he acted under the 1st Clause of Section 17. But his finding is incomplete; because, though it may be taken to declare what is the prevailing rate in the neighbourhood, there is no finding on the all-important point essential to the right to enhance under that Clause—that the higher rates in the neighbourhood are paid (*a*) by the same class of ryots, and (*b*) by ryots with similar advantages in the places adjacent.

The grounds upon which the respondent sought to enhance are set forth in the plaint in the most general and obscure terms, and as no case for enhancement within the provisions of Section 17 of Act X. of 1859 has been made out, we think the decree of the Lower Court ought to be reversed, and the plaintiff's suit dismissed.

The appellants are entitled to the costs of this appeal and of the proceedings in the Lower Court subsequent to the remand-order of the 15th February 1867.

The 10th March 1868.

Present:

The Hon'ble W. S. Seton-Karr and W. Markby, *Judges.*

Sale by Hindoo widow—Attestation by heirs—Lapse of time—Evidence.

Case No. 2032 of 1867.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 28th May 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th September 1866.

Madhub Chunder Hajrah (one of the Defendants), *Appellant,*

versus

Gobind Chunder Banerjee and others (Plaintiffs), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondents.

Where certain landed property in the possession of a Hindoo widow was sold on the alleged ground of necessity, and the execution of the deed of purchase was attested by the then next heir, it was held that the assent implied in such attestation was not *conclusive in law* as to the necessity for the sale; though the fact of persons most interested in contesting such a sale being called in to execute the deed is the strongest possible proof of good faith on the part of the purchaser.

Where a considerable time has lapsed of enjoyment and apparent acquiescence, a purchaser, or one claiming through him, may be absolved from showing anything more than the fact of a sale made to him under some ostensible plea of necessity.

Markby, J.—In this case, plaintiff, Gobind Chunder Banerjee, the son of Digumburee, and maternal grandson of Shibo Soonduree, sued together with one Ram Kishore to set aside a sale of certain landed property made by Shibo Soonduree whilst she was in possession of the property, and had in it the interest of a Hindoo widow whose husband had died leaving no male issue.

The defendant was an infant whose ancestor had purchased the property in question, and who appeared by his guardian.

The sale in question was made in the year 1241—33 years ago. The deed recites that the sale was necessary for the payment of Government revenue "and other debts:" and the execution of the deed is attested by Digumburee, the daughter of Shibo Soonduree, as also by one Doorga Doss since deceased, who was then the next heir after the death of Shibo. The plaintiff was not then born.

The only question before us is, whether this dispossession of the property by Shibo Soonduree, who had only a limited interest, was valid and binding as against the plaintiff, the next heir.

It was contended below, and has been again contended here, that, inasmuch as the execution of the purchase-deed was attested by Doorga Doss, the then next heir, it must have been taken to have been made with his assent, and, having been made with his assent, is binding and conclusive as against the present plaintiff.

We are not, however, prepared to go to this extent. We do not consider that this assent is in *law conclusive*, so as to preclude the necessity of all further enquiry, though we consider that the fact of the two persons most interested in contesting this sale, if it was unnecessary, having been called in to execute the deed, is the strongest possible evidence of good faith on the part of the purchaser.

It is true that there is a decision of the late Sudder Court, by which it is held that an attesting witness must be taken in a matter of law to be an assenting party to the deed which he attests; but we think the law is there laid down a little too strongly.

See the decisions of 1860, S. D. A., page 625.

The same subject is referred to in a decision reported in VI. Weekly Reporter 52. There the Court (Kemp and Seton-Karr, Justices) held that the attestation showed acquiescence as a matter of fact upon the evidence, and not as a matter of law.

Upon another ground, however, which has been taken before us, the appeal is, in our opinion, well founded. We think the Judge of the Appellate Court has not taken an altogether correct view of the question of fact which he had to determine.

There is not in this case any question of *onus*, or shifting of *onus* or presumption; the simple question is whether the defendant has shown, as he was bound to do, that the vendor through whom he claims, in making this purchase, acted in good faith after making such enquiries as a reasonable man would make to ascertain that the sale was necessary. If he did this, whether the sale was in reality necessary or not, is not material, the object of the law being as much to protect honest purchasers as it is to protect reversionary heirs; and it being clear that, if a man is to deal with a Hindoo widow for the estate which she holds, he must have some mode of doing so, which will render his dealings secure from impeachment by any subsequent taker.

Upon the question of good faith, the fact of Digumburee and Doorga Doss having attested the deed, is of the greatest possible weight; and we think that, if the right question, namely, that of good faith on the part of the purchaser, had been considered by the Judge, he would very likely have thought it sufficient on that point.

Nor do we think that the importance of the fact of the lapse of time has been rightly estimated. In the case referred to,* the Privy Council refused to lay down any general proposition as to what proof was required from the purchaser of his good faith; and after pointing out some cases in which it might be fairly expected that the purchaser could give some direct proof upon the point, they proceed to say: "It "is obvious, however, that it might be unreasonable to require such proof from one "not an original party after a lapse of time "and enjoyment and apparent acquiescence;" by which is clearly meant that, under some circumstances, the purchaser, or a person claiming through him, may be absolved altogether from showing anything more than the fact of a sale under some ostensible plea of necessity made to him long previously by a person who had at the time the management of the property.

With these remarks, we remand the case to the Judge for his re-consideration. In so doing, we do not at all intend to trespass upon the strict rules which have been laid down confining special appeals to matter of law. But there appears to us to have been here a substantial error in the investigation which renders a remand necessary, and the Judge appears to us to have wrongly applied the well-known precedent in Hunooman Pershad's case.

If there was an ostensible necessity, such as the payment of Government revenue certainly would be, and if the purchaser acted with good faith and reasonable caution, he ought not to be disturbed after so long a period of possession and acquiescence.

The Judge should re-consider the case from the points of view indicated by us, and pass a fresh judgment.

* That of Hunooman Pershad Panday.

The 12th March 1868.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Non-registration—Section 13, Act XVI., 1864—Contract may be recognized though not reduced to writing—Non-registration through fraud of adversaries.

Case No. 2072 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 30th May 1867, reversing a decision passed by the Moonsiff of that District, dated the 28th May 1866.

Meer Helalooddeen (Plaintiff), *Appellant,*

versus

Chowdhry Abdool Suttar and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Appellant.

No one for Respondents.

Where defendant, after executing a bill of sale in respect of certain lands, and receiving the full amount of purchase-money agreed upon, had repudiated the contract, and refused to make over possession, it was held that, though the fact of the deed of sale not being registered precluded it, under Section 13, Act XVI., 1864, from being admitted as evidence, yet plaintiff was not exclud-

ed from showing by other evidence that he performed his part of the contract. There is nothing in that Section which says that no contract purporting to create or transfer any right, title, or interest in land, shall be recognized by the Civil Court, unless reduced to writing.

HELD, also, that there was no reason why plaintiff should not be permitted to show that the non-registration was owing, not to any fault of his own, but to the fraudulent conduct of his adversaries.

Miller, J.—THIS was a suit instituted by the special appellant to obtain possession of certain lands under an alleged title by purchase. The material averments in the plaint were, that the defendant No. 1 had executed in favor of the special appellant a bill of sale in respect of the lands sued for, after receiving from him the full amount of the purchase-money agreed upon; that she, the defendant No. 1, had also executed a mooktearnamah in favor of her husband, defendant No. 2, for the purpose of causing the registration of the said bill of sale; that she had acknowledged the genuineness of this mooktearnamah before the Sub-Registrar of Deeds and Assurances, when that officer had gone to her house to enquire about its execution; but that, afterwards, the two defendants, in collusion with one another, repudiated the contract, and refused to give effect to it, by making over to him, the special appellant, the possession of the property sold.

The Court of first instance, whilst holding that the bill of sale in question could not be received in evidence for want of registration, gave a decree to the special appellant upon the other evidence produced by him in the cause. On appeal, the Lower Appellate Court has reversed this decision, and dismissed the suit altogether, upon the ground that the bill of sale not being admissible in evidence under the provisions of Section 13, Act XVI. of 1864, the special appellant could not be permitted to prove his case by any other evidence.

We are of opinion that this judgment is erroneous in law. Assuming for the present moment that the bill of sale is not admissible in evidence under the provisions of the law above cited, we do not see why the special appellant should not succeed, if he is in a position to substantiate his allegations by the other evidence on the record. There can be no doubt that in this country, where there is no such legislative enactment in existence as the Statute of Frauds in England, titles to property have passed, and can still pass, from one person to another by virtue of a contract not reduced to writing. There is nothing in the Hindoo, Mahomedan, or Regulation Law to invalidate such a contract. As to Section 13, Act XVI. of 1864, that Section merely says that the deeds and instruments described therein "*shall not be* "*received in evidence* in any civil proceed-"ing by any Civil Court, or acted on by any "public officer, unless they have been re-"gistered in the manner and within the "time prescribed by the Act." But there is nothing in this Section, which says that no contract purporting to create or transfer any right, title, or interest in land, shall be recognized by the Civil Courts, unless the same is reduced to writing.

In the absence, then, of any positive legislation on this subject, we must look to those principles of equity and good conscience which the Civil Courts in this country are by their very constitution bound to administer on such occasions. So far as these principles of equity and good conscience are concerned, we are of opinion, notwithstanding any objections based upon considerations of public policy that might be urged on the other side, that it would be unjust and inequitable as between the parties to a contract to repudiate its provisions merely because they have not been reduced to writing. It might be said that the recognition of parol contracts in such cases would open a door to fraud and perjury, and thereby increase the very evils which it was the object of the Legislature to provide against by enacting the Registration Law; but, be this as it may, it is clear that we *cannot* arrogate to ourselves the functions of the Legislature by putting a construction upon their words other than that which is warranted by the plain language of the enactment itself. If, therefore, the special appellant in this case had come into Court upon a contract not reduced to writing, and if he had proved it to the satisfaction of the Court by unimpeachable testimony, the Court could not have refused to him the relief he asks for. How, then, is his title to such relief affected by his relying upon a contract reduced to writing, but not registered for the reasons set forth by him in his plaint? Assuming, as we have hitherto done, that the bill of sale in question is not to be received in evidence even if the explanation put forward by the special appellant to account for its non-registration is found to be correct, we are aware of no law by which he is to be deprived of the power of proving his case by any other evidence he is in a position to adduce.

The only objection that can be raised against such a mode of procedure is that founded upon the rule of evidence by which secondary evidence is excluded when the absence of the primary is not satisfactorily accounted for. We entertain grave doubts about the applicability of this rule to a cause like the present, in which the primary evidence is not actually withheld, but is rejected by the Court for reasons of its own. But admitting, however, that the rejection of the bill of sale by the Court itself on the ground of non-registration is tantamount to its non-production by the special appellant, there can be no reason why he is not to get the benefit of the exception to the rule in question by being permitted to show that the document was not registered, not from any fault of his own, but from the fraudulent conduct of his adversaries.

We are, however, of opinion that, if the special appellant can account for the non-registration of the bill of sale in the manner alleged by him, the document ought to be received in evidence, notwithstanding the provisions of Section 13, Act XVI. of 1864. Such a case was never contemplated by that Section, as is evident from the provisions of Act XX. of 1866; and, although it would fall within the letter of the law, it would be contrary to all the recognized rules for interpreting a legislative enactment to hold that it is governed by that Section, for the respondents will be permitted thereby to take advantage of their own wrong, and thus enabled to commit a fraud upon the true intent and object of the Legislature.

Mr. Justice Story in his work on Equity Jurisprudence, Volume I., page 735, says: "Another exception is, where the "agreement is intended by the parties to "be reduced to writing according to the "Statute" (the Statute of Frauds), "but it "is prevented from being done by one of "them. In such a case, Courts of Equity "have said that the agreement shall be "executed, for otherwise the Statute de-"signed to suppress fraud would be the "greatest protection to it." We do not feel the slightest hesitation in holding, upon precisely similar grounds, that the bill of sale in question ought to be received in evidence if the absence of registration is accounted for in the manner alleged by the special appellant.

We are also of opinion that, even if the special appellant fails to account for the non-registration of the bill of sale, and the document is consequently rejected as inadmissible, the Court should still permit him to prove that he has performed his part of the contract by paying to the respondents the full amount of the purchase-money, as he alleged. It would be opposed to all principles of equity and good conscience to allow the respondents to retain the purchase-money without making over to the special appellant the possession of the property they have already sold to him in consideration thereof; and we are fortified in this opinion by the consideration that, in cases falling within the Statute of Frauds, part-performance is recognized as a sufficient ground for relaxing the severity of that enactment as laid down by Mr. Justice Story in Volume I., page 726, of his work on Equity Jurisprudence, already referred to.

We reverse the decision of the Lower Appellate Court, and remand the case to that Court to try it with reference to the foregoing remarks. If the special appellant succeeds in making out his case, the Lower Appellate Court will give him a decree, and forward a memorandum thereof to the District Registrar, and the Deputy Registrar within whose jurisdiction the property in suit is situated, as laid down by Section 45 of Act XVI. of 1864.

Seton-Karr, J.—I concur in remanding the case to the Lower Appellate Court.

It is perfectly true that, under Section 13 of Act XVI. of 1864, the deed of sale, not having been registered, cannot be received in evidence in the suit. But the meaning of this Section and the policy of the law is certainly not to shut out the consideration of the main issue in such a case, *namely*, whether or not the plaintiff really purchased the disputed lands from the female defendant for a consideration of 245 rupees.

The very gist of the plaintiff's case is that the deed, though executed, was never registered because the defendant resiled; and, if this be the case, it was never intended that the plaintiff should be wholly excluded from showing that he did perform his part of the contract; that he did pay the consideration-money; and that the sale was completed.

The Lower Appellate Court has treated the case as if the mere non-registration of the bill of sale (which the plaintiff alleges not to be his fault) is quite sufficient to dispose of the plaintiff's title.

The case should go back to the Lower Appellate Court to be tried on the principles which guided the first Court, and which appear to me to be substantially correct. And if the plaintiff can satisfactorily establish by other evidence the payment of the consideration-money and the execution of the sale, it appears to me that he ought to succeed.

The case is remanded accordingly.

The 14th March 1868.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Resumption of parent estate—Howladar's rights.

Cases Nos. 1885 and 1886 of 1867 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Dacca, dated the 18th May 1867, affirming a decision passed by the Deputy Collector of that District, dated the 28th January 1867.

Mothooranath Gungopadhya (Defendant), *Appellant,*

versus

Sheeta Monee (Plaintiff), *Respondent.*

Mr. J. S. Rochfort and *Baboos Hem Chunder Banerjee, Kalee Mohun Doss, Romesh Chunder Mitter,* and *Nilmonee Sein* for Appellant.

Baboos Otool Chunder Mookerjee and *Shushee Bhoosun Bose* for Respondent.

The resumption by Government of a parent estate does not nullify the existing rights of a howaladar within that estate, or deprive him of the benefit of the presumption arising under Section 16, Act X, 1859.

Mitter, J.—It is admitted that these two cases are governed by one and the same decision.

We are of opinion that the judgment of the Lower Appellate Court in these two cases must be reversed. The Lower Appellate Court is clearly wrong in supposing that the resumption by Government of the parent estate within which the disputed howalah is situated nullified all rights which the special appellant enjoyed before the date of the resumption, and, therefore, deprived him of the benefit of the presumption arising from the provisions of Section 16, Act X. of 1859. If the special appellant can prove that the rent payable by him has not been changed for 20 years next before the institution of the suit, he will be clearly entitled to the benefit of the presumption laid down in that Section, and if that presumption is not rebutted by any counter-evidence produced by the plaintiff (special respondent), the present suit for enhancement of rent brought by him must fail.

We find that the Judge, in one part of his decision, observes that the special appellant has produced a certain number of dakhilahs, dated both before and after the Decennial Settlement, but that these dakhilahs have "not been attested." The Judge is wrong in making this remark, for there is the evidence of two witnesses, Haranund Chuckerbutty and Rokunooddeen, to prove some of these dakhilahs. But the real question which the Judge had to try was not directly whether these dakhilahs were genuine or not, but whether the rent payable on account of the special appellant's tenure has been changed or not within 20 years next before the institution of the suit. We find that, besides the dakhilahs proved by the special appellant, there was his own evidence on oath that his rent has not been changed ever since the Permanent Settlement. It was for the Judge to take all this evidence into his consideration in connection with all the other facts and circumstances of the case, and then to determine whether the tenure of the special appellant was protected from enhancement by the provisions of Section 16, Act X. of 1859.

We remand the case to the Judge to re-try it with reference to the foregoing remarks. Costs will abide the final result.

The 16th March 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Liability of dormant partner—Obligee not to go beyond the terms of the bond.

Case No. 324 of 1867.

Regular Appeal from a decision passed by the Officiating Principal Sudder Ameen of Tirhoot, dated the 29th June 1867.

Nundeeput Mahatah (Plaintiff), *Appellant,*

versus

Mr. A. Urquhart and others (Defendants), *Respondents.*

Messrs. W. A. Montriou and *R. E. Twidale* for Appellant.

Mr. C. Gregory and *Baboo Unnoda Pershad Banerjee* for Respondents.

The doctrine that a dormant partner, when discovered, is liable for every debt incurred for the partnership by the active partner, is not absolute in the Courts in England, and is not to be followed by the Courts of this country, unless found, in particular cases, to be consonant with justice, equity, and good conscience.

Where money was lent on a bond to the "Malik and Mooktear" of a factory on his personal credit and the security of the entire factory, and it was afterwards discovered that other parties had a share in the factory, it was held that the lender was not entitled to go beyond his contract, and recover from those other parties personally.

Hobhouse, J.—This was a suit upon a bond entered into between the plaintiff (appellant) on the one part, and Mr. Urquhart, one of the defendants (respondents), on the other part.

The bond was entered into by Urquhart in his capacity as "Malik and Mooktear" of the Poopree Indigo Factory, and the bond recited that the money covered by it was borrowed by Urquhart, in his above capacity, to pay off a decree for rents due against the said factory, and it was agreed that the money should be paid by Urquhart in certain instalments, and that the 16 annas of the factory should stand pledged for repayment.

When the money borrowed on the bond became due, the plaintiff discovered that two of the defendants (respondents), the Chowdharies, had, at the time when the bond was entered into, a 4-annas share in the factory, and were, in fact, partners in the factory to this extent, and I agree with my brother Loch that this fact is conclusively proved, as well by the Chowdharies' admission in para. 4 of their written statement of the 11th May 1867 as by the recital in their indenture of the 12th July 1866.

On making this discovery, the plaintiff sued the Chowdharies jointly with Urquhart for recovery of the moneys due on the bond from them personally.

The Court below has made Urquhart and the 16 annas of the factory liable, but has released the Chowdharies, on these grounds apparently: *first*, that the Chowdharies did not personally benefit by the money borrowed; and, *secondly*, that Urquhart had no authority to borrow the money on behalf of the Chowdharies.

Mr. Montriou, the learned Counsel for appellant, does not contend against the judgment of the Court below on either of these grounds, but on the one general ground that a dormant partner, when discovered, is liable for every debt incurred for the partnership by the active partner.

Mr. Montriou admits that this doctrine is founded on decisions of the Courts of England, and has not, that he knows of, been followed by the Courts, nor been sanctioned by any practice in the business-transactions of this country out of Calcutta; and he further admits that even in England the doctrine has not been adopted unanimously by the Courts, but that, on the contrary, the Judges of the Court of Common Pleas have disavowed it, whilst certain Judges of other tribunals have, expressly differing, sanctioned it.

The doctrine, then, is not absolute even in the Courts in England; and, if it were, I should still consider that, under any circumstances, we were not bound to follow it, unless

it were, as applied to this particular case, found to be consonant with those rules of justice, equity, and good conscience which, in the absence of any more definite law, it is our duty to endeavour to arrive at and administer.

Now, here the questions seem to me to be: *first*, when the plaintiff was lending his money, was he lending it to what he supposed to be a partnership or firm of which Urquhart was the manager, or was he lending it to Urquhart personally on his personal security and on the security of 16 annas of the factory; and, *secondly*, has the plaintiff obtained all that he contracted for?

On these questions, I observe that plaintiff was not even aware, when he lent his money, that the Chowdharies had any share in the Poopree Factory; and it follows—and it is indeed admitted—that plaintiff did not lend the money on the credit of the Chowdharies.

On the contrary, he lent it, as is quite clear on the record, only on the credit of Urquhart personally, and on the credit of the 16 annas of the factory itself.

And then the only question that remains is, whether or not plaintiff has obtained the benefit of exactly that credit on which he advanced his money, and I think that we must say that he has, for he has obtained a decree, and is entitled to recover as well against Urquhart personally as against 16 annas of the factory.

In this view of the case, I would say that plaintiff has obtained all that he contracted for, and that he cannot, in equity, be allowed to go beyond his contract and recover personally from the Chowdharies, for neither did they pledge their credit to him, nor did he rely upon their credit when he lent his money, and I would affirm the judgment of the Court below, and dismiss this appeal with costs.

Loch, J.—I concur in affirming the judgment of the Lower Court, for it is clear that plaintiff dealt with Urquhart solely, and lent his money to Urquhart on his (Urquhart's) credit and the security of the Poopree Factory, and the decree enables him to proceed against the security which he accepted from Urquhart. Plaintiff certainly believed that he was dealing with Urquhart alone, and considered the security offered by Urquhart sufficient pledge for the safety of his money. He has that now, and can proceed against it.

The 18th February 1868.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Note (e), Art. 11, Schedule B, Act XXVI., 1867—Stamp—Pauper-petition under Section 348, Code of Civil Procedure.

Petition of Cross-Appeal "in formâ pauperis" filed in Regular Appeal No. 323 of 1867.

Rashomonee Dossee, *pauper*, Plaintiff (Respondent), *Petitioner*,

versus

Chowdhry Junmojoy Mullick, Defendant (Appellant), *Opposite Party.*

Baboo Kishen Succa Mookerjee for Petitioner.

Note *e* to Article 11, Schedule B, Act XXVI. of 1867, contains no reservation as to the stamp-duty to be levied on a petition of objection, under Section 348, Act VIII. of 1859, filed by a pauper-respondent.

Such petition of objection will be received, but will not be heard till the stamp-duty is paid. The question, however, will have to be raised at the hearing.

Note by the Deputy Registrar.—THIS is the first petition of objection under Section 348 of Act VIII. of 1859, filed by a respondent *in formâ pauperis.*

The proceeding applicable to appeals filed *in formâ pauperis* should, I presume, be followed as to objections or cross-appeals filed *in formâ pauperis*, especially as the new Stamp Law (Act XXVI. of 1867, Schedule B, Note *e*, Article 3) prescribes the levy, on objections or cross-appeals, of such additional stamp-duty as would have "been payable had the appeal comprised the part of the decision so objected to."

I, therefore, beg to submit this petition of objection filed by the respondent in the above appeal for the orders of the Judge presiding in the Miscellaneous Department as to the enquiry provided by Section 370, Act VIII. of 1859.

Jackson, J.—I think at present that there is no reservation in favor of *pauper-respondents* in Note *e* to Article 11 of the

Schedule annexed to Act XXVI. of 1867; but that the party desiring to object must, if he desires to be heard as a *pauper*, file a *cross-appeal.*

This, however, need not prevent the objection being *filed*, as the law only provides that the Court should not *hear* till the stamp-duty is paid, and, therefore, it is at the hearing that this question will have to be raised.

The 26th February 1868.

Present:

The Hon'ble L S. Jackson, *Judge.*

Affidavit — Person unable to read and write — Section 9, Act XVIII., 1863.

Anonymous.

When an individual, who is unable to read and write, presents himself to affirm solemnly or make oath to the truth of an affidavit, it will be sufficient, in order to meet the requirement of Section 9, Act XVIII. of 1863, in obtaining his verification, to allow him to affix his "mark" in lieu of his "signature," and, in affirming or swearing hi n, to vary the usual words by saying "mark instead of signature" in lieu of "signature."

Note by the Commissioner for Swearing affidavits.—SOORJO GOPE, having filed a special appeal, desires to make an affidavit to the truth of the annexed statements relating to a party to the said appeal. He cannot read and write, and has not, therefore, been able to affix his signature to the statements, but has affixed against his name, which is written by his vakeel's mohurrir, a mark.

The individual in question being unable to affirm, as prescribed by Section 9, Act XVIII. of 1863, to a signature being *his name* and *handwriting*, and having only affixed his mark, I beg instructions as to how I am to obtain his verification in accordance with the terms of the law.

Jackson, J.—"Mark" will do.

The Commissioner again.—May I beg orders as to the words to be used in the verification?

May the words prescribed by Section 9 of Act XVIII. of 1863 be varied by *me* so as to adapt the verification to a case like this? Thus:—

"I solemnly affirm in the presence of "Almighty God that the name affixed to "this is my name, and that the mark affixed "to the name has been affixed by me, and "that the contents of this affidavit are "true."

Jackson, J.—I think it will be sufficient to vary the usual words by saying "mark instead of a signature" in lieu of "signature."

The 14th March 1868.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Examination of Stamps — Refund of Stamp-duty — Partial remands.

Application relative to Special Appeal No. 731 of 1864, praying to be furnished with a cheque for the refund of Rupees 100, the value of the stamp used for petition of the said appeal, which was remanded by the High Court on the 29th March 1865.

Bhikoo Molla and another, *Appellants,*

versus

Rash Monee Dossee and others, *Respondents.*

The examination of stamps is a fiscal duty belonging to a Revenue Officer, and for which the Registrar of the High Court should not be responsible.

An application for refund of stamp-duty need not be made in writing, and may be made by a mooktear duly authorized.

Where an appeal to the High Court, in a case involving property not exceeding 3,000 rupees in value, was filed under Act X., 1862, on a stamp-paper worth 100 rupees, and the result was a remand in respect to a portion of the property of which the valu: was Rupees 1,756 —it was held that, as this appellant was successful in his appeal in respect of property representing a value which must of itself have required a stamp-duty of 100 rupees, that portion of his appeal in which he failed did not necessitate the payment of any further stamp-duty; consequently, the appellant was entitled to a refund of the stamp-duty in full.

Jackson, J.—IN this case, the Deputy Registrar puts three questions for the orders of the Court. *First*, whether further examination of the stamp-paper by the Collector is necessary, that stamp having been already

examined by the Registrar of this Court? On this point, it appears to me that it is not desirable that the Registrar of this Court should undertake the duty of, or be responsible for, the examination of stamps: it appears a fiscal duty more properly belonging to a Revenue Officer of Government, and that consequently the stamp-paper should, if necessary, be forwarded to the Collector for examination.

The *second* question is, whether a mooktear, duly authorized, can be allowed to make an application to the Court for a refund of stamp-duty? I observe that the present application is not addressed to the Court, but to the Registrar. It is an application in writing upon a stamp-paper of two rupees. It does not appear that there is any necessity for making the application in writing at all; and I am of opinion that a mooktear, if duly authorized, may apply for such refund.

The *third* question is, whether, in a case like the present, the entire amount of stamp-duties should be refunded, or only that portion of it remaining as balance, after deducting from the full value of the stamp the value of that portion that covers or relates to the portion of the property that is allowed. It appears that the applicant presented an appeal to this Court in respect of propeety not exceeding 3,000 rupees in value under the Stamp Law then in force. The stamp-duty on such appeal was 100 rupees, and it appears that the result of the appeal was a remand in respect to a portion of the property involved in the suit, of which the value was Rupees 1,756. The Deputy Registrar's opinion is that the appellant should, as it were, first be debited with stamp-duty to the extent of that portion of the appeal in which he was unsuccessful, and that, after deducting this amount, the balance, if any, of the actual stamp-duty paid should be refunded. It does not appear to me that this mode of accounting should be adopted. It appears that the appellant was successful in his appeal in respect of property representing a value which must of itself have required a stamp-duty of 100 rupees: that portion of the appeal on which he failed did not necessitate the payment of any further stamp-duty. That being so, it appears to me unnecessary to charge the appellant with any stamp-duty in respect of the portion of his claim as to which he failed, but which did not involve payment of additional stamp-duty. Therefore, I think that the applicant is entitled to a refund of the stamp-duty in full.

The 16th March 1868.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Section 224, Act VIII. of 1859—Legal receipt for possession — Actual receipt of rent.

Case No. 1423 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Nuddea, dated the 22nd March 1867, affirming a decision passed by the Deputy Collector of that District, dated the 8th August 1866.

Khetturnath Roy (Defendant), *Appellant,*

versus

Durbesh Moonshee (Plaintiff), *Respondent.*

Baboo Ashootosh Chatterjee for Appellant.

Baboos Chunder Madhub Ghose and *Khettur Mohun Mookerjee* for Respondent.

Where compliance with the formalities prescribed by Section 224, Act VIII. of 1859, and a legal receipt for possession, are found as facts, they give such a right under a Civil Court's decree as will prevail over one founded on mere actual receipt of rent.

Bayley, J.—In this case, the only point placed before us in special appeal is, that the Lower Appellate Court should not have held that a decree of a Civil Court, under which *actual* possession was not shown to have been given, was to be looked to by the Lower Appellate Court, and *not* the actual receipt of rent; and that, further, in this case, the special appellant, being a farmer, could not be affected by a decision to which he was no party.

We observe that here it is found as a fact by the Lower Appellate Court that the necessary formalities required by Section 224 were adhered to and completed, and we also find a legal receipt on record for posses-

sion. Such facts found undoubtedly gave the special respondent in this case such a right under a Civil Court decree as will prevail over one founded on mere actual receipt of rent.

The position of a farmer will always so far be affected by a Civil Court decree that it cannot be said the farmer is (what the law requires he should be) *bonâ fide* in actual receipt of rent, when the law recognizes a superior title in another under a Civil Court decree, with possession legally given under such decree.

In this view, we dismiss this special appeal with costs.

The 16th March 1868.

Present:

The Hon'ble H. V. Bayley and F. A Glover, *Judges.*

Jurisdiction—Tenant's right to sue for declaration of title.

Case No. 1470 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 4th April 1867, reversing a decision passed by the Moonsiff of that District, dated the 29th August 1866.

Juddoonath Sein and another (Defendants), *Appellants,*

versus

Ram Coomar Chatterjee and others (Plaintiffs), *Respondents.*

Baboo Romanath Bose for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

The decision of a Revenue Court, that a party is liable for rent to another as his tenant, does not bar that party suing in a Civil Court to obtain a declaration of title on his general civil rights, either as proprietor by purchase or as mokurrureedar.

Bayley, J.—In this case, the plea which alone is raised before us is one of jurisdiction, *viz.*, that, as it has been held by the Revenue Court that the special respondent is liable to the special appellant as the tenant of the latter, this suit by special respondent for confirmation of possession with declaration of proprietary title based on purchase and on mokurruree title will not lie in a Civil Court.

We think that this plea is untenable. The Revenue Court may decide that, for a certain year, special respondent is liable as a tenant of special appellant for the rent of these lands; but it is open, notwithstanding, for the special respondent to sue in a Civil Court to obtain a declaration of title on his general civil rights, either as proprietor by purchase or as mokurrureedar. The decision of the Revenue Court on title is binding only for the purposes of the rent-suit.

This special appeal is, therefore, dismissed with costs.

The 17th March 1868.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

A Civil Court undertaking to pass orders under Section 168, Code of Civil Procedure.

Case No. 1352 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 22nd March 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 21st July 1865.

Mohadeb Shaha and others (Defendants), *Appellants,*

versus

Sheo Suhoy Geer (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboo Shib Chunder Chatterjee* for Appellants.

Baboo Issur Chunder Chuckerbutty for Respondent.

Where a Lower Appellate Court by the terms of its order on a petition for the apprehension of witnesses under Section 168, Code of Civil Procedure, undertakes to see that proper orders shall be passed, it is bound to pass such orders as may in its judicial discretion be necessary under that Section.

Bayley, J.—THE point raised before us in this special appeal is that the Lower Appellate Court did not judicially exercise the discretion vested in it under Section 168, Act VIII. of 1859, in not proceeding to issue a warrant under that Section in respect to two witnesses, who, being summoned, failed, without lawful excuse, to comply with the summons.

The case was remanded by the High Court, because the burden of proving title had been wrongly put on the lakherajdar.

On remand, both parties were allowed to produce further evidence, and did so.

But the special appellant issued summonses in the names of two witnesses (pottahdars), who, without lawful excuse, did *not* appear on such summons.

Upon this, the special appellant filed a petition praying the Lower Appellate Court to cause them to be apprehended and brought before the Court.

The order passed upon this was, that at the hearing, if *the Lower Appellate Court thought it necessary, it would pass proper orders.*

The hearing proceeded, and the judgment was delivered, and no orders were passed on the subject of this petition, or the matter noticed in the judgment.

We think that, ordinarily, it would have been for the petitioner, where the order is merely for record, to show that he did urge upon the Lower Appellate Court to pass the further orders contemplated by Section 168. But here it is clear that the Lower Appellate Court, by the terms of its order, did, in fact, undertake, and in our opinion very wrongly undertake, to see that proper orders should be passed; whereas, in fact, it did not see to any orders being passed as it said it would.

The case must be remanded that the Lower Appellate Court might proceed according to Section 168 to pass such orders as may, in its judicial discretion, be necessary under that Section.

Remand accordingly.

The 17th March 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Section 260, Act VIII., 1859—Benamee purchaser—Right of suit.

Case No. 202 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rungpore, dated the 24th April 1867.

Bykunt Chunder Moostafee (Plaintiff), *Appellant,*

versus

Khema Moyee Debia and another (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Greeja Sunkur Mojoomdar* for Appellant.

Baboos Onookool Chunder Mookerjee and *Gopal Lall Mitter* for Respondents.

The correct interpretation of Section 260, Act VIII., 1859, is to the effect that a suit by a party claiming to be the real purchaser of immoveable property sold in execution of a decree cannot be brought against the certified auction-purchaser, even though claimant has had previous possession.

Loch, J.—THE plaintiff alleges that he purchased the estate in dispute in the name of his mother, the defendant Khema Moyee, at a sale in execution of a decree; that, though the sale-certificate runs in her name, he is the actual purchaser; that he obtained possession, and was dispossessed in Falgoon 1272 by the other defendant, Rehling, who had taken a farm of the property from Khema Moyee; and he brings this action against the certified auction-purchaser for the purpose of having it declared that he, and not the certified auction-purchaser, is the real purchaser of the property, and to recover possession of the property from the hands of the farmer.

The suit has not been brought within six months from the alleged date of dispossession, and therefore plaintiff, if his suit be admis-

sible, is bound to prove his title; and he urges that, as he has since been in possession with the consent of the certified purchaser. Section 260, Act VIII. of 1859, is no bar to his bringing the present suit. He further urges that, at any rate, he can proceed against the second defendant, and recover possession from his hands, as he is not the certified purchaser; and, in support of his allegation, he quotes a judgment of this Court, bearing date the 23rd April 1863, II. Hay's Reports, page 512. The case quoted, however, is totally different in its facts from that before us, and the judgment come to therein cannot be applied to this suit. The law, however, *viz.*, the meaning of Section 260, is very distinctly given, and is to the effect that a suit by a party claiming to be the real purchaser of immoveable property sold in execution of a decree cannot be brought against the certified auction-purchaser; and in this interpretation of the law we concur. The interpretation which the pleader for the appellant would put on this Section is to the effect that no suit would lie against the certified auction-purchaser, provided the claimant has not had previous possession. We do not, however, think the Section open to such an explanation. We think the judgment of the Lower Court is correct; and, without calling on the opposite party for any answer, we dismiss the appeal with costs.

The 18th March 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Questions raised in execution—Sections 284 and 290, Act VIII., 1859.

Case No. 579 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 15th August 1867.

Kishub Chunder Paul Chowdhry (Judgment-debtor), *Appellant,*

versus

Khelat Chunder Ghose (Decree holder), *Respondent.*

Baboo Anund Gopal Paleet for Appellant.

Baboos Sham Lall Mitter and *Motee Lall Mookerjee* for Respondent.

Where a decree of the High Court is transmitted to a Judge for execution under Section 284, Act VIII., 1859, and the judgment-debtor contends that the balance due on the decree is less than that for which execution is sought, the Judge has no jurisdiction to enquire into the question, but may, on cause shown under Section 290, stay execution, pending a reference to the High Court.

Hobhouse, J.—THIS was a case of execution of decree transmitted by the High Court, which passed the decree, to the Judge of Nuddea, for execution under Section 284, Act VIII. of 1859.

When the parties were before the Judge of Nuddea, the judgment-debtor (special appellant) contended that the amount of balance due on the decree was so much; that the judgment-creditor sought to execute for so much more; and so he prayed the Judge to determine between him and the judgment-creditor for what amount the decree might be executed.

The Judge determined that, as the judgment-creditor was executing for less than the amount specified in the decree, execution for the sums he demanded might proceed.

It is contended before us that this judgment is in error, and so we think it is, but not in the way contended for by special appellant.

We think that the Judge had no jurisdiction to enquire into and determine this question at all. The proper procedure was under Section 290; and had special appellant applied under that Section, and shown cause to stay execution, pending a reference to and judgment by the High Court, the Judge might have stayed execution for a reasonable time; but he had no jurisdiction to enter into and determine the point he has determined, and he should, on that ground, have rejected special appellant's objections.

The effect of the judgment, however, is to let execution proceed, and the order, therefore, passed is correct, and is affirmed, and this appeal is dismissed with costs.

The 18th March 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Application for execution—Payment to judgment-creditor—Sections 206 and 212, Act VIII. of 1859.

Case No. 569 of 1867.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 6th September 1867, reversing an order passed by the Moonsiff of Bunwarah, dated the 6th July 1867.

Gunga Gobind Gooptoo and others (Decree-holders), *Appellants,*

versus

Makhun Lall Hattee and others (Judgment-debtors), *Respondents.*

Baboo Ashoolosh Chatterjee for Appellants.

Baboo Bhuggobutty Churn Ghose for Respondents.

An application for execution of a decree need not be accompanied with either the original decree or a copy.

Where a judgment-debtor, instead of paying into Court, as prescribed in Section 206, Code of Civil Procedure, pays direct to the creditor, he does so at his own risk.

Loch, J.—We think the order passed by the Judge in this case is altogether wrong. Section 212 of Act VIII. of 1859 prescribes the mode in which application for the execution of a decree is to be made, and we do not find that it is necessary with such application to produce the decree, whether in original or a copy; and with regard to the settlement out of Court, the law (Section 206) is positive, and declares that no adjustment shall be recognized, unless it be made through the Court, or be certified to the Court by the party in whose favor the decree has been made. The law requires that money payable under a decree should be paid into Court; and if the debtor, instead of doing what the law required him to do, preferred to pay direct to the creditor, he did it at his own risk. The pleader for the respondents admits that the order of the Judge cannot be supported. We reverse the order with costs.

The 18th March 1868.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Life-interest in property—Allegation of waste.

Case No. 292 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 20th August 1867.

Mussamut Budhun (Defendant), *Appellant,*

versus

Moulvie Fuzloor Rahman (Plaintiff), *Respondent.*

Messrs. A. T. T. Peterson, R. E. Twidale, and *C. Gregory* for Appellant,

Mr. R. V. Doyne and *Baboo Kishen Kishore Ghose* for Respondent.

Where moneys deposited in Court had been drawn out by a party on the admission of the opposite party, and the latter sued on the allegation that, as the former had been declared by a decree of Court to have only a life-interest in the property in dispute, the money which represented that property ought to be so tied up as to prevent defendant from wasting it, it was held (following a decision of the Privy Council) that it was not sufficient to allege that defendant was committing waste: the suit would not lie unless some act of waste threatening the *corpus* of the property were proved.

Kemp, J.—The plaintiff alleges that he is the purchaser, under the provisions of Act XXV. of 1857, of the rights and interests of one Moulvie Ali Kureem, a rebel in the Mutiny of 1857, but who has since surrendered under the Amnesty Act, in certain properties held in zur-i-peshgee lease by the said rebel.

The defendant, Mussamut Budhun, the mother of the rebel, instituted a suit to set aside the sale made by the Government, on the allegation that the properties belonged to her exclusively in lieu of dower, and that the rebel had no right and title therein. She obtained a decree in the local Court, and under that decree obtained possession. On appeal by the auction-purchaser, the plaintiff in the present suit, the High Court (present Justices Bayley and Roberts) held, on the 25th November 1863, that Mussamut Budhun's claim to the property in right of dower was not established, but that she had a life-interest in the same. This decision is now in appeal before the Privy Council. In the meantime, and while the appeal was

pending, the plaintiff obtained from Onoop Roy, the son of the original mortgagor, a renewal of the zur-i-peshgee lease. The plaintiff then sued the defendant Mussamut Budhun for possession of the mortgaged premises, and deposited the sum of Rupees 8,286-10-8, which were drawn out of the Court by Mussamut Budhun. The present suit is brought on the allegation that, as Mussamut Budhun has been declared by the decision of the High Court to have only a life-interest in the property, the sum of Rupees 8,286-10-8, which represents that property, ought to be so tied up, either by deposit in the Bank, the defendant drawing the interest thereof, or by the defendant giving security, so as to prevent her from wasting the same.

The Principal Sudder Ameen of Patna, Baboo Greesh Chunder Ghose, in his decision, dated 20th August 1867, observes "that "as it is now established that the plaintiff has "a right to which he will succeed on the death "of the defendant Mussamut Budhun, but "as this right is confined to the sum of "Rupees 8,286-10-8 being preserved, the "plaintiff has every right to take steps to "preserve it intact by preventing antici-"pated waste taking place." The suit of the plaintiff was decreed. The defendant was called upon to furnish adequate security within three months. In event of failure, the sum of Rupees 8,286-10-8 was to be realized from the defendant in execution of the decree, invested in Government securities, and deposited in the Patna Branch Bank; the accruing interest to be paid to the defendant during her life.

In appeal, the defendant (appellant) has been heard through Mr. Peterson, and the plaintiff (respondent) through Mr. Doyne.

There has been much argument as to the title of the plaintiff. It is contended that he has not produced the certificate of sale under which he derives title, and that his suit ought to have been dismissed on the ground that he had not proved his title. It is further argued that the proceedings of the Government officers, with reference to the attachment and forfeiture of the rebel's estate, were illegal. But these contentions are foreign to the real point in issue.

The moneys in dispute have been drawn out by the defendant by order of the Court and, on the admission of the plaintiff, in the suit which he brought for possession of properties covered by the zur-i-peshgee. He could not have succeeded in obtaining possession of the mortgaged premises, except on such payment. No act of waste done or threatened on the part of the defendant is alleged or suggested in the plaint. It is not sufficient to allege that a defendant is committing waste. Some act of waste threatening the *corpus* of the property must be proved. (*Vide* Privy Council Decision, Volume VI., Moore's Reports, page 432.) No act of waste completed or threatened is proved in this case. The plaintiff ought to have moved this Court, when he appealed, to take security from the defendant, or he might have made a similar application to the Privy Council. The suit of the plaintiff in its present shape ought to have been dismissed, and is hereby dismissed, the appeal being decreed with costs, bearing interest, payable by the respondent.

The 18th March 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Two sales of a tenure for rent due by the same defaulter—Sections 106 and 151, Act X., 1859—Fraud—Jurisdiction.

Case No. 1855 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Furreedpore in Dacca, dated the 10th May 1867, reversing a decision passed by the Moonsiff of that District, dated the 22nd November 1866.

Sowdaminee Dossee (Defendant), *Appellant,*

versus

Bholanath Shaha (Plaintiff) and others (Defendants), *Respondents.*

Baboo Nuleet Chunder Sein for Appellant.

Baboo Greeja Sunker Mojoomdar for Respondents.

A putneedar who had obtained two decrees, one for back and current rents and another for back rent, first sold the tenure in execution of the decree for back rent, and, within three days after its sale, caused it to be sold again in execution of the decree for back and current rents.

HELD that, as the case of the purchaser at the first sale was not that of a defaulting tenant, the arrears not having accrued during his incumbency, he was not barred from instituting a suit in the Civil Court to set aside the second sale. (*Vide* Full Bench Ruling, dated 22nd February 1867.)

HELD, also, that, having come in under the provisions of Section 106, Act X., 1859, and his objections having been overruled by the Collector, he had a right to sue within a year from the date of adjudication; and the suit would lie in the Civil Court, as the act of the putneedar in setting up the defaulter's tenure a second time for sale for arrears due by the defaulter was a fraud.

Kemp, J.—THIS was a suit to reverse a sale held under the provisions of Section 105, Act X. of 1859.

It appears that the putneedar (defendant) obtained two decrees: one for partly *bukeya* and partly current rent, and one for back rent. The putneedar first caused a sale for the old arrears, and the plaintiff (special respondent) became the purchaser. Very shortly afterwards, or within about three days, another sale was brought about by the putneedar for the rents partly of the current year and partly for old arrears; and at that second sale, the defendant (special appellant), the putneedar, became the purchaser.

The first Court held that the suit was cognizable by the Civil Court.

On the merits, the first Court held that, as the plaintiff raised objections to the second sale, which were overruled, he must be held to have been fully cognizant of the second sale, and that, as he was competent, by depositing the amount of the decree for the current rent, to stay the sale and to sue the defaulter for the moneys so deposited, his suit to set aside the sale must be dismissed.

On appeal, the Principal Sudder Ameen raised two points for decision:—

1st.—Is a suit of this character cognizable by the Civil Courts?

2nd.—Can the jote be sold for rent that was due before the plaintiff's purchase?

On the first point, the Principal Sudder Ameen observes "that the plaintiff does not "consider himself to be the subordinate "tenant of the defendant, but her dupe, whom "she is bent upon cheating under misconstrued laws and precedents by selling her "jote for rent that was not due during his "occupancy." "Surely," says the Principal Sudder Ameen, "the Revenue Court cannot "take cognizance of the matter; so it must "be tried by the civil tribunal."

On the second point, the Principal Sudder Ameen held that the sale must be set aside on the ground that the plaintiff had purchased the tenure in good faith on a title guaranteed to him by the certificate of sale of the Collector. The putneedar must look to the defaulting tenant for the rents due previous to the plaintiff's purchase, the latter being responsible only from date of purchase.

The decision of the Court of first instance was reversed with costs and interest, and the appeal decreed.

The main grounds taken in special appeal are:—

1st.—That the Civil Court had no jurisdiction to try this suit for reversal of a sale held in execution of a decree under the provisions of Act X. of 1859.

2nd.—That, as the tenure is hypothecated for the rent, the plaintiff purchased it subject to the liability for the arrears of rent which had accrued thereupon, and as plaintiff failed to protect the tenure from sale by discharging those liabilities, he cannot, either in law or equity, claim as against a second *bonâ-fide* purchaser.

3rd.—That the second sale, having taken place on account of the current arrears, must necessarily prevail.

I am of opinion that this is not the case of a defaulting tenant against whom a decree for rent had been passed, and in satisfaction of which decree the tenure has been sold: for the special respondent was not the defaulting tenant, the arrears not having accrued during his incumbency. Had such been the case, no suit in the Civil Court could have been instituted to set aside such sale. (*See* Section 151, Act X. of 1859, and the decision of this Court published at pages 147—148 of the Special Number of the Weekly Reporter.)

The Full Bench have ruled that a suit to set aside a sale under the provisions of Section 105, Act X. of 1859, can, under certain circumstances, such as fraud, be instituted in the Civil Court. (*Vide* decision, dated 22nd February 1867, Weekly Reporter, Volume VII., pages 183—185.)

In the present case, the special respondent did come in under the provisions of Section 106, Act X. of 1859, and, on his objections being overruled, he has a right to sue within a year from the date of the adjudication by the Collector upon the claim; and this he has done. Further, the plaintiff has a right to bring an action in the Civil Court to set aside a sale alleged to have been brought about by fraud.

The circumstances of the present case, in my opinion, disclose gross fraud on the part of the defendant, the putneedar.

He (the putneedar) sued separately for the *bukeya*, and partly for *bukeya* and partly for the current rent. In execution of the decree for the *bukeya*, he sold the tenure, which was purchased by the plaintiff. Within three days of this purchase, the defendant (putneedar) sells the tenure over again in satisfaction of the decree obtained for the current and back rent, not due from the plaintiff, but from the former tenant, and purchases the tenure himself. The defendant could have sold the tenure for the old and current arrears together; and if the sale-proceeds were not sufficient to meet his demand in full, he could, under Section 105, Act X. of 1859, have applied for process against any other property, moveable or immoveable, belonging to the debtor; but, instead of doing this, he sold the tenure for the old balance only, and then fraudulently caused its re-sale for the current and back balance, which was not due from the plaintiff, inasmuch as it had accrued before his purchase.

I would confirm the decision of the Principal Sudder Ameen, and dismiss the appeal with costs and interest.

Jackson, J.—I also think that the appeal should be dismissed. The suit did lie in the Civil Court, as the act of the putneedar in setting up the defaulter's tenure a second time for sale for arrears due by the defaulter was a fraud. It is inexplicable to my mind on what principle a Deputy Collector, who had already sold the tenure, could have again sold the same tenure for further arrears due from the same defaulter. The purchaser at the first sale purchases all the rights and interests of the defaulter, and holds the tenure on the same terms as the defaulter did, but the tenure is no longer liable for any further debts of the defaulter.

The appellant will pay all the costs of this appeal and of the suit in the Lower Courts, with interest until paid.

The 19th March 1868.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Non-possession for 12 years—Adverse possession.

Case No. 1040 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Manbhoom, dated the 21st February 1867, modifying a decision passed by the Moonsiff of that District, dated the 30th December 1865.

Gopeenath Mookerjee (Plaintiff), *Appellant,*

versus

Issur Chunder Banerjee and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Gopeenath Banerjee for Respondents.

If plaintiff does not show possession within 12 years of suit, it does not follow that defendant must have a verdict. Possession must be weighed with other evidence for the party proving it, and with reference to the tendency, to rebut it, of the evidence adduced by the opposite party.

The plea of adverse possession for more than 12 years is another point for adjudication in bar.

Bayley, J.—This case must be remanded for a full trial on the merits.

The Principal Sudder Ameen has held that, as plaintiff has not shown his possession *within twelve years* of suit, defendant must have a verdict; and that, if either party wish to sue on any title by inheritance, or on any question of extent of share, they must bring a separate suit.

This is quite erroneous. Possession may be some evidence of title. But it must be weighed for the party proving that fact, more or less, together with the other independent evidence adduced by that party; and it must be considered also with reference to how far the evidence adduced by the opposite party may tend to rebut it.

This case must be tried on its merits. If a question of limitation arises, that is, that plaintiff cannot sue because, however good his title, adverse possession for more than twelve years bars him, that is another point

for adjudication in bar. But if plaintiff removes that bar, the whole question on the merits of the respective titles will still be open and have to be adjudicated, and that in one suit, not, as here directed, separately.

We, therefore, reverse the Lower Appellate Court's order, and remand the case for re-trial with reference to these remarks.

The 20th March 1868.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Misconstruction—Special Appeal.

Case No. 1264 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Manbhoom, dated the 15th March 1867, reversing a decision passed by the Moonsiff of that District, dated the 29th August 1866.

Kalee Churn Pattur and others (Defendants), *Appellants,*

versus

Chundee Churn Mundul and others (Plaintiffs), *Respondents.*

Baboo Bungshee Dhur Sein for Appellants.

Baboo Nil Madhub Sein for Respondents.

Where a Lower Court, in recording the words of a document on which it relies, puts one term for another, it is a "misconstruction" affording good ground for special appeal; but where, for reasons given, it places a particular boundary-mark in a particular spot, its decision, even though wrong on the facts, would not be a misconstruction, unless incompatible with the wording of the document.

Glover, J.—THE points taken in this special appeal are:—

1st.—That the Principal Sudder Ameen has thrown the *onus probandi* on the special appellant, instead of on the plaintiff (special respondent).

2nd.—That he has misunderstood the decree of 1856, and given boundaries not mentioned in that decree.

3rd.—That there were no erasures or interpolations in the pottah of 1270; and

4th.—That the Principal Sudder Ameen has taken no notice of the fact that a dustburdaree petition filed by the special respondent in Pous 1270 mentions the boundaries exactly as they are given in the pottah, which the Lower Appellate Court declares to be spurious.

The first ground of appeal is untenable. The Lower Appellate Court has nowhere thrown the *onus* on the defendant, but has fully considered the evidence on both sides. No doubt, the Principal Sudder Ameen has in his judgment taken the proofs adduced by the special appellant first in order; but he finds most clearly in the course of his decision that the plaintiff must succeed on proof of continuous possession of the disputed land as part of Mouzah Gokoolnuggur.

The second objection is equally unsupported. It is nowhere shown to us that the Principal Sudder Ameen misunderstood the boundaries, or located them wrongly. The special appellant's pleader could not show to this Court the position of the disputed lands as he claimed to have them, or prove that the Lower Appellate Court had erroneously construed the decree of 1856. Misconstruction of a document as a ground of special appeal must be clearly shown. Where a Lower Court, for instance, records in its judgment north instead of south, or a tree instead of a nullah as a boundary, in recording the words of a document on which it relies, to prove what are the boundaries, such errors would undoubtedly be a "misconstruction," and afford good ground for a special appeal.

But where the objection, as in the present case, is a mere matter of opinion, where the Lower Appellate Court, that is, has, for reasons given, placed a particular boundary-mark in a particular part of a disputed piece of land, unless it can be shown that its conclusion is incompatible with the wording of the document it professes to go upon, such decision would not be a misconstruction; it might be a wrong decision on the facts, but there would be no such misreading of a document as would allow of a special appeal.

With regard to the alleged interpolations and erasures in the pottah of 1270, we observe that, after a careful examination with a magnifying glass, the Court was unable to detect either the one or the other. Nor was the special appellant's pleader able to point out anything suspicious in the appearance of the document.

The special appellant refers to a dustburdaree petition of the same year, filed by the special respondent's privies, in which the same boundaries are given. Had the special appellant been able to show that the parties (or any of them) who signed their

assent to that dustburdaree petition were privies to the special respondents in their case, there would be sufficient reason for remanding the suit for the Lower Appellate Court to take that dustburdaree petition into consideration before declaring that the pottah of 1270 was spurious so far as related to the boundaries specified therein.

But special appellant has not been able to do this; and, failing such connection between the parties, the dustburdaree petition would not bind the special respondents in this case, and it would, therefore, be useless to order a remand, granting that there are no erasures or interpolations in the pottah of 1270. The decision of the Principal Sudder Ameen on the other evidence generally would still be one of fact, with which we could not interfere in special appeal.

This application must, therefore, be dismissed with costs.

The 23rd March 1868.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Limitation—Clause 9, Section 1, Act XIV., 1859—Cause of action.

Case No. 132 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Moorshedabad, dated the 28th February 1867.

Ranee Shama Soonduree Debia (Plaintiff), *Appellant,*

versus

Messrs. Jardine, Skinner, and Co. (Defendants), *Respondents.*

Baboos Sreenath Doss, Mohinee Mohun Roy, and *Ashootosh Chatterjee* for Appellant.

Messrs. R. V. Doyne and *J. S. Rochfort* for Respondents.

Certain factories, already sown with indigo, were given in lease by the Court of Wards; and the lessees agreed to take over all contracts and pay all expenses which had been incurred for that season's cultivation, depositing the amount of outlay incurred. The lease having been set aside by superior authority, the lessees agreed to give up the factories and all the indigo manufactured by them while in possession, on condition of being repaid the amount deposited by them.

HELD that, if the lessees failed to deliver up all the manufactured indigo, the remedy against them was by suit for damages for breach of the contract to deliver it up.

Macpherson, J.—THIS is a suit brought to recover the value of a certain number of maunds of indigo.

The suit is purely speculative in its character, and the plaint is framed so as to make it almost impossible to discover what is supposed to be the cause of action—being probably intentionally so framed in order to prevent its appearing on the face of the plaint that the plaintiff's claim is barred by limitation.

In 1862, the factories Sultangunge and Moheshkholy were under the management of the Court of Wards; and in the summer of that year, the Court of Wards granted a lease of them to Messrs. Jardine, Skinner, and Co. The lands of the factories had already been sown with indigo; and one of the conditions of the lease was, that Messrs. Jardine, Skinner, and Co. were to take over all contracts and pay all expenses which had been entered into, or incurred for, that season's cultivation. The defendants accordingly deposited in the Collectorate the sum of Rupees 32,721, which was agreed on as being the amount of outlay which up to that date had been incurred.

Certain objections having been raised by the plaintiff to the granting of the lease, Messrs. Jardine, Skinner, and Co., who were put in possession when they made the deposit in the Collectorate, must be considered to have taken possession, and to have made the deposit subject to the lease being confirmed by the higher Revenue Authorities. The lease, in fact, was not confirmed, but was set aside by the Revenue Board on the 26th of September 1862. In refusing to confirm the lease, the Board directed, apparently with the consent of Messrs.

Jardine, Skinner, and Co., that, in order to restore all parties as nearly as possible to their original position, Messrs. Jardine, Skinner, and Co. should give up the factories and all the indigo which had been manufactured by them while in possession, and should thereupon be repaid the amount deposited by them in the Collectorate, together with such other expenses as might have been incurred by them in manufacturing.

In accordance with this arrangement, the defendants gave up possession, and in the course of the month of December made over to the Collector 148 maunds and 38 seers of indigo, which they said was all that had been made in the factories. They got receipts for these quantities from the Collector, and subsequently (on the 11th of March 1863) were repaid the 32,721 rupees which they had deposited when they first got the lease.

The matter was thus apparently finally settled. But some time afterwards, the Court of Wards having made over the estate to the plaintiff, she, on the 12th of March 1866, filed the plaint in the present suit, seeking to recover damages from the defendants upon the ground that, whereas they delivered to the Collector only 148 maunds odd of manufactured indigo, they had, in truth, manufactured 510 maunds.

It appears to me that the plaintiff's claim is barred by limitation. If any cause of action is disclosed upon this plaint, it is that, when the lease was cancelled by the Board of Revenue, Messrs. Jardine, Skinner, and Co. agreed, amongst other things, to give up all manufactured indigo, and that, in breach of this agreement, Messrs. Jardine, Skinner, and Co. did *not* give up all the manufactured indigo. If this be the cause of action, the suit is a simple suit for damages for breach of contract, and falls under Clause 9 of Section 1 of Act XIV. of 1859, and is barred unless brought within three years. The breach took place in 1862, when Jardine, Skinner, and Co. failed (it is alleged) to deliver more than the 148 maunds: the plaint was not filed till the 12th of March 1866, that is to say, not till after the lapse of more than three years from the origin of the cause of action. Therefore, the suit is barred. If it be contended that the breach may be said not to have taken place until the 11th of March 1863, when the refund was made to the defendants, still the suit is barred, the plaint not having been filed till the 12th of March 1866.

It was argued that the claim is not barred by Clause 9 of Section 1, as the case is not one of contract at all. It is said that the suit was brought merely to force the defendants to do that which they were in equity bound to do. But I fail to see that, in the absence of a contract on the defendants' part to give up the indigo they had manufactured, they were in any way bound in equity or otherwise to give it up. The lease granted by the Court of Wards made no provision for the contingency which occurred; and, so far as I can see, the defendants would have had a right to retain all the indigo, but for the new arrangement made and assented to by them, when the Board of Revenue set aside the lease. I think that, under their contract, the defendants were bound to deliver up the indigo they had manufactured, but that, if there was no such contract, they were not bound on any considerations of mere equity to give it up.

But, supposing that the claim is not barred, the plaintiff has wholly failed to make out any case against the defendants. That the defendants, in the opinion of the Court of Wards, complied with the terms of their agreement is *primâ facie* proved by the Court having accepted the indigo they tendered, and having refunded the 32,721 rupees they had deposited; and no question appears subsequently ever to have been raised by the Collector or Court of Wards as to the correctness of the accounts rendered by the defendants.

In bringing the present suit, then, it lay on the plaintiff to prove her case; and it does appear to me that, if ever there was a suit in which a plaintiff was bound to prove his case strictly, the present is one. The Lower Court has found for the defendants on the merits. The plaintiff's evidence scarcely purports to prove more than this, that a certain quantity of land was sown with indigo, and that, after the indigo had grown to some extent, persons who saw the plant estimated and expected that a certain number of bundles would be eventually cut. But there is no evidence (favorable to the plaintiff) to show how many bundles were actually cut, or how much indigo was really manufactured by the defendants—or how much might have been cut or how much might have been manufactured by the defendants but for their default or neglect. There is some evidence as to what the prospects before the plant was cut were or might have been; and also as to what was the

quantity of indigo manufactured on other lands situated at no great distance. But with such a delicate and varying cultivation as that of indigo, depending on a variety of contingencies, it is quite impossible to treat that as evidence of actual receipt of more indigo-plant or actual manufacture of more indigo than what has been admitted by the defendants.

While the *onus* lay on the plaintiff, the plaintiff has proved no case; therefore the suit was rightly dismissed; and this appeal must also be dismissed with costs and interest.

Glover, J.—I am of the same opinion, and have nothing to add to the judgment of my brother Macpherson.

The 23rd March 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Execution of decree for mesne-profits—Interest on profitable land.

Case No. 291 of 1867.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 28th February 1867.

Becharam Doss (Decree-holder), *Appellant,*

versus

Brojonath Pal Chowdhry and others (Judgment-debtors), *Respondents.*

Baboos Chunder Madhub Ghose and *Nuleet Chunder Sein* for Appellant.

Mr. R. T. Allan and *Baboo Tarucknath Sein* for Respondents.

Where a decree for mesne-profits does not declare whether interest is or is not to be awarded, the Court which executes it is right in refusing to award interest.

In executing a decree for mesne-profits, a Court does right in excluding from the account lands of such a nature as would, under ordinary circumstances, yield no profit, regarding which it has not been shown that the judgment-debtors had opportunities of disposing of them for a profit.

Hobhouse, J.—This was a case of execution of decree for mesne-profits in the Court below; and, in regular appeal, three objections are made by the decree-holder to the finding of the said Court.

The first objection is that the Judge has neglected to adjudge interest on mesne-profits from date of ascertainment of the said profits.

On this point, it is admitted by pleader for appellant that in decrees for mesne-profits it is usual to declare whether such interest is or is not to run, and that in the decree in this case there is no such declaration.

And, further, whilst, on the one hand, pleader for appellant is unable to show us any case in which, in the absence of such declaration, interest has been awarded by the Courts, we are referred by Mr. Allan for respondent to a Full Bench decision, to be found at page 109, Volume VI., Weekly Reporter, Miscellaneous Rulings, in which was decided the general question that interest could not be awarded in execution where the decree itself contained no such award.

We think, therefore, that in this case the Judge was right to refuse to award interest on mesne-profits from date of ascertainment.

The second objection taken is in the matter of the Judge's refusal to award any mesne-profits at all in a certain plot of beegahs 15-15-11-10 of lands.

On this point, the Judge remarks as follows: "Then there are beegahs 15-15-11-10, "which are said to be unculturable, and "to yield no profits at all. It is contended "that the judgment-debtors might have realized profits from them with due diligence; "but on the evidence I think that it has "not been shown that they had opportunities of disposing of the lands for a profit. "The nature of the lands, as described by "the Ameen, is such that, under ordinary "circumstances, they would yield no profit; "and all that I have to consider is what "amount the decree-holder might, with reasonable probability, have realized if they "had retained possession. Therefore, I "exclude them from the account."

The contention before us is, that the Judge, in preferring the report of the third Ameen to that of the second Ameen who held local investigations in the matter, has assigned no reason for such preference, and that his judgment must, therefore, be set aside.

But we think that the Judge has assigned ample reasons for such preference. In his concluding remarks, he lays down—and correctly—the principle on which he ought to proceed, and has proceeded. He there describes the nature of the lands in question, he correctly applies his principle to those lands, and he then finds upon the evidence that the lands never had been profitable, and never, during respondent's incumbency, could have been profitable; and he, therefore, rightly determines not to award that which never had been received, and never could have been receivable, from them, *viz.*, mesne-profits.

And if the Judge was wrong in coming to this conclusion upon the evidence, it was upon appellant to show us that he was wrong; but he does not even attempt to do so, for he does not ask us to go into the evidence at all.

We think, therefore, that the Judge's decision must stand on this point also.

The third objection taken is, that the Judge was in error in allowing so much as 20 per cent. as deduction for collection-expenses.

We observe that the usual allowance for such expenses is 10 per cent., and this is admitted by pleader for respondent; but the Judge has allowed 20 per cent. "*for* cost of collections *and for losses.*" We have asked Mr. Allan for respondent to show us what the Judge meant by "losses," and what on the evidence these "losses" were for which the Judge allowed a deduction; but he is unable even to suggest, much less to show, anything.

We think, therefore, that deduction should only have been allowed for "costs of collection," and not for "losses" also; and, in the absence of any evidence in support of a larger percentage than the usual 10 per cent., we award such 10 per cent. only, and so far modify the award of the Judge.

It is then contended, under Section 348, for respondent, that the Judge should have allowed deductions for income-tax; but at a late stage in the case, although the pleader for respondent pointed to certain papers which he said were income-tax receipts, yet when he was arguing his case he did not ask us to consider these papers, and we cannot, therefore, say that there is any sufficient evidence of payment of such taxes on the record, and we are unable, therefore, to allow any deduction on that account.

We think that appellant must pay the costs of this appeal.

The 23rd March 1868.

Present:

The Hon'ble F. B. Kemp and L. S. Jackson, *Judges.*

New grounds—Review—Section 374, Act VIII., 1859.

Case No. 289 of 1866.

Application for review of judgment passed by the Hon'ble Justices Kemp and Jackson, on the 24th April 1866, in Special Appeal No. 2804 of 1866.

Fukurooddeen Mahomed Ashan Chowdhry, *Petitioner,*

versus

Rajah Annundnath Roy, *Opposite Party.*

Baboo Molee Lall Mookerjee for Petitioner.

Baboos Mohinee Mohun Roy and *Sreenath Doss* for Opposite Party.

A party wishing to be heard in support of new grounds must apply for permission under Section 374, Act VIII., 1859: he cannot be permitted to raise them in an application for review.

Kemp, J.—THIS application is framed, as if it were a special appeal, on fresh grounds. If the applicant, at the previous hearing of the special appeal, wished to be heard in support of the grounds now taken in the petition of review, he ought to have applied, under Section 374 of Act VIII. of 1859, for the permission of the Court to be heard in support of those *new* grounds. Not having done so, he cannot be permitted, in an application for review, to raise entirely new points, and having failed to show us that our former decision is wrong, the application is rejected with costs.

The 24th March 1868.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

False warranty of title—Proof of fraud—Refund.

Case No. 1374 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 25th March 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 12th July 1866.

Rajah Nil Monee Singh (Defendant), *Appellant,*

versus

Messrs. Gordon Stuart and Co., on behalf of the Calcutta Coal Company (Plaintiffs), *Respondents.*

Baboos Tarucknath Sein and *Bama Churn Banerjee* for Appellant.

Messrs. R. V. Doyne and *F. J. Fergusson* and *Baboo Juggodanund Mookerjee* for Respondents.

A zemindar (*A*) gave certain villages in putnee to *B*, and received consideration-money and rent for them from him; but *B* never got possession of them, or derived any benefit from the putnee, it having been found that the villages belonged to a third party as lakherajdar, who obtained a decree against *A* in a suit to which *B* was made a party.

HELD that the advertisement published by *A* setting forth a description of the villages, and calling upon intending purchasers to come forward, was substantially an implied warranty of title, and would, in any case, make him responsible to the purchaser deceived by such misrepresentation.

HELD that, in cases like this, it would be a sufficient proof of fraud to show that the fact (of ownership), as represented, was false, and that the person making the representation had a knowledge of a fact contrary to it.

HELD that, fraud having been substantially alleged, the absence of a stipulation to refund did not protect *A* from refunding.

Glover, J.—THIS was a suit on the part of the Bengal Coal Company to recover the amount of consideration-money paid by them to the defendant for the putnee of two mouzahs, and for various sums paid as rent and law-expenses on the same account. Their allegations are that the defendant, who is the Rajah of Pachate, gave to them in putnee the two mouzahs for a consideration of Rupees 200; that these mouzahs were, it was afterwards found, not the Rajah's to give, but belonged to a third party as lakherajdar; that the result of a suit by the lakherajdar against the Rajah was a decree in favor of the former; and that, consequently, plaintiffs never got possession of the mouzahs, or derived any benefit from their putnee of them. Their claim is made up of the 200 rupees consideration-money; Rupees 511-5-1, paid to the Rajah as rent; and Rupees 142-14-1, law-expenses; together with interest: these last charges being incurred in the suit between the Rajah and the lakherajdar, to which the plaintiffs were made parties.

There was no denial by the Rajah of the plaintiffs' statement of facts. He defended the suit on technical grounds only, urging—

1st.—That, there being no covenant for a refund in the putnee lease, the plaintiffs could not recover; and

2nd.—That no fraud on the part of the Rajah being either alleged or proved, the doctrine of *caveat emptor* applied.

Both Lower Courts decreed for the plaintiffs.

The defendant, in special appeal, urges the same objections as before, with the addition that the Lower Courts made no enquiry into his allegation of collusion between the Coal Company and the lakherajdar.

We see no reason to interfere. With reference to the objection that "fraud" was not alleged, we think that the plaint discloses substantially, although not perhaps in express terms, a charge of fraud against the Rajah. He is there said to have given the two mouzahs in putnee, knowing all the time that they were not part of his mâl estate, but the lakheraj holding of a third party.

The special appellant's pleader urges that, even if this be admitted, it is insufficient,

it being necessary to prove, as well as to allege fraud. (VI. Weekly Reporter, page 67, Privy Council Decisions.) But we observe that, in cases like the present, it would be sufficient proof of fraud to show, *first*, that the fact, as represented, was false; and, *secondly*, that the person making the representation had a knowledge of a fact contrary to it. (1 Sugden's Vendors and Purchasers 6-7.) The first of these facts is admitted, and the second may fairly be presumed. The Rajah's knowledge of the fact is, moreover, nowhere denied.

We think, further, that the advertisement published by the Rajah, setting forth a description of the two mouzahs, and calling upon intending purchasers to come forward, was substantially an implied warranty of title, and would in any case make the Rajah responsible to the purchaser deceived by such misrepresentation.

The mere fact of the putnee-lease not containing any stipulation for refund in no way affects the question. The Rajah sold what he, as zemindar, must have known was not his to sell, concealing from the purchaser the fact that the lands were lakheraj, and not *mdl.* It is not, as before remarked, alleged on the part of the special appellant, that he was an innocent seller, ignorant of the claim of the lakherajdar. The Rajah shelters himself under the absence of any stipulation to refund in the pottah. Had there been no allegation of fraud on the part of the special respondent, it is possible that the Rajah might have defeated the claim on the ground that, at the time of the contract, he was unaware of any defect in the estate sold, and that the maxim of *caveat emptor* applied; but as fraud has been, we think, substantially alleged, the absence of a stipulation to refund will not protect the Rajah.

The special appellant must be presumed to have known the state of his property when dealing with it with a view to lease it—a matter particularly within his own knowledge; and, having that knowledge, to have advertised for purchasers of what he had no right to sell.

It appears to us that he is justly liable to refund to the special respondents the whole amount of their payments with interest.

With regard to the charge of collusion between the Coal Company and the lakherajdar, we observe that the special appellant never took any steps to have the matter investigated, never asked for any "issue" on the point, or even pressed the Court of first instance to make any enquiry. This being so, we think it much too late to take the objection in special appeal, or to re-open a subject on which the special appellant has been all along silent.

We are of opinion that there is no point of law in special appellant's favor, whilst all the equities are against him.

His special appeal is, therefore, dismissed with costs.

The 24th March 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Sale of rights and interests vested in Official Assignee—Execution of a decree against another decree-holder—Section 206, Act VIII., 1859—Rule of adjustment out of Court—Board of Revenue.

Lowazima Miscellaneous Appeal from an order passed by the Deputy Collector of Nuddea, dated the 16th January 1868.

Ram Chunder Roy and another, *Appellants,*

versus

Ram Churn Bukshee and another, *Respondents.*

Baboos Ramanath Bose and *Kalee Prosunno Dutt* for Appellants.

Baboo Otool Chunder Mookerjee for Respondents.

If a party's rights and interests in a decree are sold at a time when all his assets are vested in the Official Assignee, even though the latter does not claim the rights and interests in question, nothing passes to the purchaser.

d

Where a Deputy Collector executes a decree against a party holding another decree from his own Court, he ought, instead of selling that other decree, to appoint a manager under the provisions of Act VIII., 1859, to realize the judgment-debt due thereon.

Section 206, Act VIII., 1859, does not apply to Revenue Courts, and no rule of the Board of Revenue can justify a Deputy Collector's refusing to enquire whether or not a private adjustment of a decree has, as alleged, been effected out of Court.

Phear, J.—THIS is an application to set aside an order of the Deputy Collector for execution of a decree against the petitioner in favor of one Parbutteenath Buxee.

The decree was originally made in the Deputy Collector's Court in a suit wherein a Mr. J. White was plaintiff, and the petitioner, defendant. But Parbutteenath claimed to be decree-holder by virtue of having purchased Mr. J. White's rights and interests in the decree.

On Parbutteenath applying to the Deputy Collector for execution of the decree, the petitioner objected: *first*, that Parbutteenath had obtained nothing by his purchase of Mr. J. White's rights and interests in the decree, because at that time Mr. White was insolvent, and all his assets (of which the decree would be one) were, therefore, vested in the Official Assignee; *secondly*, that he (petitioner) had satisfied the decree out of Court before the sale thereof to Parbutteenath.

The Deputy Collector disallowed both these objections. As to the first, he held that "the decree was never vested in the "Assignee specially, for it was omitted in "Mr. White's schedule. And though the "Assignee can claim it, he has not done so; "and, till he does, it remains in the legal "possession of the person who now possesses it—Parbuttee Buxee. The Assignee "having made no claim to it, it is not in "my power to assume that he has any, and "to protect his interest against his will."

The Deputy Collector here makes a serious mistake of law; for, if at the time of Parbuttee's purchase all Mr. White's assets were vested in the Official Assignee, nothing would have passed to Parbuttee by the sale. The petitioner asked him to enquire whether this was so or not; and we think that he acted wrongly, under the circumstances of the case, in refusing to make the enquiry.

We are of opinion also that the Deputy Collector erred in selling Mr. J. White's decree against the petitioner to Parbuttee. That decree was a decree of his own Court, and his duty with regard to it was primarily to cause it to be executed upon the application of any one duly entitled to have the benefit of it. It appears to have been sold in the execution of a decree obtained in the same Court by one Ramruttun against Mr. White. Instead of so selling, it seems to us that the Deputy Collector ought, under the provisions in that behalf of Act VIII. of 1859, to have appointed a manager to realize Mr. White's judgment-debt. Had he done this, he would have acted with propriety, and would have avoided the appearance of encouraging the practice of trafficking in decrees of Court, a practice which may prevail largely, but is certainly very objectionable.

The Deputy Collector refused to entertain the second objection, on the ground that he was forbidden by a rule of the Revenue Board to enquire whether or not a private adjustment had been effected out of Court. On this point also, the Deputy Collector was wrong, for the rule of the Revenue Board cannot override the law, and it has been held by this Court that Section 206 of Act VIII. of 1859 does not apply to decrees of a Revenue Court. (See 7 Weekly Reporter, page 520.)

We may add that it appears to us some grave irregularity must have occurred in execution of Ramruttun's decree against Mr. White, which has probably led to much of the blundering in this case. It is clear that, at the time of the order for execution in Ramruttun's case, or at any rate before the sale to Parbuttee, Mr. White died. Now, on Mr. White's death, both decrees for the time being abated, although probably they might both have been revived by proper steps taken. If they were revived, the same person would appear as Mr. White's legal representative in both cases, and the confusion which the Deputy Collector exhibits in regard to the effect of the sale to Parbutteenath could scarcely have occurred.

On the whole, we are of opinion that the Deputy Collector acted illegally in refusing to entertain and determine the petitioner's objections on their merits. We, therefore quash the order which is complained of, and, we direct that the Deputy Collector, before issuing fresh process of execution, enquire,

first, whether Parbutteenath Buxee, by his purchase of Mr. White's right and interest in the decree made in favor of Mr. White against the petitioner, having reference to all the circumstances under which that purchase took place, obtained the right to sue out execution of that decree; and, *secondly*, whether the petitioner at any time satisfied that decree by private adjustment out of Court.

The Deputy Collector will be governed by the result of this inquiry in regard to the order which he may make relative to the execution sought. Parbutteenath Buxee will pay the costs of the petitioner in this application.

The 24th March 1868.

Present :

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Wasilat (Principle on which determined).

Case No. 1356 of 1867.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 23rd March 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 11th August 1866.

Mr. J. P. DeSilva and others (Defendants), *Appellants,*

versus

Syud Teharanee and others (Plaintiffs), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Baboos Hem Chunder Banerjee and *Nuleet Chunder Sein* for Respondents.

The principle upon which wasilat should be determined is that the party who may be found to have been wrongfully in possession shall refund to the party wrongfully ousted such sums as the party wrongfully in possession had collected, or might with due diligence have collected.

Bayley, J.—PLAINTIFF in this case sued for wasilat at kursa rates, on a certain detailed area of cultivated land.

Defendant's plea was that the plaintiff had no right to kursa rates, but only to howala rates, and that the claim was otherwise excessive, especially as to the area in cultivation.

The first Court gave plaintiff a decree at ryotee rates, for 2 annas a beegah for 2,332 beegahs, cultivated area, as per a dowl of 1271 B. S., or (as shown by the first Court's orders of 27th October 1866) for Rupees 964-12 with interest.

On an appeal by defendant to the Judge from this decision, it was urged that, the newly cultivated area being part of the howala, wasilat should not have been taken at ryotee, but at howala rates; that the area was not 2,332 beegahs when the possession was held by defendant, but only 989, as per dowl of 1263; and that the amount of Government revenue had not been duly deducted.

The Lower Appellate Court held that it was on defendant to show what he had, or might properly have, collected when in wrongful possession: that defendant had the Ameen's report against him, and, in rebuttal of it, no proof that he did not collect at ryotee rates when in possession, but at howala rates; that defendant failed to prove that he did not hold khas all the lands found by the Ameen to be in excess, *viz.*, 1,402 beegahs of newly cultivated area; and, lastly, that, as the new settlement for the new lands only came into operation from 1271 B. S., it was for defendant to show that he had paid Government revenue before, and that this defendant had failed to do. The Lower Appellate Court thus also decreed 964 rupees 12 annas against the defendant.

Defendant now appeals specially, and urges before us as follows:—

I.—That as defendant was in possession from 1266 to 1270, and the area, giving an increase of 1,402 beegahs, first formed part of the dowl of 1271 B. S, that dowl was no evidence on which the Lower Appellate Court could base its decree for wasilat for the excess area referred to from 1266 to 1270 B. S.

II.—That as the last dowl, before the defendant had any possession, was of 1263 B. S., and showed 295 beegahs as excess, plaintiff could not claim more than that.

III.—That Government revenue should have been deducted as it was payable for 295 beegahs 16 cottahs under the dowl of 1263.

IV.—That the chittahs of 1260 were good evidence in defendant's favor.

We do not think there are valid grounds for interfering in special appeal.

The Lower Appellate Court has quite rightly appreciated the principle upon which wasilat should be determined, *viz.*, that such party as may be found to have been wrongfully in possession shall refund to the party wrongfully ousted such sums as the party wrongfully in possession had collected, or might with due diligence have collected.

An Ameen having been sent to make a local enquiry, his report is legal evidence, and has been accepted by the Lower Appellate Court. Nothing is shown against it.

The Lower Appellate Court finds defendant does not prove anything to set it aside, and finds as a fact that plaintiff is entitled to wasilat according to that report. This meets the first two pleas in special appeal.

To come to the other two objections of the special appellant, we think the Lower Appellate Court gives sufficient reasons for its finding of fact; that the chittahs of 1260 are not evidence of the area of 1266-70 for the purposes of this case, and were never accepted as such; and that, as it is found by the Lower Appellate Court as a fact that it is not sufficiently *proved* by special appellant that he did pay the Government revenue which he alleges he paid, the deduction claimed cannot, as a matter of special appeal, be allowed by us now; nor indeed is anything shown to us to support the plea that the Lower Appellate Court has made any error in law.

In this view, we dismiss this special appeal with costs.

The 24th March 1868.

Present :

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Vakeel's admission—Legal evidence—Cross-appeal—Section 348, Act VIII., 1859.

Case No. 1407 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 28th March 1867, affirming a decision passed by the Deputy Collector of that District, dated the 11th October 1866.

Khajah Abdool Gunnee (Plaintiff), *Appellant,*

versus

Gour Monee Debia (Defendant), *Respondent.*

Messrs. C. Gregory and *R. E. Twidale* for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

A Vakeel's admission during the trial of a suit is legal evidence by which his client is bound, though it is open to the latter to show that the effect of the admission is not such as to invalidate his claim.

A party wishing to file a cross-appeal should do so at the commencement of the hearing of the appeal, and the objection should be put in, in a written form, on a properly stamped paper: it is too late to take an objection under Section 348, Act VIII. of 1859, when the Appellate Court has given its decision.

Glover, J.—THE special appellant in this case sued in the Deputy Collector's Court, under Act X. of 1859, to enhance the rent on an Ousut Talook held by the defendant, on the ground that the tenant paid less than the proper rates.

The defence was that the talook had been in existence from before the perpetual settlement, always paying the same fixed rent, and was, therefore, not liable to enhancement under the Act.

Both Lower Courts took this view of the case, and dismissed the plaintiff's suit.

The point taken in special appeal is, that the Lower Appellate Court has decided against the plaintiff on what is not admissible evidence, and has, moreover, misstated the facts of the case.

This last objection refers to an admission made by the special respondent's Vakeel during the trial, that the tenure was created in 1805 A. D., or 1212 B. S., some years after the perpetual settlement.

The Judge says that there is some doubt as to whether the special respondent's Vakeel did make the admission referred to; and that, if he did, his client would not be bound by it.

That the statement was made appears from the record, and has never been denied; and, that being so, it appears to us that the Lower Appellate Court was wrong in law in laying it down that the special respondent was in no way bound by it, but it would, of course, be open to the special respondent to show that the effect of that admission was not such as to invalidate her claim to hold the tenure at a fixed rate; but the admission itself was legal evidence which the Judge ought to have considered. It is impossible to say what effect it might have had on his decision, and the special appellant appears to us to have been unfairly prejudiced by the omission.

With regard to the special respondent's documentary evidence, the Judge observes that she has filed her pottah and receipts, some of which are proved. Now, the only meaning that can be attached to this is that the special respondent had proved some of the receipts which established the fact of her holding from the date of the perpetual settlement. But it is clear from the record (and the fact is not denied by the other side) that no single receipt for any year anterior to 1236 B. S. (the year in which Suleem, through whom the special appellant derives, is said to have got a new title with a variable jumma) has been proved; so that this part of the Judge's decision is a grave mistake of fact and one which would naturally weigh heavily against the special appellant.

It appears to us, therefore, that the case should be remanded, in order that the Judge may reconsider the evidence in accordance with the real facts of the case. There are various circumstances in the Lower Appellate Court's decision, notably in its estimate of Suleem's evidence, which we cannot reconcile; but, as the case must go back on the evidence taken as a whole, we do not think it necessary to go into particulars, remembering that this is a special appeal.

At the close of the case, and after the Court had intimated its intention of remanding it, the Vakeel of the special respondent asked permission to file a cross-appeal, objecting to the Judge's rejection of certain evidence (*viz.*, the kubooleut of Motee Baboo, the original holder of the talook), on behalf of his client.

It appears to us that this application should be disallowed. It has long been a rule of practice of this Court that a party wishing to file a cross-appeal should do so at the commencement of the hearing, in order that the other side may not be taken by surprise, but may have due notice of the points he has to meet. Moreover, the objection should have been put in, in a written form, on a properly stamped paper (Mackintosh *versus* Bengal Indigo Company 8 Sevestre 173), which was not done.

In Section 348, Act VIII. of 1859, the words used are "*upon the hearing of the appeal;*" but when the Appellate Court has given its decision (as in the present case), it seems to us that the "hearing" has terminated, and that it is then too late to take an objection under this Section.

We, therefore, reject the cross-appeal, and remand the case to the Lower Appellate Court for a fresh decision with reference to the above remarks.

The 24th March 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Ancestral property—Settlement with parties in possession — Adjustment of their respective rights.

Case No. 1324 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 15th March 1867, reversing a decision passed by the Moonsiff of Russoolgunge, dated the 20th April 1865.

Tarinee Dossee (Defendant), *Appellant*,

versus

Chunder Nath Dutt and another (Plaintiffs), *Respondents*.

Baboo Bama Churn Banerjee for Appellant.

Baboo Gopal Lall Mitter for Respondents.

In a dispute as to the proprietary rights of parties with whom a settlement has been made by the Revenue Authorities, even if made on the ground of possession without title, it is necessary for the Court to see how possession was obtained, and, if from their ancestors, to determine the respective rights of the parties with reference to the *status* of the family at the time of the settlement.

Mitter, J.—This case was formerly remanded to the Principal Sudder Ameen of Sylhet to try whether the property in dispute was the ancestral property of the litigant parties, and, if so, what were the shares to which they were respectively entitled according to the Hindoo Law of Inheritance. The Principal Sudder Ameen has now found that the property in question originally belonged to one Baroye Doss Kanoongoe, and not to Baroye Doss Dutt, the common ancestor of the parties; and he has accordingly decreed the claim of the special respondents, without going into the second part of the question above referred to.

In special appeal, we are of opinion that this finding cannot be supported. It is partly based upon exhibits, the authenticity of which was no way proved before the Principal Sudder Ameen, and partly upon others which are not admissible in evidence against the special appellant. The copies of the petitions of Gour Chunder Surma and of Kanto Narain Roy are documents of the latter class, neither the special appellant, nor any body through whom she claims to derive her title, being in any way privy to those individuals. These documents ought not, therefore, to have been received in evidence against her. The pottahs, kubooleuts, receipts of rent, and delasha-puttro, referred to by the Principal Sudder Ameen, ought not to have been accepted in evidence against her without some proof of their authenticity.

The only remaining document referred to by him, namely, the settlement proceeding, dated the 20th of January 1845, does not in any manner countenance the conclusion he has arrived at. In the first place it is to be observed that, if the parties with whom that settlement was made had not been looked upon by the Revenue Authorities as the proprietors in possession, some provision for Malikana would have been, as a matter of course, made for the real proprietors, whoever they were. It is also clear that, so far at least as two of those individuals, namely, Surbo Mongola and another, were concerned, the settlement was made with them, because they had succeeded to the rights of their ancestors who had previously held the disputed mehal in conjunction with others. We are by no means satisfied with the conjecture made by the Principal Sudder Ameen that Baroye Doss Dutt is necessarily a distinct individual from Baroye Doss Kanoongoe. The slight difference between these two names is by no means inconsistent with the identity of the individuals represented by them. This point should be particularly enquired into, evidence being called for from both parties in support of their respective allegations with reference to it. Nor are we satisfied with the manner in which the Principal Sudder Ameen has got rid of the evidence of Kanto Narain, one of the plaintiffs in this case. The mere statement made by the respondent's pleader that Kanto Narain was bought over by the special appellant, unsupported, as it was, by any proof, direct or presumptive, ought not to have been accepted by the Principal Sudder Ameen as a sufficient ground for the rejection of his evidence.

We wish further to remark that, even if it be shown that the settlement above referred to was made on the ground of possession without title, it will be still necessary to see how that possession was obtained; for, if that possession had devolved upon the parties with whom the settlement was made from their ancestors, their respective rights in the property in dispute must be determined with reference to the *status* of the family at the time of the settlement. The Principal Sudder Ameen has made no enquiry as to how and in what shares the parties held possession of the disputed property at any time before or after the settlement, and yet this was one of the most important points to be taken into consideration for the purpose of determining their respective rights.

For these reasons, we reverse his decision, and remand this case to the Judge of the

district. We think that the ends of justice require in this case that both parties should be permitted to give such further evidence as it would be in their power to produce, and the Judge will then dispose of the case upon the whole record with reference to the above remarks. The resumption-chittas must also be sent for. Costs will abide the final decision.

The 24th March 1868.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Suit for possession — Tenant's plea of Limitation.

Cases Nos. 915 and 953 of 1867.

Special Appeals from a decision passed by the Judge of Backergunge, dated the 14th February 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 25th January 1866.

Brindabun Chunder Chuckerbutty and others (Plaintiffs), *Appellants,*

versus

Nubo Kishen Dey and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Nuleet Chunder Sein* for Appellants.

Baboos Womesh Chunder Banerjee and *Dwarkanath Sein* for Respondents.

In a case in which plaintiff sued for khas possession of certain lands as comprised in a Government paying estate, and defendant's answer was that the lands in question lay in another estate of plaintiff's, but were covered by a howala-tenure of defendant's, it was held that the rule which prohibits a tenant pleading limitation against his landlord did not apply, as plaintiff's case was that the lands lay in an estate within which defendant did not admit tenancy.

Bayley, J.—These two special appeals will, it is admitted by the pleaders on both sides, be governed by one and the same decision here.

In this case plaintiff sued for khas possession of certain lands as comprised in the Government paying estate in the Collector's rent-roll No. 1477.

Defendant's answer was that the lands in suit did not lie in that estate; that they lie in plaintiff's estate No. 1578, *but* that they were covered by a howala-tenure of defendant's; and that, therefore, plaintiff could not have khas possession of them. Limitation was also pleaded by defendant.

The first Court held that defendant could not plead limitation against plaintiff, as defendant admitted that he was a tenant of plaintiff. The first Court further held on the merits that the defendant had failed to show any howala-rights. It accordingly decreed plaintiff's suit.

In the Lower Appellate Court, the Judge held that, as no tenancy was admitted by defendant as to talook No. 1477, in which plaintiff alleged the lands in suit to be, limitation might be pleaded; and then the Lower Appellate Court, having regard to the evidence of possession and of title adduced by defendant, and not rebutted by plaintiff, held that the defendant was entitled to a verdict.

From this decision, two special appeals are preferred. The first ground really is that, as the defendant admitted tenancy under plaintiff, who was proprietor of both estates 1477 and 1578, defendant could *not* legally plead limitation, and that on the merits the Lower Appellate Court had decided in favor of defendant on no legal evidence.

We think both these pleas quite untenable. A party admitting tenancy of lands, as alleged by plaintiff to be in a certain estate, cannot plead limitation successfully against his landlord. But in this suit plaintiff's case is that the lands are in plaintiff's Government settled estate No. 1477. Defendant in no way whatever admits that he is a tenant of any lands in plaintiff's Government settled estate No. 1477. Defendant cannot, then, come under the rule which prohibits a tenant pleading limitation against his landlord.

On the merits, the Lower Appellate Court, throwing the *onus* on defendant, holds, as a finding of fact on evidence of various kinds, that defendant has, and has long had, possession of the lands in suit as his howala, and has a title to retain possession. The Lower Appellate Court, accordingly, rejects the claim of plaintiff to khas possession.

Under this state of facts, this special appeal cannot succeed. It is, therefore, dismissed with costs.

The 24th March 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Assessment of accretions to a zimma tenure—Section 51, Regulation VIII., 1793—Section 4, Regulation XI., 1825—Sections 15 and 17, Act X., 1859.

Cases Nos. 387 to 389 of 1867.

Applications for review of judgments passed by the Hon'ble Justices H. V. Bayley and Dwarkanath Mitter on the 24th September 1867, in Special Appeals Nos. 666, 667, and 668 of 1867.

Mr. E. O. Panioty, *Petitioner,*

versus

Juggut Chunder Dutt, *Opposite Party.*

Mr. G. C. Paul and *Baboo Gopal Lall Mitter* for Petitioner.

Baboo Nil Monee Sein for Opposite Party.

A suit for the assessment of lands accreted to a zimma tenure must be tried under Section 51, Regulation VIII., 1793, the burden being on the plaintiff to prove that the tenure is liable to the assessment sought; and the provisions of that law are not affected by Regulation XI., 1825, as regards the mode in which, the conditions on which, and the burden of proof with which, the zemindar may proceed to assess.

Clause 1, Section 4, Regulation XI., 1825, and Section 22, Act X., 1859, will not allow of such a suit; and holders like the zimmadar in a case of this nature are not liable under Section 15, Act X., 1859, for additional rent for *churland*, until they are shown by the zemindar to be holders of tenures subsequent to the decennial settlement not having a fixed jumma, and then only liable for the talookdaree rates paid by others of the same class for similar lands.

Section 17, Act X., 1859, applies only to ryots, not to zimmadars having a tenure of a talooki character.

Bayley, J.—THESE are three applications for review of our judgments in special appeals Nos. 666, 667, and 668. The facts are fully stated in previous decisions of this Court.

We are asked to review our judgments because we held that plaintiff's suit for a kubooleut, *i. e.*, for assessment on account of lands accreted to a *zimma* tenure, must be tried under the provisions of Section 51, Regulation VIII. of 1793, the burden of proof of the tenure being liable to the assessment sought, being on the plaintiff; and because we also held that Section 15, Act X. of 1859, and Clause 1, Section 4, Regulation XI. of 1825, did not admit of the suit being brought as it was.

We have most fully heard Counsel in support of these applications, and we see no reason whatever to alter our view previously expressed.

Certainly, Section 17, Act X. of 1859, does not apply to other than ryots, and consequently the defendant zimmadar here, having a tenure of a talooki character, not a ryotee, does not come under Section 17.

It is urged that Section 51, Regulation VIII. of 1793, does not apply to the assessment of *accretions*, but that Clause 1, Section 4, Regulation XI. of 1825, and Section 15, Act X. of 1859, do. I cannot find, nor are we shown any law, except Section 51, Regulation VIII. of 1793, which provides for assessment of accretions of such talooks as these, certainly not up to the date of Regulation XI. of 1825.

Then, on reading Clause 1, Section 4, Regulation XI. of 1825, I find that it enacts that as the zemindar may be liable for revenue for excess accretions to his estate, so his subordinate holders *may* be affected by the same principle. But this law (XI. of 1825) does not say how, or on what conditions, or with what burden of proof the zemindar may proceed to assess. These provisions remain, as far as Regulation XI. of 1852 was concerned, as they were under Section 51, Regulation VIII. of 1793. It certainly, I may here observe, is an error in the application for review to say that this Section 51 applies only to *parent* estates. The very terms of the Section contradict this plea.

It is said in the first part of the application that "Section 15, Act X. of 1859, has no "reference to the assessment on accretions, "and does not in any way annul or modify "the provisions of Clause 1, Section 4, Regu-"lation XI. of 1825," and the applicant goes

on to say that "therefore, this Court is wrong "in holding that plaintiff is debarred from "assessing the lands which have accreted to "defendant's tenure under the terms of the "first named Section," *viz.*, Section 15, Act X. of 1859.

I have already said that the Clause 1, Section 4, Regulation XI. of 1825, and Section 17, Act X. of 1859, will not allow of this suit. And referring to Section 15, Act X. of 1859, I find that holders of the nature of the zimmadar in this case are certainly not liable under that Section until they are shown by the *zemindar* to be holders of tenures subsequent to the decennial settlement, and *not* having a fixed jumma, and then only liable to the talookdaree rates which others of the same class pay for similar lands.

Such being my view of this case, the present suit for a kubooleut on account of accreted lands to be assessed cannot, in my view, succeed: and I would, consequently, reject these applications with costs.

Mitter, J.—The petitioner for review of judgment in these three cases has raised the two following points for our consideration:—

1st.—That these cases ought to have been remanded to the Lower Appellate Court, in order to give the petitioner a proper opportunity to prove that the alluvial lands in dispute were liable to assessment, both according to the custom of the country, as well as according to the terms of the engagement under which the parent talook is held by the opposite party.

2nd.—That Section 15, Act X. of 1859, does not bar the zemindar's right to demand additional rent for *chur* lands that have been formed subsequent to the date of the Permanent Settlement.

With reference to the first point, it was contended that the Judge below having thrown the *onus* of proof upon the defendant, the petitioner was misled in thinking that it was not necessary for him to give any evidence in proof of the custom of the district, or of the contract under which the parent talook was held. I am of opinion that there is no ground for such a contention. The petitioner ought to have known what it was necessary for him to prove in order to establish his right to a decree: and from what I know of the practice that is invariably followed in the Mofussil Courts with reference to the *onus* of proof, there is no reason for supposing that the petitioner could have been possibly misled by anything that the Judge might have done. Both parties were called upon to produce evidence in support of their respective allegations, and it was only when the case was called on for final hearing, that any question with reference to *onus* of proof could have been raised. The petitioner never alleged in his plaint that there was such a custom or contract as would entitle him to assess these alluvial lands, and I do not see any reason why he should be permitted at such a late stage of the proceedings to ask for a fresh remand.

With reference to the second point, I must confess that I feel some doubts as to the correctness of the opinion expressed by me on the former occasion. But as the point already referred to was the first ground upon which our former judgment was based, and as that point has been already decided by me against the petitioner, and is quite sufficient by itself to dispose of his whole claim, I do not wish to give any definite and decisive opinion upon this second point. My own opinion on that point, so far as it was expressed in the former judgment, will, therefore, remain a mere *obiter*. I reject these three applications with costs.

The 25th March 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Case No. 1809 of 1867.

Declaratory decree—Cause of action —Remand —Evidence—Section 15, Act VIII. of 1859—Act VI. of 1862, B. C.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 4th May 1867, affirming a decision passed by the Principal Sudder Ameen of that district, dated the 10th March 1866.

Puree Jan Khatoon and others (Plaintiffs), *Appellants,*

versus

Bykunt Chunder Chuckerbutty and others (Defendants), *Respondents.*

Baboos Ashootosh Dhur, Hem Chunder Banerjee, and *Kalee Mohun Dass* for Appellants.

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Baboos Unnoda Pershad Banerjee and *Onookool Chunder Mookerjee* for Respondents.

In suits for declaratory decrees under Section 15, Act VIII., 1859, it is entirely in the discretion of the Court to grant or to withhold relief, and each case must be judged by its own particular circumstances.

Where parties in possession of certain lands sued for a declaration of title, not only on the allegation that defendant had caused a demarcation to be made behind their backs, annexing a slice of their lands to defendant's estate, but had also, under color of this proceeding, sued plaintiff's tenants for rent under Act X., and proceeded against them to enforce a measurement under Act VI. (B. C.), 1862, it was held that acts had been done hostile and obviously injurious to the plaintiffs, and the suit would lie.

Where the High Court, proceeding on the assumption that appellants (plaintiffs) were in possession, remanded a case to a Zillah Court with ins ructions to pass a declaratory decree, if that Court was satisfied that the act complained of was so recent, and of such a nature, as to entitle plaintiffs to a declaratory decree, it was held (by Kemp, J., decreeing the appeal) that the Zillah Judge was wrong in re-opening the whole question of possession.

Held (by Jackson, J.) that the issue of possession being one which clearly arose on the statements of the parties, the Zillah Judge was not in error in trying it.

Documentary evidence tendered by a plaintiff cannot be rejected merely because it had not been adduced in a former suit to which plaintiff was a party.

Kemp, J.—This case was remanded on the 29th January 1867 by Justices Trevor and Glover.

It appears there were originally two special appeals numbered 2185 of 1866 and 2245 of 1866. The appellants in No. 2185 are now before us as special appellants in No. 1809. They were plaintiffs in the Zillah Court.

The plaintiffs in special appeal No. 2245 sued certain ryots, under Section 10, Act VI. of 1862, Bengal Council, for measurement of the lands in their occupation. The defendant in that suit pleaded that the lands did not belong to the plaintiffs, but to another party, the plaintiffs in No. 2185, special appellants in the case under consideration.

The Lower Courts on enquiry found that the plaintiff in No. 2245 had never been in possession of the lands, and, therefore, dismissed his suit. The special appeal in No. 2245 proceeded on the ground that it was not necessary, in order to give him a right to measure, that he should be in actual possession, inasmuch as the right to possession was quite sufficient to entitle him to obtain what he asked for.

The learned Judges above referred to held that Section 10, Act VI. of 1862, contemplated possession by the receipt of rent for those lands of which the measurement was required, and as plaintiff had not proved such possession, the Lower Court was quite right in dismissing his suit. Special appeal No. 2245 was, therefore, dismissed with costs.

With reference to special appeal No. 2185, which, we may observe, was heard and disposed of at the same time and by the same decision as No. 2245, the learned Judges observed that "the plaintiffs sued as in possession, for a declaration by the Court under "Section 15, Act VIII. of 1859, of their right "to certain lands, those rights having been "placed in jeopardy by the act of the Survey "Authorities, who measured and demarcated "those lands as being within the defendant's "estate. The Judge, accepting the plaintiffs' "statement as to possession, finds that, as "more than six years have elapsed since the "act complained of forming his cause of "action arose, plaintiffs were out of Court "under the Statute of Limitations."

The learned Judges proceed to observe "that the Statute of Limitations would not "apply to a claim for a declaration of title, "the *plaintiffs being in possession* of the "land regarding which the declaration is "required; that it is competent to the Court, "however, to enquire whether the act complained of is so recent, and of such a "nature, as to entitle plaintiffs to a declaratory decree, for the Court will not be put "in motion under Section 15, Act VIII. of "1859, unless some injury appears so "probable as to lead to the conclusion that, "unless stayed by the declaratory decree, "the inchoate or threatened injury may be "completely perpetrated. If the Court is "satisfied on this point, it will pass a declaratory decree, otherwise it will refuse "the same."

With these clear and precise instructions, the case was remanded with directions to pass orders in conformity with the same.

The Judge, on the remand, observes that the order of remand does not preclude him from entertaining and deciding the question of the plaintiffs' possession, inasmuch as in his former decision he had only admitted the plaintiffs' possession by way of argument. On the question of possession, the Judge was of opinion that there were very serious objections to the reception of the evidence as true which had been adduced by the plaintiffs in support of their possession, inasmuch as, in a former suit in 1856, to which the plaintiffs were parties, those documents had not been produced, though it was of the utmost importance to the

plaintiffs to file all evidence that would bear on their case; and naturally it was to be expected that the documentary evidence on which the plaintiffs now rely should have been brought forward in 1856, and that, therefore, the only conclusion the Judge could come to was that the evidence was not then in existence, and is consequently spurious and fabricated for the purposes of the present suit. Lastly, the Judge observes that even two of the plaintiffs' own witnesses, *viz.*, Ram Komal Sein and Suduroodeen, who are also in the plaintiffs' employ, support the defendant's claim. On the whole, the Judge thinks that the evidence upon which the plaintiffs relied could not be trusted, and that, therefore, as they had not proved either their title or possession, their suit must be dismissed.

In special appeal it is contended—

1st.—That as the suit was remanded by this Court for the sole purpose of enquiring into the point whether the act complained of was so recent and of such a nature, as to entitle plaintiff (special appellant) to a declaratory decree, the Judge was not competent to re-open the question of possession, but should have confined himself to the issue upon which the suit was remanded.

2nd.—That, even if the Judge was competent to re-open the question of possession, his decision is erroneous and defective: *first*, because the Judge is in error in supposing that, in the suit under Act VI. of 1862, Bengal Council, the question of possession was not determined in favor of the special appellant and against the special respondent; *second*, because the Judge has improperly rejected the documentary evidence of the special appellant, on the ground that this evidence was not filed in the suit of 1856: for, according to the contention in that suit, it was wholly unnecessary to file these documents then; moreover, only one of the plaintiffs in the present suit was a party to the suit of 1856.

Another ground is taken, to the effect that the Judge has misunderstood the evidence of the two witnesses, Ram Pershad Sein and Suduroodeen.

A cross-appeal is preferred by the special respondent, to the effect that the suit of the plaintiff for a declaratory decree would not, under the circumstances set forth in the plaint, lie, and that it ought to have been dismissed.

The cross-appeal of the special respondent was argued first. The pleader for the special respondent contends that the plaint discloses no cause of action, and that the plaintiff (special appellant) is not entitled to a declaratory decree under the provisions of Section 15, Act VIII. of 1859. A decision of the second Bench, Justices Bayley and Phear, in No. 1164 of 1857, dated 25th February 1868, which has not been published, and a decision published in Volume VIII., Weekly Reporter, page 64, were quoted in support of the argument.

Section 15, Act VIII. of 1859, runs thus: "No suit shall be open to objection on "the ground that a merely declaratory "decree or order is sought thereby, and it "shall be lawful for the Civil Courts to "make binding declarations of right with-"out granting consequential relief."

In the case No. 1164, cited by the pleader for the special appellant, Mr. Justice Bayley held that "no overt act of hostility, or attempt to take possession from the plaintiff in that suit," had been alleged in the plaint. It was merely suggested that the plaintiff might be injured by a certain demarcation made by the Survey Authorities, and that, as the plaintiff had preferred no objection at the time of the demarcation to the Survey Authorities, although he had full notice of their proceedings, he was not entitled to relief under the provisions of Section 15 of Act VIII. of 1859.

Mr. Justice Phear added that "a plaint-"iff who seeks relief under Section 15 must "make out to the satisfaction of the Court "some act done by the defendants, which is "hostile to and invades his rights, and "which would justify an injunction or "a decree for damages, or a decree for deli-"very of possession, or some other decretal "order being passed against the defendants "if the Court had so thought fit to exercise "its discretion."

In the decision published in Volume VIII., Weekly Reporter, the plaint was for a declaration under Section 15, Act VIII. of 1859, that the demarcation-line set down in the survey-map was wrong. The plaintiff in that suit had not appeared before the Survey Authorities, and pointed out that the boundary-line was erroneous.

The Court (*Present:* The Chief Justice and Mr. Justice Loch) held that it is discretionary in the Courts whether they will give a declaratory decree or not. Taking the

circumstances of the case then before them into consideration, those learned Judges held that the case was not one in which justice required that such a decree should be made.

It is clear from these decisions that it is entirely in the discretion of the Court to grant relief under the Section, or to withhold it; and each case must be judged by its own particular circumstances. Is, then, the present case one in which the Court, exercising a wise discretion under the Section, ought to give relief? I am of opinion that it is.

The plaintiffs sue, not only on the allegation that the defendant has caused a demarcation to be made behind their backs, which takes a slice from their estate and annexes it to that of the defendant, but that the defendant, under color of this proceeding, has sued the plaintiffs' tenants for rent under Act X., and has proceeded against them to enforce a measurement under the provisions of Act VI. of 1862, Bengal Council. These are acts which, in my opinion, are hostile, and obviously injurious to the plaintiffs' title; and I would hold that the suit under Section 15 will lie. The cross-appeal ought, in my opinion, to be dismissed with costs and interest.

On the grounds taken by the special appellants, I think that the decision of the Judge ought to be reversed.

The order of remand distinctly proceeded on the assumption that the special appellants were in possession. Had there been any argument as to the question of possession before the remanding Judges, their judgment would have taken notice of such argument. The judgment observes that the Judge "accepted the special appellant's statements as to possession," but thought the claim as barred under the Statute of Limitations. The learned Judges proceed to observe that the Statute does not apply to a claim for a declaration of title, "the plaintiffs being in possession of the land regarding which the declaration is required:" words cannot be clearer.

The Judge, without touching the point upon which alone the suit was remanded, re-opened the whole question of possession. In doing this, I think he was clearly wrong, and that he acted in opposition to the orders of this Court.

I am further of opinion that, even admitting for argument's sake that the Judge was competent to re-open the question of possession, he was clearly wrong in rejecting the evidence as to possession adduced by the special appellants, simply because it had not been filed in a previous suit in 1856.

In the first place, all the special appellants before us were not parties to that suit: only one of them was a party. He sued on the footing that he had purchased a two-annas share of the property in dispute in that suit; that his vendor, withholding the rent, caused a sale of a four annas of the property, which included the plaintiff's two annas; and the suit was to recover a two-annas portion of the sale-proceeds in deposit.

The defendant's plea, while admitting execution of the bill of sale, was that the sale of the two annas to the plaintiff in the suit of 1856 was a conditional one, subject to his taking certain proceedings to adjust a decree; that, failing to carry out those conditions, the sale fell through; and that, therefore, the plaintiff in that suit had no title to any of the sale-proceeds.

In such a suit, it does not appear to me that it was at all essential to prove plaintiff's possession. All he had to prove was that the two annas really passed to him by an unconditional sale. It may be that his vendor had not put him in possession of any title-deeds, and that, therefore, in 1856, the plaintiff was unable to produce them. But, be that as it may, he was not bound to produce them in that suit as the proceedings stood. And they ought not to have been summarily pronounced to be manufactured for the purposes of the present suit, simply because they were not filed in 1856. Moreover, the position of the plaintiffs (special appellants) is very much changed since 1856. They are now the maliks by purchase and otherwise of the whole 16 annas of the property which was the subject of litigation in 1856. The two witnesses for the plaintiffs do not support the defendant's case. They make a mistake in the name of the talook, which is so far favorable to the defendant's claim; but their evidence, taken as a whole, is clearly hostile to the defendant; and, reading the whole evidence, as also from the context, it is clear that the name of the talook was a pure mistake.

In this view, I would reverse the decision of the Judge, and decree both this appeal and the plaintiff's (special appellant's) suit with costs of all the Courts, bearing interest.

There being a difference of opinion between us, the opinion of the senior Judge will prevail.

Jackson, J.—I also am of opinion that a sufficient cause of action has been put forward by the plaintiffs, special appellants, and that the Judge was, therefore, right to entertain this suit, and proceed to try it.

There are some rulings of this Court that a mere demarcation in a Government survey-map does not afford a sufficient cause of action to a person who alleges that a portion of his land has been demarcated in the map of another estate. But, in this case, the defendant took other steps to enforce his right to the land so demarcated, and such acts were hostile and injurious to the rights of the plaintiffs, and afforded them a sufficient cause of action.

I cannot, however, concur with my learned colleague that the Judge was in error on the remand to him in trying the issue of possession. It was an issue which on the statements clearly arose between the parties. The plaintiff had asked for a declaration of his title and a confirmation of his possession. The defendant had denied the plaintiff's title as well as his possession. There was then a distinct issue on the question of possession. The Judge in the first instance had dismissed the plaintiff's claim, on the ground that the suit had not been brought within six years of the date on which the hostile survey-demarcation which he sought to set aside was made. This Court, on special appeal, held that the Law of Limitation did not apply to such suits, and remanded the case for trial on the merits, if the plaintiff had made out a sufficient cause of action. The Judge, therefore, was, I think, right to try the remaining issues which, on the statements of the parties, required decision; and foremost among them was the question of possession.

But it is said that that question had been already decided in another suit between the same parties, in which the defendant had come into Court as plaintiff, asking for a measurement of the lands of the ryots living on the disputed land. The Judge took no notice of this objection, and decided that in that case he had not determined that the present plaintiff was in possession. We have heard that decision read, and I am of opinion that the Judge was right in the view which he took of it, and that consequently he was right to go on and determine in this case whether the plaintiff was, as he alleged, in possession or not.

In trying this question, the Judge rejected a number of zemindaree-papers put in by the plaintiff, on the ground that these were not produced in the course of a former suit in which the question of the plaintiff's possession had been raised. It appears to me, on reading the decision in that suit, that the point of possession was considered in it, and that it was important to plaintiff to have proved his possession, if he had then possession. The plaintiff in that suit alleged that he had purchased and obtained possession of a certain share in an estate, and, as such purchaser, that he was entitled to certain moneys then deposited in the Collectorate. The defendant in that suit alleged that the plaintiff's purchase was not complete; that there had been a conditional sale to the plaintiff; and that, under certain circumstances, that sale would have become a complete sale; that the plaintiff had not conformed to the terms laid down between the parties, and the purchase had, therefore, not been completed, and the plaintiff had not obtained possession; and it followed that the plaintiff was not entitled to the money he claimed. In such a suit, the plaintiff might have proved that the sale was complete without adducing evidence to possession, and indeed the plaintiff might have recovered the money if the sale was complete, although he had not obtained possession. One ground upon which the decision went against the plaintiff was, that he had not proved his possession. Of course, possession would have been very strong evidence that the sale had been complete, and the absence of evidence upon the point was very properly remarked upon by the Judge who decided it. But it is a question whether the Judge in this suit is right in totally rejecting the whole of the documentary evidence now offered as to possession, because it was not then produced. The decision in that case was, that the sale to plaintiff was, as the defendant then alleged, not a complete sale; but there is no longer any question upon this point. It is now not denied that the plaintiff's purchase is a complete purchase. It may, as the plaintiff's pleader suggests, have been since completed; and the zemindaree-papers now put in may have been made over subsequent to the decision of that suit. It may even be that the zemindaree-papers were even then in his possession, but he neglected to file them. The Judge is not, in my opinion, justified in rejecting the whole of these papers on no other

ground, but that, if genuine, they would have been filed in the former suit. There may have been numerous reasons for their absence in the former suit. The plaintiff or his zemindaree-agents might have been examined on the point. They might have explained the omission to file them, or it is possible that he could not have explained it; but the Judge was not right to reject the papers when the examination of the witnesses had not been turned on this point.

The Judge is also clearly wrong in the view which he has taken of the evidence of two of the witnesses who do not depose to the defendant's possession, but in whose evidence there seems to have been a clerical mistake, which has led the Judge into error.

However reluctant I may be to remand a case a second time to the Judge, still, if the Judge has drawn a conclusion from a former decision which is not justified by that decision, and has upon that conclusion wrongly rejected the whole of the plaintiff's documentary evidence as manufactured for the purposes of the present suit, I think that there is no other course to adopt. My learned colleague is of opinion that the Judge should not have tried the question of possession at all. Therein I have the misfortune to differ from him. I think he should have tried it, but that there has been error in law in the mode in which he has tried it. I would remand the case for re-trial:

The 25th March 1868.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Onus probandi—Hibbanamah.

Case No. 2197 of 1867.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 14th June 1867, reversing a decision passed by the Moonsiff of that District, dated the 28th February 1866.

Mooad Mullick and others (Defendants), *Appellants,*

versus

Belat Mullick (Plaintiff), *Respondent.*

Baboo Bungshee Dhur Sein for Appellants.

Baboo Rash Beharee Ghose for Respondent.

Where a plaintiff claims, not under any general right of inheritance, but expressly under a deed, he must prove that deed: no legal presumption as to the contents of the deed can arise from a consideration of what the party through whom he claims would have been entitled to by the law of inheritance had there been no such deed.

Macpherson, J.—I AM of opinion in this case that the judgment of the Lower Appellate Court is wrong, inasmuch as it lays the *onus* upon the defendants when it clearly lay on the plaintiff. The plaintiff in his plaint bases his claim exclusively upon the *hibbanamah* which is alleged to have been executed by Oojun Mullick. As he does not claim under any general right of inheritance, and as he claims under a deed expressly, he must prove that deed. No presumption warranted by law as to what the contents of the deed were can arise from a consideration of what the plaintiff's father would have been entitled to by the Law of Inheritance if there had been no deed of gift.

As the judgment of the Lower Court contains no decision upon the question whether there was or was not a *hibbanamah*, as alleged by the plaintiff, the case will be remanded to the Lower Appellate Court in order that this issue may be tried and decided.

The decision in the former suit to which the plaintiff was no party is doubtless in no way binding on the plaintiff. But the plaintiff cannot succeed in this suit, framed as it is, unless the *hibbanamah* is, in the opinion of the Court below, properly proved.

The case is remanded accordingly.

Glover, J.—I concur.

The 25th March 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Interest—Decree of Lower Court not to be modified by Judge's declaration.

Case No. 223 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 26th January 1867, affirming an order passed by the Principal Sudder Ameen of that District, dated the 29th September 1866.

Jumoona Moyee Debia (Decree-holder), *Appellant,*

versus

Doorga Soondur Roy and another (Judgment-debtors), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

Where a decree of a Lower Appellate Court, awarding interest to a suitor from the date of the institution of his suit, was affirmed by the High Court in special appeal, it was held that the decree-holder was entitled to recover interest for the period allowed in the decree, notwithstanding a subsequent declaration of the Judge of the Lower Court that his meaning was not to allow interest except from the date of his own decision in appeal.

Jackson, J.—It is admitted that the decree of the Lower Appellate Court awarded to the special appellant interest in the mode in which he now claims it before us; but for the respondent it is contended that the Judge now, having the entire proceedings before him, and having declared that his meaning was not to allow interest except from the date of his own decision in appeal, has, in effect, varied and modified the decree which he originally passed, and that for this reason the special appellant is not entitled to obtain that which was granted him by the decree.

This contention, it appears to me, is untenable. It may be a question whether, after the affirmance of the decree of the Lower Appellate Court by this Court in special appeal, the Judge could, upon a motion for that purpose, have altered the decree of his own Court. Whether he might or might not have done so, it is quite clear that nothing of the sort was done; and as it is the decree, and not the judgment, of the Court which has to be executed, it appears to me that the special appellant is entitled, as long as that decree is in force, to obtain the interest which it allows. I think, therefore, the order of the Zillah Judge must be modified, and the special appellant (plaintiff) must be declared entitled to recover interest from the period allowed in the decree, *viz.*, upon the whole amount finally decreed to him from the date of the institution of his suit. Special appellant, I think, is entitled to his costs.

It may be right to mention that the ground of special appeal as originally stated, which was worded "from the date of the decree of the first Court," was shown to us to have been so worded by inadvertence; and the special appellant's pleader was permitted to amend the grounds, so that it should run "from the date specified in the decree of the first Court."

Hobhouse, J.—I concur.

The 25th March 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Jurisdiction—Section 15, Act XXIII., 1861—Section 15, High Court's Act.

Case No. 598 of 1867.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 1st June 1867, reversing an order passed by the Moonsiff of that District, dated the 19th November 1866.

Showdaminee Dossee (Decree-holder), *Appellant,*

versus

Manick Ram Chowdhry (Judgment-debtor), *Respondent.*

Baboos Ashootosh Dhur and *Greeja Sunker Mojoomdar* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

An order of a Zillah Court in appeal exempting a particular judgment-debtor from liability, even though erroneous, cannot be said to have been passed without jurisdiction.

Section 15 of the 24 and 25 Vic., Cap. 104, does not enable the High Court, by way of motion, to deal with an order made by a Lower Appellate Court in cases where the latter has jurisdiction, and the law declares that its order shall be final.

Jackson, J.—THIS is an application made by the petitioner complaining of an order made in appeal by the Zillah Court in a case in which no special appeal lies, and the petition asks to have the order of the Lower Court set aside. The application is made under Section 35 of Act XXIII. of 1861, on the ground that the Lower Appellate Court, in hearing the appeal, has exercised a jurisdiction which it did not possess. The alleged excess of jurisdiction appears to consist in an error committed by the Court in exempting a judgment-debtor who ought, according to the petitioner, to have been declared liable. That, we need hardly say, cannot be called an act done, or order made, without jurisdiction.

Undoubtedly, the Court below was competent to decide as to the liability of the particular judgment-debtor, and in fact it was the petitioner himself who brought the question before that Court. It is quite clear, therefore, that Section 35 does not apply to this case. But the petitioner has also asked us at the hearing to-day to consider and deal with his application, with reference to Section 15 of the High Court's Act (24 and 25 Vic., Cap. 104). He contends that the power of superintendence, which is vested in this Court, will enable it to deal with an order made by an inferior Court, whenever that Court shall appear to have committed an error in law. It has been frequently decided in this Court that, although the Court is competent, under the Section just cited, to require the inferior Courts to exercise a jurisdiction which they possess, and which they have declined to exercise, or to set aside anything which has been done plainly without their jurisdiction, that Section will not enable this Court, by way of motion, to deal with an order made by a Lower Appellate Court in cases where it has jurisdiction, and the law expressly declares that its order shall be final. This is a case of that description; it is a case in which a special appeal is expressly taken away, and, therefore, our powers of superintendence will not enable us to interfere, however obvious the mistake in law of the Lower Court may be. Application refused. The opposite party will get their costs.

The 25th March 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Jurisdiction—Altering in execution an award of costs—Retaining a deposit in Court—Joint receipt.

Case No. 614 of 1867.

Miscellaneous Appeal from an order passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 7th September 1867.

Nuffur Chunder Paul and another (Decree-holders), *Appellants,*

versus

Naduroonissa Beebee (Judgment-debtor), *Respondent.*

Baboos Ashootosh Dhur and *Opendur Chunder Ghose* for Appellants.

Mr. G. J. Twidale for Respondent.

In a case in which a Principal Sudder Ameen's decree had allowed separate costs to separate defendants, his successor was not competent, in execution, to alter that award, even though the High Court in appeal had, in respect of the appeal, allowed only one set of costs to the respondents, and the principal defendants had purchased the interests of the other defendants.

HELD that, after the costs had been levied from the plaintiffs, it was not necessary for the Principal Sudder Ameen to detain the whole amount until a joint receipt could be obtained from all the defendants, the proper course being for him to give notice to the second set of defendants to come in within a reasonable time and prove what portion of the cos they were entitled to.

Jackson, J.—THERE are two objections advanced against the order made by the Principal Sudder Ameen. The *first* is, that he has refused to carry out the original decree of his predecessor, whereby the separate defendants were allowed their separate costs. This order the Principal Sudder Ameen seems to think is necessary, in consequence of the direction which the High Court made upon an appeal against that decree. The High Court thought fit to allow in respect of the appeal only one set of costs to the respondents, and probably did so with excellent reasons. Notwithstanding this, it might have been quite reasonable and proper that the defendants who appeared separately below should have their separate costs. Whether this was so or not, it seems that the High Court did not, in this respect, modify the decree of the Court below, and that the decree in consequence stands in that respect unaltered. The Principal Sudder Ameen observes that, in fact, the principal defendants had purchased the interests of the other defendants, and that on this account it would not be reasonable to allow separate costs. This may or may not be. But the Principal Sudder Ameen is not competent to enter into questions of this description to alter in execution the decree of his predecessor. On this point, therefore, we think the Principal Sudder Ameen is clearly wrong, and that the defendants must have their costs in accordance with the original decree.

The *second* point is that the Principal Sudder Ameen, after levying the costs from the plaintiffs, has directed that the whole amount is to remain in Court until the second set of defendants come in, and, with the present petitioners, grant a joint receipt for the whole amount, and take it out of Court. This appears to be unreasonable and unnecessary. At that rate the other defendants might annoy the petitioners by refusing to come in, and they would thus be debarred from getting their costs at all. The proper course appears to be that the Principal Sudder Ameen should cause notice to be served on the other defendants, giving them a reasonable time to come in and prove what portion of costs they are entitled to. On these two points, therefore, the order of the Principal Sudder Ameen will have to be modified. The appellants will receive 64 rupees costs.

The 26th March 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Execution of decree in a different District—Illegal sale—Sections 235, 256, and 285, Act VIII., 1859.

Case No. 182 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dinagepore dated the 11th April 1867.

Luchmeeput Sing Doogur and another (Defendants), *Appellants,*

versus

Mooktakashee Debia (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboos Onookoolchunder Mookerjee* and *Sreenath Doss* for Appellants.

Baboo Ashootosh Chatterjee for Respondent.

On an application made to a Principal Sudder Ameen for execution of a decree against a judgment-debtor's estate situate in a different district, that functionary caused a prohibitory order, under Section 235, Act VIII. of 1859, to be issued through the Judge of the other District, after which, without further procedure under Section 285 and the Sections following, or further attachment, the property was put up for sale and purchased, no certificate under Section 259 being given to purchaser. HELD that the sale was illegal, and that there had been no valid transfer of right, title, and interest in the property.

HELD that Section 256 refers to objections by judgment-debtors, and not to third parties purchasing at a sale conducted regularly and with all formality, property which had been previously purchased at an illegal sale.

Kemp, J.—THE plaintiff, as trustee of the estate of Sreenath Sandyal, a lunatic, sued to set aside two summary orders of the Judge of Dinagepore, dated respectively the 19th June and 28th December 1866, and to obtain possession of a five annas six gundahs two cowrees two krants share in certain properties specified in the Schedule annexed to the plaint, which she alleges she purchased at an auction in satisfaction of a decree obtained by the lunatic against one Judoonath Sandyal. The sale, it is alleged, took place on the 4th September, and was confirmed on the 4th December 1865. The suit is valued at Rupees 56,366-4-12.

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The defendants stated that the sale at which the plaintiff purchased was invalid and vitiated by a defect in the procedure prior to sale; that the properties in dispute had been purchased by them on the 8th January 1866 in satisfaction of a decree against the same judgment-debtor, *viz.*, Judoonath Sandyal; that they had received a certificate under Section 259 of Act VIII. of 1859, and been put in possession.

The Principal Sudder Ameen held that "the purchase of the defendants had become "null and void, as the plaintiff whose pur-"chase is prior in date had virtually be-"come the owner of the property, and the "judgment-debtor had lost all right and "title in it."

With reference to the irregularity in the procedure prior to the sale at which the plaintiff purchased, the Principal Sudder Ameen held that the defendants were not entitled to raise any objections on that score, as they were not injured by such irregularities.

The suit of the plaintiff was decreed, the summary orders set aside, and possession awarded to the plaintiff in her capacity of trustee to the estate of the lunatic. The defendants to pay all costs.

The defendants appeal.

The plaintiff, respondent before us, purchased the properties in dispute in satisfaction of her own decree, or rather the decree obtained by the lunatic, her husband, for whom she is trustee. This decree was obtained in the Court of the Principal Sudder Ameen of Burdwan. It became necessary to execute this decree against the estate of the judgment-debtor, situated within the jurisdiction of the Dinagepore district. The procedure to be followed in such cases is laid down in Section 285 of Act VIII. of 1859 and the Sections which immediately follow that Section.

It appears that the Principal Sudder Ameen of Burdwan, on the application of the plaintiff, decree-holder, addressed the Judge of Dinagepore, directing him to issue an order under Section 235 of Act VIII. of 1859, prohibiting the judgment-debtor from alienating his properties situated in the Dinagepore district. No application was made under the provisions of Section 285, and no certificate was forwarded to the Court by which the decree-holder, the plaintiff, wished the decree to be executed. The Judge of Dinagepore issued the prohibitory order under Section 235, and intimated to the Principal Sudder Ameen of Burdwan that he had done so. Subsequently, and without further procedure under Section 285 and the Sections following it, and without further attachment, the properties in dispute were put up for sale and purchased by the plaintiff. A certificate, however, under the provisions of Section 259, was not granted to the plaintiff, and therefore there has been no valid transfer of the right, title, and interest of the defendant in the property sold. (*Vide* the latter portion of Section 259.) Possession also was not given to the plaintiff.

Subsequently, the defendants, who had obtained a decree in the Moorshedabad Court against the same judgment-debtor, *viz.*, Judoonath Sandyal, applied in the manner laid down by the Code under Section 285, obtained the attachment and sale of the properties in dispute, became the purchasers thereof, and, on obtaining a certificate of their title, were duly put in possession.

The question before us is this, which sale is to prevail?

We are of opinion that the sale under which the plaintiff purchased is invalid, and that the purchase by the defendants must prevail.

The provisions of Section 285 were not carried out. The plaintiff, who had obtained a decree in the Burdwan Court, which could not be executed within the jurisdiction of that Court, whose duty it was to execute the same, made no application to that Court in the manner laid down in Section 285. No copy of the decree or certificate that satisfaction of the decree had not been obtained by execution within the jurisdiction of the Burdwan Court was forwarded to the Dinagepore Court, within whose jurisdiction the properties against which the plaintiff desired execution are situated.

The Dinagepore Court, instead of proceeding according to the rules laid down for execution of decrees referred by another Court, proceeded to sell without further attachment, and without conforming to the procedure laid down in Section 285 and the following Sections. Such a sale is clearly illegal. This view is supported by a deci-

sion published in the Weekly Reporter, Volume VIII., page 310, in a case which is on all fours with the present case. The plaintiff is not in the position of a stranger who purchases without any responsibility for the regularity of the proceedings prior to the sale, and as such entitled to consideration, for she is the representative of the decree-holder, and it was incumbent upon her to observe all the formalities required by the law. It is a somewhat curious coincidence, that in a case in which this plaintiff was the decree-holder, published at Volume VII., Weekly Reporter, page 267, she was distinctly informed by this Court how an attachment of property situated in another district than that in which the decree is passed must be made.

The Principal Sudder Ameen seems to consider that the defendants have not been injured by these irregularities, and, therefore, they are not entitled to object. The Section apparently relied upon by the Principal Sudder Ameen, although he does not quote it, is Section 256. That Section refers to objections by judgment-debtors who must prove to the satisfaction of the Court that they have sustained substantial injury by reason of such irregularity before a sale can be set aside. The defendants are third parties who have purchased at a sale regularly conducted and after all the formalities prescribed by the law had been observed by them. Section 256 does not apply to their case. It is idle to say that they would not be injured if their purchase is set aside, as such purchase represents a portion of the money due to them under their decree, and which the judgment-debtor may have no other means of satisfying. The plaintiff is also unable to produce her title-deed, the certificate of sale, under which alone the right, title, and interest in the property purchased passes.

We reverse the decision of the Principal Sudder Ameen and decree this appeal, the result being that the plaintiff's suit is dismissed with costs of both Courts, bearing interest.

The 26th March 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Limitation—Subsequent proceedings cannot revive an extinct decree—Petition to restore execution-proceedings—Section 207, Code of Civil Procedure.

Case No. 627 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 25th September 1867.

Ram Dhun Roy and others (Judgment-debtors), *Appellants,*

versus

Khajah Abdool Gunnee and others (Decree-holders), *Respondents.*

Baboos Romesh Chunder Mitter and *Sreenath Doss* for Appellants.

Baboos Onookool Chunder Mookerjee and *Chunder Madhub Ghose* for Respondents.

When the execution of a decree has become absolutely barred by limitation, no subsequent proceeding, whether permitted by inadvertence of the Court or by the silence of the judgment-debtor, can revive the extinct decree.

Where certain execution-proceedings had been struck off the file, and the decree-holder applied that they might be restored, his petition containing not one of the particulars set forth in Section 207 of the Code of Civil Procedure, it was held that his application was not an application to execute the decree within the meaning of the Procedure Code.

Jackson, J.—We are of opinion that this case clearly falls within the principle adopted in the recent Full Bench ruling of this Court, which is not, we believe, yet reported, and that the execution of this decree, having been absolutely barred on the 16th April 1865, no subsequent proceedings, whether permitted by inadvertence of the

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Court or by the silence of the judgment-debtor, can revive that which had been absolutely extinct.

The last effective proceeding taken before the application in April 1865 was the sale which took place at the instance of the creditor in January 1862 (it was the sale of property belonging to other judgment-debtors), and which was confirmed in March 1862. Intermediately between those proceedings of 1862 and April 1865, a petition on the part of the decree-holder was lodged in the Judge's Court on the 13th December 1864. That petition set forth that the decree-holder had allowed the execution-proceedings to be struck off the file, but that it was now requisite for him to take some measures to receive the amount due to him; and he, therefore, prayed that his case "might be restored to the file." It seems that, upon the recommendation of a mohurir of the Judge's office, the case was "restored to the file," and an order was made that notice should be served on the debtor. But the decree-holder took no further step whatever, either in pursuance of that order or otherwise; and the petition in question was, therefore, with the proceedings, again struck off the file. Now, if that petition had been an application within the meaning of the Procedure Code, for execution of a decree, the question might have arisen whether it was a *bonâ-fide* application, and, as such, a proceeding to keep the decree in force which would prevent the bar of limitation from taking place.

But it seems to us quite clear that this petition could not be so designated. Section 207 of the Code of Civil Procedure provides that, "when any person in whose favor a decree has been given is desirous of enforcing the same, he shall apply to the Court whose duty it is to execute the decree either in person or through his pleader in the suit, or some other pleader duly appointed to act for him on that behalf;" and then Section 212 provides that "the application for execution of a decree shall be in writing, and shall contain in a tabular form the following particulars, *viz.*, the number of the suit, the names of the parties, the date of the decree, whether any appeal has been preferred from the decree, and whether and what adjustment of the matter in dispute has been made between the parties subsequently to the decree, the amount of the debt or damage due upon it, or other relief granted by the decree, the amount of the costs (if any were awarded), the name of the person against whom the enforcement of the decree is sought, and the mode in which the assistance of the Court is required, whether by the delivery of property specifically decreed, the arrest and imprisonment of the person named, or attachment of his property, or otherwise, as the case may be."

Now, this last portion of the Section is a very material one, because the requisition made upon the Court for its assistance by way of delivery of property, or arrest of person named or attachment of property, would be an excellent indication of the real intention of the decree-holder to enforce his decree; and although the Court might not be inclined to look rigidly at the application to see whether it contained the whole of the particulars set forth in that Section, it would undoubtedly require to be shown that the application did contain some essential particulars, and, above all, that it required the assistance of the Court to carry out and enforce the decree by means there specified. But the petition to which reference is made in this case contained not one single particular of those set forth in the Section cited.

It merely states: "My execution-case has been struck off; I ask the Court to re-place it." This was filed apparently with some vague intention of subsequently moving the Court to make a further order. But whatever the intention of the party may have been, he carried it no further, and no application to execute the decree was made at that time. It seems, therefore, to us quite clear that no proceeding had taken place within three years next before April 1865, in respect to which question could arise whether or not that proceeding was *bonâ fide*.

We think, therefore, the execution was and is barred, and the decree-holder cannot proceed. The appeal must be allowed, and the decision of the Court below reversed with costs.

The 26th March 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Remand — New evidence — Special appeal— Bona fides.

Case No. 1927 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 23rd May 1867, reversing a decision passed by the Deputy Collector of Manickgunge, dated the 27th March 1866.

Ram Sunkur Sein and another (Defendants), *Appellants,*

versus

Nilkant Biswas (Plaintiff), *Respondent.*

Mr. J. S. Rochfort and *Baboos Mohinee Mohun Roy* and *Nuleet Chunder Sein* for Appellants.

Baboo Bungshee Dhur Sein for Respondent.

In a case remanded for a finding as to whether a confirmatory pottah had been really given or not, it was held that, as the order of remand did not restrict the Judge to the evidence on the record, he was at liberty to examine witnesses who were in Court.

HELD also that, as the *bona fides* of the grantor was before the Court, or might have been if defendant's pleader had examined him, defendant could not appeal specially on the ground of the want of a finding on the point.

Kemp, J.—THIS case was remanded for the Judge to find whether the confirmatory pottah said to have been granted by Essan Chunder was really given or not, and to decide the case accordingly.

The Judge, after remand, took the evidence of Essan Chunder and two other witnesses, and found that the confirmatory pottah had been given and decreed accordingly.

In special appeal it is contended, *first*, that the Judge ought to have found whether Essan Chunder granted the pottah in good faith; *second*, that the Judge was wrong in admitting new evidence when the order of remand contained no such direction. The *third* ground is a new one, not arising out of the order of remand or the previous contention between the parties.

We will take the second point first. The order of remand does not restrict the Judge to the evidence on the record. The witnesses apparently were in Court, and the Judge was clearly at liberty to examine them, particularly the grantor of the pottah, Essan Chunder.

The special appellant's pleader admits that his client's pleader in the Court below cross-examined Essan Chunder and the two other witnesses.

The *bona fides* of Essan Chunder was, therefore, before the Court, or might have been so, if the special appellant's pleader had examined him on this point.

The special appeal is dismissed with costs and interest.

The 26th March 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Enhancement of rent—Mode of ascertaining a fair rate.

Case No. 1942 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 17th May 1867, affirming a decision passed by the Deputy Collector of that District, dated the 28th February 1867.

Amanoollah (Defendant), *Appellant,*

versus

Ram Nidhee Ghose and others (Plaintiffs), *Respondents.*

Baboo Goopeenath Mookerjee for Appellant.

Baboo Anund Chunder Ghosal for Respondents.

That the value of produce is said generally to have doubled or trebled is not a sufficient reason for doubling the rate of rent, except where new rates of rent are not to be found. The best mode of ascertaining a fair rate is by finding what rate is paid by similar ryots for similar lands.

Jackson, J.—THIS case must be remanded to the Judge to determine what is a fair and equitable rate on some certain data. The Ameen's report must be considered, and the Deputy Collector's reasons for increasing the rates fixed by the Ameen must also be considered by the Judge. The best mode of ascertaining a fair rate of rent is to find what rate is paid by other similar ryots for similar lands. In this case, the Judge has supported the Deputy Collector in doubling the rate of rent solely, because the value of produce is said generally to have doubled or trebled. This is not sufficient, although this principle may be applied in certain cases, *viz.*, where new rates of rent are not to be found; it should not be applied where direct evidence to new rates of rent can be obtained. The Judge has, however, given no good reason for upholding the Deputy Collector's decision.

The 26th March 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Section 11, Act XXIII., 1861—Resumption-proceedings—Suit to recover possession.

Case No. 68 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 22nd December 1866.

Maharajah Rajenderpertaub Sahee and another (Plaintiffs), *Appellants,*

versus

Ramput Tewaree and others (Defendants), *Respondents.*

Messrs. R. T. Allan and *R. E. Twidale* and *Baboo Unnoda Pershad Banerjee* for Appellants.

Baboos Romesh Chunder Mitter and *Sreenath Doss* for Respondents.

In a suit to recover possession of land according to a certain boundary-line laid down by the resumption-authorities, in which the Lower Court held that it had no jurisdiction to try the case as a regular suit, but that, under Section 11, Act XXIII., 1861, it involved matter for adjudication in the execution department only, it was—

HELD that the Lower Court was wrong, because the decree in the execution of which the disputed demarcation had to be made was that of the Special Commissioner, the subject-matter of the litigation being the right of Government to assess land heretofore not assessed; whereas in this case Government was not a party, and the subject-matter was totally different.

Bayley, J.—THIS is a suit to recover possession of 600 beegahs of land according to a certain boundary-line laid down by Deputy Collector Khyrut Ali Khan, on the 26th February 1852, followed by a proceeding of the Collector on the 24th January 1853, of the Special Commissioner on the 10th January 1854 and 1st April 1859, of the Assistant Collector, Mr. Barlow, on the 16th February 1859, all having reference mainly to a map of Hur Sahee Ameen.

The case of the defendant was that limitation—both special and general—barred the suit. Apparently the order of the Special Commissioner of 28th March 1860 is taken by defendant as plaintiff's cause of action. Defendant also pleaded that this suit involved a matter for execution, and not for regular suit; also that it is *res adjudicata* by the Judge's decision of the 13th May 1847, and so barred under Section 2, Act VIII. of 1859; and on the merits that the boundary-line had been properly demarcated by Mr. Reily, Deputy Collector, on the 11th April 1862, and by orders of the Judge, dated 27th April and 12th December 1864.

The Lower Court has held that there was no jurisdiction in the Civil Court to try the case as a regular suit, but that, under Section 11, Act XXIII. of 1861, it involved a matter for adjudication in the execution department only, but at the same time a Lower Court has held on the merits that Mr. Reily's proceeding, which plaintiff sues to have set aside, is right, and therefore the Lower Court dismissed plaintiff's case.

A regular appeal on both the above points has come before us. In respect to the Civil Court having no jurisdiction on account of the matter being one to be adjudicated between the parties in execution under Section 11, Act XXIII. of 1861, we cannot concur with the Lower Court, because the decree in the execution of which the disputed demarcation had to be made was that of the Special Commissioner, *viz.*, Government on the one part *versus* the party on the record as in possession on the other. The subject-matter of the litigation was the right of Government to assess land heretofore not assessed. In this case, however, Government is not a party, and the subject-matter is (as before shown) totally different.

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The 27th March 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Jurisdiction—High Court—Appeals.

Case No. 615 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Chittagong, dated the 5th September 1867.

Mahomed Busheeroollah Chowdhry, *Appellant,*

versus

Ramkant Chowdhry and others, *Respondents.*

Baboo Sreenath Banerjee for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

The general powers of the High Court do not enable it to hear an appeal from an order of a Zillah Judge refusing to "rectify" a decree.

Jackson, J.—THIS is an appeal against an order of the Zillah Judge "refusing" (I use the words of the vakeel for the appellant) "to rectify a decree" under which his client was unable to pay certain costs. The appellant's vakeel has been asked to point out under what provision of law an appeal lies against such an order. He was unable to do so, and suggests only that the appeal may be entertained under the general powers of this Court. We find those powers not sufficiently extensive to enable us to hear this appeal.

We, therefore, dismiss it with costs.

The 27th March 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Cancellation of certificate under Act XXVII., 1860—Inherent power of Courts—Misrepresentation.

Case No. 504 of 1867.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 6th September 1867.

Hameeda Bibee and others, *Appellants,*

versus

Noor Bibee, *Respondent.*

Baboo Anund Gopal Paleet for Appellants.

Baboo Poorno Chunder Shome for Respondent.

In a case in which a Judge refused, on the ground of want of competency, to entertain a petition which asked him to recall a certificate granted by him under Act XXVI. of 1860, as having been obtained by fraud, it was—

HELD that it is a power inherent in every Court of Justice, on finding that an order has been obtained from it by fraud and misrepresentation, and that, if the real facts had been known to the Court, it would not have acted in the matter, to recall the order made in ignorance of the true circumstances by reason of the misrepresentation alleged.

Jackson, J.—THIS is a petition by Hameeda Bibee and others, complaining of the grant of a certificate by the Zillah Judge of the 24-Pergunnahs to Noor Bibee in respect of the estate of Faizoollah, deceased. It appears that Noor Bibee, describing herself as a resident of the 24-Pergunnahs, and as the widow of this Faizoollah, applied to the Judge of that district for a certificate under Act XXVII. of 1860, and the Judge, I presume, after taking the various steps prescribed by that Act, granted to Noor Bibee the certificate in August 1867. Very shortly after the granting of the certificate, the present petitioners came before the Judge, and represented to him that the said certificate had been obtained from his Court by fraud, inasmuch as neither was the deceased Faizoollah a person whose ordinary place of abode was within the 24-Pergunnahs, nor was Noor Bibee, as she alleged herself to be, the wife of Faizoollah; and upon this allegation they prayed the Zillah Judge to enquire into the matter, and to recall the certificate granted to Noor Bibee.

The Judge in his decision, dated the 6th September last, held that it was not competent to him to entertain the application, inasmuch as the Act, *viz.*, Act XXVII. of 1860, does not authorize the Zillah Court to cancel a certificate once given. The Judge observed that the applicant must either institute a suit to set aside the certificate, or he must obtain from the High Court an order which would authorize his Court to re-open the matter; and he accordingly rejected the application.

It is not quite clear what order the Judge meant that the petitioners should obtain from this Court, which would authorize him (the Zillah Judge) to re-open the matter. I do not find in Section 6 (which states under what circumstances the Sudder Court may interfere with orders made by the District Court) any provision which precisely meets the present case. The petition now before us is not brought forward by way of appeal against the Zillah Judge's order, so much as by way of application with a view to this Court granting a fresh certificate, or otherwise interfering in the matter. We know at present nothing of the merits of this case; the matter has not gone beyond a mere allegation on the part of the petitioners. It is manifest, however, that if that allegation be true, and if the deceased Faizoollah had a fixed place of residence within the town of Calcutta, and not within the 24-Pergunnahs, that the Zillah Court of the 24-Pergunnahs would have no jurisdiction to grant a certificate in respect of his estate, but neither would this Court itself possess any such jurisdiction. It seems to me, however, that the Zillah Judge has taken too contracted a view of his own powers in respect of the application made to him. It seems to me a power inherent in all Courts of justice, on finding that an order has been obtained from the Court by fraud and misrepresentation, and that the true facts are such that, if they had been known to the Court, the Court would not have acted in the matter, for the Court, on being satisfied of such fraud, to recall the order made in ignorance of the true circumstances by reason of the misrepresentation alleged.

It is true that Act XXVII. of 1860 makes no provision for the withdrawal of a certificate granted by the Civil Judge; but if it were necessary to bring this matter within the written provisions for procedure of Courts in this country, it seems probable that the Zillah Judge, on the complaint of a person aggrieved by his order in granting this certificate, might review the order which he had made, and thereupon might recall the certificate. But whether the Zillah Judge might have acted under the rules relating to review, or under the general power that I have spoken of, I entertain no doubt that he might so deal with his first order, and ought to do it on being satisfied of the fraud which had been practised.

I think, therefore, the Zillah Judge, on receiving the petition of Hameeda Bibee and others, ought to have immediately called upon the petitioners to substantiate their allegations by affidavit or other proof. He should thereupon have summoned the holder of the certificate, and, after due inquiry into the circumstances, have passed such orders as the case might seem to demand.

I do not know that, under the circumstances stated, we can make an order which shall be binding upon the Zillah Judge, requiring him to act as I have stated; but I am quite satisfied that after the expression of our opinion to this effect, the Zillah Judge will not hesitate to do that which, in our opinion, he ought to do, and to consider the circumstances.

If, contrary to our expectations, the Judge should again refuse to act, the petitioner, if so advised, may make a further application to this Court.

The 27th March 1868.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Stamp—Suit for resumption of Lakheraj—Cl. (d), Section 11, Schedule B, Act X., 1862.

Case No. 2371 of 1867.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 25th July 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 27th May 1867.

Gopee Mohun Mojoomdar (Plaintiff), *Appellant,*

versus

Mr. J. B. Mackintosh, Manager on the part of the Bengal Coal Company (Defendant), *Respondent.*

Baboos Romesh Chunder Mitter and *Nil Monee Sein* for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

A suit to resume lands claimed as *lakheraj* falls in respect of stamp-duty, under Clause (*d*), Section 11, Schedule B of Act X., 1862.

The term "revenue" in Clause (*d*) must be read as meaning revenue or rent, whether to Government or to a zemindar.

Macpherson, J.—THE question in this special appeal is, whether the Lower Court is right in holding that the suit has been improperly valued, and that the stamp-fee paid is less than it ought to have been. The Lower Court held that the suit was substantially one for the resumption of lands claimed to be held as *lakheraj*, and that, as such, the suit falls under Clause (*d*) of Section 11 of Schedule B of Act X. of 1862, under which Clause the suit should have been valued at eighteen times the aggregate annual rents payable by the ryots. In special appeal it is contended that the suit was one which properly fell under Clause (*e*), and therefore was rightly valued.

We think that the Lower Court was right, and that the plaint did not bear a proper stamp. The suit was substantially a suit to resume lands claimed to be held as *lakheraj*, although this does not appear on the face of the plaint. The plaint, in fact, discloses no cause of action, and is in itself bad. It alleges that the defendants, being in possession of the lands in dispute by right of a jote, had not executed a *kubooleut*, and thereupon the plaintiff instituted a suit under Act X. of 1859 for a *kubooleut*; and that that suit was dismissed, the Revenue Courts holding that no rent was paid for the land. The plaint concludes to the following effect: "Hence I bring this suit to declare my right to these lands, and for possession."

There is no doubt that the suit was instituted for the one object of setting aside the *lakheraj* title set up by the defendants; and we have but little doubt that the plaint was framed, as it has been, merely with a view of evading the Stamp Law.

Then it is said that, even supposing it is a suit to resume the land, and to have it declared that the *lakheraj* title set up by the defendants is invalid, the case still falls under Clause (*e*), and not Clause (*d*). It is argued that the word "revenue" in Clause (*d*) must be construed as meaning "revenue to Government," and that this is apparent from the fact that "revenue to Government" is the term used as Clauses (*a*), (*b*), and (*c*), to which Clause (*d*) is to be considered as a mere sequel. But we think that (applying the ordinary rules of construction) the fact of the words "to Government" being omitted in Clause (*d*) shows that it was not intended that the word "revenue," as used in that Clause, should be limited, as it was limited in (*a*), (*b*), and (*c*); and that the word "revenue" in Clause (*d*) must be read as meaning revenue or rent to Government, or to a zemindar, or to any other person.

In this view we are confirmed by the language which we find was used in the corresponding Clause in the old Stamp Law, Regulation XI. of 1829. The words used there are: "In suits for *lakheraj* lands, "*i. e.*, lands not paying revenue to Government, the value shall be assumed at "eighteen times the amount of annual rent." As the words "to Government" existed in the old Clause, and are omitted in the new, we cannot but presume that the omission was intentional.

We think that this appeal ought to be dismissed with costs.

The 28th March 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. Hobhouse, *Judge*.

Construction—Bill of lading—Claims required to be made in Calcutta.

Reference to the High Court by the Recorder of Rangoon, dated the 13th February 1868.

Mahomed Ismailjee Nada, *Plaintiff*,

versus

The British India Steam Navigation Company, *Defendants*.

Where a bill of lading contained a clause to the following effect: "Any claim for short delivery or damage done to goods and all other claims whatso-

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ever to be made at the port of Calcutta, and at no other port, and the goods are shipped, and this bill of lading granted subject to this express condition "—it was held by the Recorder of Rangoon to operate so as to make the preferring of a claim in Calcutta a condition precedent to a suit in his Court.

HELD by the High Court, that this opinion is correct, and that a suit for short delivery under the bill of lading cannot be maintained without a claim being made in Calcutta.

Case.—IN this case the plaintiff is the consignee of certain goods shipped at Calcutta under a bill of lading A.

The goods consisted of a number of packages; one of which, marked A. M. A. was not delivered. Evidence has been given of its value, and it is shewn to have been priced in the invoice at Calcutta at 494 rupees, but that its market-value in Rangoon is Rupees 619-6-0. The main question in this case is one of law, that is to say, what is the effect of a clause in the bill of lading which is worded as follows:—

"Any claim for short delivery of or damage done to goods and all other claims whatsoever to be made at the port of Calcutta, and at no other port, and the goods are shipped, and this bill of lading granted subject to this express condition." This clause gave rise to the *2nd* and *3rd* issues in the case. The *3rd* issue is decided by an admission on the part of the Advocate for the plaintiff that no claim has been made in Calcutta in respect of the lost case A. M. A.

The issue now in question is as follows:—

No. 2: "Is the clause or note at the foot of the bill of lading and relied upon by the defendants, a bar to the present suit, or does it operate so as to make the preferring of a claim at the port of Calcutta a condition precedent to the right to bring an action in this Court?"

The same question arose in another case tried in appeal before Mr. Justice Norman and Mr. Justice Seton-Karr in Calcutta (decided 12th June 1867, reported in 8 Sutherland's Weekly Reporter, page 35) in which Ebrahim Moosum was plaintiff, and the present defendants were defendants and appellants. In that case Mr. Peterson for the defendants appears to have revived before the Court of Appeal a contention taken and overruled by the Recorder, that no suit would lie at all in this Court on a bill of lading of the present form in consequence of the clause in question; and the Court of Appeal intimated an opinion that "the clause was not meant to bar suits "in Courts other than those at Calcutta, "but simply to provide that claims should "not be made against agents of the Company at the out-ports, and that it was not "intended to interfere with the remedies of "the claimant to enforce his claim after it "should have been made."

This appears to me to be a direct decision on the point taken by Mr. Peterson and in the Court below; and their Lordships, moreover, go on to overrule a further objection of Mr. Peterson's that there was no evidence that a claim had been made, because they say, if this objection had been taken in the Court below, the respondent might have withdrawn his suit, made his claim in Calcutta, and sued again. Evidently this decides that the making of a claim in Calcutta is a condition precedent to a suit in this Court, and this settles the case upon the second issue, and I must decide that it be dismissed with costs.

As, however, the Counsel for the parties wish it, I will refer the case to the High Court at Calcutta, under Section 22 of the Recorder's Act.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the opinion expressed by the learned Recorder is correct, and that a suit for short delivery under the bill of lading cannot be maintained without making a claim in Calcutta.

It is unnecessary to determine whether a suit would lie at Rangoon, if a claim in such a case made at Calcutta should be rejected.

The 28th March 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. Hobhouse, *Judge*.

Limitation — Applications for new trial.

Reference to the High Court by the Officiating Judge of the Court of Small Causes at Kishnaghur, dated the 15th February 1868.

Pran Kisto Banerjee (Plaintiff), *Judgment-debtor*,

versus

Nuzimooddeen *alias* Rojin Turfdar (Defendant), *Decree-holder*.

A suit was dismissed with costs in a Court of Small Causes, after which an application for a new trial was rejected, and subsequently another application was made for a new trial and referred by the Judge to the High Court, the result being rejection of the application. After this defendant applied for execution for the costs.

HELD that the decree became final and conclusive when the Judge rejected the last application in accordance with the decision of the High Court, limitation beginning to run from the date of such rejection.

Case.—THE facts connected with this case are these: The present decree-holder was defendant in the original case (an action on a bond), which was dismissed on 16th May 1863; and application for a new trial was rejected on 16th June 1863. Another application for a new trial was preferred on 12th May 1864 on a stamp of the full value required in a suit for the amount claimed. This application professed to be made under Section 376 of Act VIII. of 1859. It was rejected on 16th September 1864.

Again, on the 13th April 1865, another application for a new trial was made, quoting the High Court's letter to this Court, No. 987, dated 24th March 1865. This application was supported by several vakeels of the Judge's Court. There is no record of any appearance by the other party (present decree-holder) on that occasion, and no *vakulutnamah* was given by him, but the vakeel who appeared for him in the suit has stated on solemn affirmation that he was present, and opposed the motion for a new trial; he also produced some witnesses to the same effect, who speak generally as to the fact of his repeatedly opposing the application for a new trial, but are unable to speak specifically as to dates. I have no reason, however, to doubt the pleader himself, who has deposed distinctly to the fact. I considered it necessary to go into evidence on the point according to the ruling in Bipro Doss Gossain's case, 7 Weekly Reporter, 521, which indicates the circumstances under which a decree-holder's opposition to an application for a review, or petition of appeal, is to be considered an act for keeping a judgment in force.

The result of the proceedings of the 13th April was, that the Judge of this Court referred to the High Court in a letter, No. 9*B*, dated 18th May 1865, as to whether Sections 376 and 378 of Act VIII. of 1859 were applicable or not. He received a reply in the negative on the 12th June 1865, and, in accordance therewith, rejected the application for review on the 16th of the same month.

Defendant alppied in December 1867 for execution for the costs allowed him in the original case, and the question is whether this application is barred by limitation or not. I think the answer depends partly on two considerations, *viz.*, (1.) When did the judgment, in pursuance of which the decree-holder seeks to execute, become final and conclusive;—on the 16th June 1863, when the first application for a new trial was refused, or on the 16th June 1865, when the Judge of this Court, in accordance with the order of the High Court, finally rejected the application? (2.) If the former date be accepted, whether the proceedings of the decree-holder's vakeel on the 13th April 1863 can be considered as a proceeding to keep the decree in force.

With regard to the first of these, there is no doubt now that the order rejecting the motion for a new trial on 16th June 1863 was a final judgment, and the decree-holder thereupon bec me definitively entitled to the costs for which he now applies for execution. At the same time, the matter was constantly kept open by the other party, and it appears from the letter of the Judge of this Court, already referred to, that there was some doubt at the time in consequence of certain letters and rulings of the High Court, whether a new trial or application for review might not be entertained. Under these circumstances, I think the defendant was justified in abstaining from execution until the matter was finally set at rest, *viz.*, the 16th June 1865, within 3 years from which the application for execution is made.

If, however, the judgment of the 13th June 1863 is to be considered final, it is urged by the debtor that the appearance of the decree-holder's vakeel on subsequent dates, including the 13th April 1865, cannot be considered a proceeding to keep the decree in force, as there was no necessity for him to oppose a judgment which was already irrevocable. I do not, however, coincide in this reasoning. Great efforts were made to obtain a review, and the Judge thought the

question doubtful enough to warrant him in applying to the High Court for orders.

Taking all the circumstances into consideration, I think the application for execution is within time.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the view expressed by the Judge is correct. The case is governed by the decision of the Full Bench to which the Judge has referred.

The 28th March 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. Hobhouse, *Judge*.

Jurisdiction—Small Cause Courts—Suit to recover balance of decree.

Reference to the High Court by the Judge of the Court of Small Causes at Chooadangah, dated the 10th February 1868.

Mr. M. F. Sandes and another, *Plaintiffs*,

versus

Jomir Shaikh, *Defendant*.

A suit cannot be maintained in a Small Cause Court in the Mofussil to recover the unsatisfied balance of a decree of such Court.

Case.—THIS is an action brought by the plaintiffs to recover from the defendant the sum of Rupees 59-10-4, being the amount due on an unsatisfied judgment of this Court, dated 28th February 1863; and for the defence it is urged that the action is not maintainable, and that the claim is, in reality, nothing more than an application for enforcing the original judgment, and therefore, under Section 20, Act XIV. of 1859, the plaintiff is out of Court, as no proceeding had been taken to enforce the said judgment within the three years next preceding the application.

When the judgment was passed, on which the present action is based, Act XLII. of 1860 was the Act in force for Mofussil Small Cause Courts, and under Section 12 all decisions and orders of the Court were final; and the question, therefore, arises whether the present suit is maintainable, being founded on a judgment of a Court not of record.

Now, under English Law, a judgment is a contract of record, and an action of debt or *assumpsit*, according to the nature of the judgment, is maintainable thereon, and no consideration is necessary to support it, inasmuch as, whilst the judgment remains in force, a legal liability to pay has been already ascertained thereby, or the judgment may, according to circumstances, be proceeded upon by *fieri facias*, or by writ of revivor, or it may be enforced by execution in the ordinary manner; and says Chitty in his work on Pleading, Volume I., 7th Edition, page 119, speaking of actions of *assumpsit*: "This "action is also sustainable upon the *judg-* "*ment of a foreign Court*, which is not consi- "dered as a debt of record in this country: "Walker *versus* Witter, 1 Doug. 4; Hall "*versus* Odber, 11 East 124. When not: "Buchanan *versus* Rucker, 1 Camp. 63; "Sadler *versus* Robins, 1 Camp. 253; and "it lies upon an Irish judgment: Harris "*versus* Saunders, 4 B. and C. 411; 6 D. "and R. 471, S. C.; and upon a Scotch "decree: Douglas *versus* Forrest, 4 Bing. "68; 1 M. and P. 663, S. C.; Russel "*versus* Smyth, 9 M. and W. 810. But "neither *assumpsit* nor debt can be sustain- "ed on the decree of the Court of Chancery "for a specific sum of money, founded on "equitable considerations only: Carpenter "*versus* Thornton, 3 B. and Ald. 52; "Henley *versus* Soper, 8 B. and C. "20; 2 M. and R. 165, S. C.; or on a "mere interlocutory order of a Court or "Law: Emerson *versus* Lashley, 2 Hen. "Bla. 248; Fry *versus* Malcolm, 4 "Taunt. 705; Carpenter *versus* Thornton, 3 "B. and Ald. 56. But an action may be "maintained on the decree of a Colonial Court "for payment of a balance due on a part- "nership-account: Henley *versus* Soper, 8 "B. and C. 16; 2 M. and R. 153, S. C.; "Sadler *versus* Robins, 1 Camp. 253;" and at pages 124 and 125, he says, speaking of the action of debt: "This action also lies on "*records* as upon the *judgment* of a supe- "rior or inferior Court of record. Gilb., "Debt 391, 392; Salk 209; Com. Dig., "Debt, A. 2. *Semble.*—That debt will lie on "a judgment of an inferior Court not of "record: Read *versus* Pope, 1 C. M. and "R. 302; 4 Tyrn 403, S. C.; Jones *versus* "Jones, 5 M. and W. 523; 7 Dowl. 841, S. "C. Either generally or against an executor

"or administrator suggesting a *devastavit:* "1 Saund. 216, 218, 219, *n.* 7, 8; Woodcock *versus* Morgan, 6 Mod. 306; Hope "*versus* Bagne, 3 East 2. Although the "judgment was erroneous, debt lies until it "has been reversed: Harvey *versus* Daniel, "2 Lev. 161; 1 Marsh. 284; Prince "*versus* Nicholson, 5 Taunt. 667; and the "mere circumstance of the defendant "having been rendered will not bar the "action. Where, however, the defendant "has been charged in execution on the "judgment, no action can be supported on "the judgment; although he was discharged "out of custody upon a promise to pay the "sum recovered by instalments, and which "he neglects to do: Vigers *versus* Aldrich, "4 Burr 2482; Tayler *versus* Wat, 5 M. "and S. 103. *Query.*—If the defendant "died in execution, *ibid* 104. And where the "defendant has been discharged out of "custody under the Lord's Act, debt is not "sustainable: 32 Geo. II., C. 28, S. 20; "and an action upon a judgment has become less frequent since the Statute 43 "Geo. III., C. 46, S. 4., which precludes "the plaintiff from recovering costs in an "action on a judgment, unless the Court or "one of the Judges thereof shall otherwise "direct. It appears that debt lies upon the "judgment or decree of a Colonial or Foreign "Court, &c., *See* Harris *versus* Saunders, "4 B. and C. 418; 6 D. and R. 474, S. C.; "O'Callaghan *versus* Marchioness Thomond, "3 Taunt. 85; Parkins *versus* Stewart, 9 "Price 1; Russel and Wife *versus* Smith, "1 Dowl., N. S., 935; 9 M. and W. 810, "S. C., in those instances in which *assumpsit* is maintainable upon them, and which "have been already alluded to."

In the case of Jussorut Khan *versus* Kanye Laul Dey, quoted by Mr. Thomson in his work on Limitation, page 243, Appendix A., which was an action upon an unsatisfied judgment of the Calcutta Court of Small Causes referred to the High Court, Phear, J., said: "The Judge considers this suit as nothing more than a "revivor of the original suit. Now, I take "it to be beyond dispute that the final judgment of a competent Court, whether of "record or not, constitutes an original cause "of action." In Williams *versus* Jones (13 M. and W. 628), which was a suit brought on a judgment of an old County Court, Baron Parke says: "The principle "on which this action is founded is, that "where a Court of competent jurisdiction "has adjudicated a certain sum to be due "from one person to another, a legal obligation arises to pay that sum on which "an action of debt to enforce the judgment "may be maintained. It is in this way "that the judgments in Foreign and Colonial Courts are supported and enforced, "and the same rule applies to inferior "Courts in this country, and applies equally, "whether they be Courts of Record or "not." Later cases, doubtless, have decided that judgments of the modern County Courts cannot be sued on, but that is because there are peculiarities in the nature of the judgments of these Courts which cause them not to be final. But the reason of the exception is to be found solely in the terms of the modern County Court Act. I find no reason of a like kind in the Act consisting the Calcutta Court of Small Causes to make its judgments fall short of a cause of action; and, moreover, it appears that, in Rule No. 34, the Court itself recognizes its own judgments as a good and sufficient cause of action for a new suit. I consider the cause of action which was sued upon in this case to be the judgment of the 13th March 1860, and that it first arose on that date. The question then put to me comes to this, whether this is such a cause of action as falls within Clause 11, Section 1, Act XIV. of 1859. I certainly think that the cause of action sued on is "an obligation of record" in the strict sense of the word.

Lord Campbell, C.J., in delivering judgment in the case of Berkeley *versus* Elderkin (21 L. T. 74; 6 C. C. Chron. 75), said: "*Primâ facie* an action could be "maintained in the superior Courts on a "judgment recovered in any Court of competent jurisdiction, but an examination of "the County Court Act (9 and 10 Vic., "C. 95) showed that parties who recovered "judgments in those Courts were confined "to the specific remedies pointed out in that "Act. The intention of the Legislature "was to give facilities for obtaining the "payments of debts, and it pointed out the "manner in which judgments were to be "enforced; but that intention would be "defeated if an action could be brought "on a judgment of the County Court in "the Courts of Westminster Hall." And in the case of Chunder Narain Ghose *versus* Gouree Nath Bose (Small Cause Court References, page 8, Weekly Reporter, Volume IV.), Morgan and Shumbhoonath Pundit, JJ., said: "We do not mean "to lay down that a suit cannot be main-

"tained on a decree, because, notwithstanding the facilities provided by the "Procedure Code for enforcing execution, the rights which arise from a judgment or decree may frequently themselves "require to be ascertained and enforced in a "new suit, or there may be obstacles to the "execution of the decree in the usual way. "But in ordinary cases, and in the absence "of special cause, a fresh suit on the decree "is not the proper remedy, and still less is "a suit maintainable on any agreement to "compromise, which may have preceded the "decree."

It would appear from the case of Mirza Jeleel *versus* Gora Chand Dutt (page 231), and of Kissen Chunder Sircar *versus* Ram Dhone Nundy and others (page 345), of Morton's notes of cases, that an action of *assumpsit* is maintainable on a judgment of a Court of Dewanny Adawlut of India; and it would also appear from the case of Punchanund Ghose *versus* Kissen Mungul and others [note (*b*), page 231], that such an action is maintainable on the decree of a Zillah Court, and the cognizance of the suit, as laid in the plaint, does not appear to be barred by any Act of Parliament, or by any Regulation of the Bengal Code, or any Act of the Governor-General of India in Council, and, therefore, under Section 1 of Act VIII. of 1859, it is cognizable by a Civil Court; nor can it be said that the present suit is brought on a cause of action which has been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, and, therefore, under Section 2 of the said Act, it is not cognizable by a Civil Court, as a judgment on which it is founded worked a merger of the original cause of action. It, therefore, appears to me that the judgment sued on constitutes an original cause of action, and that it arose on the 28th February 1863, and is, therefore, cognizable by a Small Cause Court under Section 6 of Act XI. of 1865, notwithstanding that no proceeding had been taken to enforce the said judgment within the time limited by Section 20 of Act XIV. of 1859.

The only other question is, what is the period of limitation applicable to the present suit, one of the parties to it being a Mahomedan?

It cannot be contended that Clause 11, Section 1 of Act XIV. of 1859, is applicable, as the words of that Clause are intended to point out a class of cases in which, as between the parties exclusively, English Law must be administered. Clearly the present is not one of that class of cases. I therefore think that it is a suit for which no period of limitation is expressly provided, and that, therefore, it must be governed by the provisions of Clause 16 of the Act.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that a suit cannot be maintained in a Small Cause Court in the Mofussil to recover the unsatisfied balance of a decree of such Court.

It is unnecessary to determine the second question as to limitation.

The decision by Mr. Justice Phear was on the original side, where the principles of English Law prevail.

There would be no end to a case if a fresh suit may be maintained upon a decree.

The 30th March 1868.

Present:

The Hon'ble J. B. Phear and E. Jackson, *Judges.*

Alluvion—Clause 3, Section 4, Regulation XI., 1825—Land "most contiguous"—"Gradual accession."

Case No. 1348 of 1867.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 27th April 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th September 1866.

Golam Ally Chowdhry and others (Plaintiffs), *Appellants,*

versus

Gopal Lall Tagore and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Romesh Chunder Mitter* for Appellants.

Mr. R. T. Allan and *Baboo Kalee Mohun Doss* for Respondents.

The land "most contiguous" to a *chur*, as that phrase is used in Regulation XI. of 1825, Section 4, Clause 3, is intended only to comprise the estate or estates with which the *chur* comes into contact along the length of the fordable part of the channel, and the whole *chur* becomes an accession to the land, and part of the tenure, of the party to whom such estate belongs; and no portion of it will cease to belong to him merely by reason of the deep water between it and the estate of another becoming shallow and fordable.

HELD also that, after the *chur* had, by the first occurrence of the fordable channel, become part of *A's* property, all further accretions to it, if gained by "gradual accession," would also belong to *A*, even though the result would, in the aggregate, be a prolongation of the *chur* in front of estates on the river-bank not belonging to him.

Phear, J.—IT is admitted that the *chur*, a share of which the plaintiffs seek to obtain by bringing this suit, first made its appearance as an island surrounded by unfordable water in a large navigable river, and was at that time by law at the disposal of Government. Afterwards the channel between it and the shore of the river became fordable at a certain part. The Government did not assert its right previously to the occurrence of this event; and, subsequently thereto, it declined to do so. Under these circumstances, as soon as the channel became fordable, according to Regulation XI. of 1825, Section 4, Clause 3, the *chur* became an accession to the land of the person or persons whose estate or estates on the bank of the river fell under the description of being "most contiguous" to it. We think this somewhat vague phrase is intended to comprise only the estate or estates with which the *chur* comes into contact, so to speak, along the length of the fordable part of the channel. It does not embrace estates which may be on the river bank opposite some portion of the *chur*, but with an unfordable channel lying immediately between them and the *chur*. The Regulation is silent as to how the *chur* is to be partitioned between the estates in the event of its being an accession to more than one at once; but no difficulty on this account arises here, because the Lower Appellate Court has found as a fact that, when the annexation to the river-bank took place, the fordability of the channel did not extend beyond the defendant's frontage. Consequently, with the interpretation just given to the Regulation, the *whole chur* there became an accession to the defendant's land and part of his tenure. If this be so, no portion of it would afterwards cease to belong to him, merely by reason of the deep water between it and (say) the plaintiff's estate becoming shallow and fordable. The silting up of the channel could not have the effect of transferring the ownership from the one person to the other. Again, after the *chur* had, by the first occurrence of the fordable channel, become part of the defendants' property, all further accretions to it, if gained by "gradual accession," would also belong to him, even though the result would in the aggregate be a prolongation of the *chur* in front of estates on the river-bank not belonging to the defendant. The Lower Appellate Court appears to us to have determined the case in conformity with these principles, and the special appellants have failed to satisfy us that there is any ground for impeaching his decision in this Court. We, therefore, dismiss this appeal with costs.

The 31st March 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges*.*

Mesne-profits—Limitation—Jurisdiction—Same cause of action—Section 14, Act XIV. of 1859.

Case No. 792 of 1866.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 28th December 1865, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 14th June 1865.

Hurro Chunder Roy Chowdhry and others (Defendants), *Appellants*,

versus

Shoorodhonee Debia (Plaintiff), *Respondent*.

Messrs. J. Cochrane and *R. E. Twidale* and *Baboo Romanath Bose* for Appellants.

* This case was heard before five Judges on the 5th March 1867. Mr. Justice Trevor was the fifth Judge.

Baboos Sreenath Doss and *Nil Monee Sein* for Respondent.

A obtained a decree against *B* for possession of land. On appeal by *B*, that decree was reversed by the late Sudder Court, and *B* applied to the Lower Court for restitution of the land and for mesne-profits. She was put in possession of the land, and the Principal Sudder Ameen ordered an investigation into the amount of the mesne-profits, and eventually directed the same to be paid to her. On appeal, the Sudder Court reversed this last-mentioned order, holding that the Principal Sudder Ameen went beyond his jurisdiction in giving mesne-profits when the decree of the Sudder Court had not awarded mesne-profits, and observing that *B* should have either applied to the Sudder Court for review of its judgment, or should bring a separate suit. The present suit was brought by *B* to recover the mesne-profits.

HELD by *Peacock, C.J.*, and *Kemp* and *Macpherson, JJ.* (*Loch, J., dissenting*), that in the proceedings which *B* took in the former suit to obtain the mesne-profits, she was prosecuting a suit upon the same cause of action within the meaning of Section 14, Act XIV. of 1859.

HELD by *Macpherson* and *Kemp, JJ.* (*Loch, J., concurring, Peacock, C.J., dissenting*), that the order of the Principal Sudder Ameen had not been reversed on the ground of "defect of jurisdiction or other cause" mentioned in the Section 14, and that, therefore, the time during which *B* was engaged in endeavouring to obtain the mesne-profits in the former execution-proceedings could not be deducted, and that the present suit was barred.

This case was referred to a Full Bench on the 29th August 1866, under the following orders, recorded by Peacock, C.J., and Shumbhoonath Pundit, J.:—

Peacock, C.J.—IF this case is barred by limitation, the appeal must be allowed, and the decisions of the Lower Courts reversed. But if the case is not barred by limitation, the decree must be amended by disallowing the amount of costs in respect of the investigation by the Ameen. They were expenses which had been incurred in prosecuting an execution which wholly failed. It is not because expenses have been saved in this case, in consequence of the proceedings having been taken in another case which has failed, that the plaintiff is entitled to recover the costs in this case either as damages or costs.

As regards limitation, I think the point must be reserved for the consideration of a Full Bench, inasmuch as our view of Section 14, Act XIV. of 1859, conflicts with the view taken by Justices Loch and Glover in the case reported in 4 Weekly Reporter, Miscellaneous Appeals, page 18.

In that case a decree passed by a Zillah Judge was sought to be executed in the Principal Sudder Ameen's Court, and the Principal Sudder Ameen struck off the case as beyond his jurisdiction. The learned Judges held that the word "suit" in Section 14 did not apply to the case of an execution, and consequently that the plaintiff, having applied to a wrong Court for the execution of his decree, could not deduct the time occupied in that proceeding in calculating the time within which the application to the right Court for execution ought to have been made. If the construction of the learned Judges be correct, the time occupied by the plaintiff in this case, in endeavouring to recover the mesne-profits in an execution-case, cannot be deducted.

If, on the other hand, the learned Judges are not right, and the proceedings to enforce an execution for the same amount against the person who is now defendant may be treated as a suit, &c., the plaintiff would be entitled to an allowance of that time.

The words of Section 14 are: "In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature, which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which in appeal shall have been amended for any such cause, including the time during which such appeal (if any) has been pending, shall be excluded from such computation."

In this case the lessee, who was the defendant in the former suit, having been ordered to restore the possession of the property taken in execution under a decree which had been reversed, sought by execution of the decree of the Appellate Court to recover the mesne-profits of the land during the time they had been held under the decree which was subsequently reversed. Having failed in that proceeding, she now sues

by action to recover the same mesne-profits, and in determining the question whether the action is barred by limitation we have to decide whether she is entitled to deduct the time occupied in the execution-proceedings. The question is, whether the proceeding in execution is the prosecution of a suit upon the same cause of action against the same defendant within the meaning of Section 14, Act XIV. of 1859. The words "against the same defendant," as my learned brother Shumbhoonath Pundit suggests, mean the person who is now defendant.

Section 20 says: "No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution." The word "suit" does not necessarily mean an action in its ordinary restricted sense; any proceeding to enforce a demand is a suit; the person who defends himself against the enforcement of the demand is a defendant; and the demand is the cause. I, therefore, think that the endeavour to enforce a demand by execution may fairly be considered as the prosecuting a suit for that demand.

To show that the words "enforcing an execution" may be considered a suit within the meaning of Section 14, I would refer to the preamble and the title of the Act. The title is—"An Act to provide for the limitation of suits," and it recites that—"Whereas it is expedient to amend and consolidate the laws relating to the limitation of suits, it is enacted as follows: —"

If, as held by the learned Judges in the case to which I have referred, Section 14 does not include proceedings to enforce by decrees for execution, one would have expected the title to be—"An Act to provide for the limitation of suits and of the enforcement of decrees," and a corresponding recital. Each of the Sections is one of the enactments included in the recital under the words "it is enacted as follows" in the recital.

Suppose Sections 19 to 22 had been the first four Sections of the Act, could it be concluded that a proceeding to enforce a decree was not a prosecuting of a suit for a cause of action within the meaning of Section 14? I think not.

I apprehend, therefore, that Section 14 was intended to apply to those Clauses which related to the enforcement of decrees, and that the words "suit" and "cause of action" may very fairly be read as meaning an application to enforce an execution to recover the same subject-matter which subsequently forms the cause of action against the same person as the defendant in the subsequent suit.

Seeing that these Clauses are introduced into an Act which is simply an Act for the limitation of suits, I think the above construction is a very reasonable one; and that, unless such a construction be put upon the Act, the full object of the Section will not be obtained. But I express no final opinion on the point; and as the view I now take differs from that taken by my learned brother Loch on that point, I shall leave my mind free for a fuller consideration of the question when it comes before a Full Bench; and I have had the advantage of conferring with the other Judges upon the subject, of discussing the matter with them, and of becoming acquainted with their views and arguments.

Pundit, J.—I concur.

The following are judgments of the Full Bench:—

Peacock, C.J.—The present appellant is the defendant in a suit brought against him by the respondent for mesne-profits. In that suit it was held that the mesne-profits amounted to Rupees 8,116, odd annas, and the plaintiff obtained a decree in her favor for the balance due to her. The decision of the Principal Sudder Ameen was affirmed as to the mesne-profits by the Zillah Judge. The defendant appealed specially to this Court, and one ground of appeal is that the suit is barred by limitation. The question whether it is or is not so barred has been referred to a Full Bench.

The facts are clearly stated in the judgment of Mr. Fowle, the Zillah Judge, affirming the judgment of the Principal Sudder Ameen.

It appears that, many years back, the present defendant sued the present plaintiff in the Principal Sudder Ameen's Court to set aside a deed under which she claimed power to adopt a son. In that suit the present defendant, who was then plaintiff, also sought to recover possession of the lands which belonged to the husband, to whom he claimed to be reversionary heir in

the absence of a valid power to the widow to adopt. He obtained a decree setting aside the deed, and also for possession of the lands. He executed that decree in August 1857. The present plaintiff, who was the defendant in that suit, appealed to the Sudder Court, and that Court, on the 13th of May 1858, affirmed the decision so far as it related to the deed, and reversed it as to the award of possession to the then plaintiff, and directed that the property should remain with the present plaintiff, who, as widow in the absence of an adoption, was entitled to the estate during her life as heir of her deceased husband.

After the decree of reversal by the Sudder Court, the plaintiff applied to the Principal Sudder Ameen for restitution of the property from which she had been turned out under the erroneous decree, and in November 1858 she was restored to possession of the lands. This suit is brought to recover the mesne-profits received by the defendant from the plaintiff's estate during the time he was in possession under the erroneous decree, and the question is whether the suit is barred by limitation. At the time when the plaintiff applied to the Principal Sudder Ameen for restitution of the lands, she also applied to the Principal Sudder Ameen to enforce from the defendant restitution of the mesne-profits which he had received whilst he was in possession of her estate by force under the erroneous decree. The Principal Sudder Ameen entertained her application, and appointed an Ameen to ascertain the amount of the mesne-profits for the period in question. The proceedings before the Principal Sudder Ameen were pending from 1858 to the 19th of March 1864, when the amount of mesne-profits having been ascertained, the Principal Sudder Ameen ordered them to be paid to the plaintiff. From that order, an appeal was preferred to the High Court, and on the 6th of September 1864 it was held by a Division Bench, consisting of Mr. Justice Loch and Mr. Justice Seton-Karr, that the Principal Sudder Ameen went beyond his jurisdiction in giving mesne-profits, which the Sudder Court passing the decree of reversal had not provided for, or had purposely omitted.—See I. Weekly Reporter, Miscellaneous cases, page 5. They said: "The decree-holder may be entitled to mesne-profits; but when application was made to the Court below, it should have referred the applicant to the Court making the decree, or to a separate suit. As the Court below has in this matter *acted altogether without jurisdiction*, we quash the decree, and decree the appeal with costs."

The plaintiff applied for a review of that judgment of the Division Bench which was rejected on the 28th January 1865. In February 1865, the plaintiff commenced this suit, and limitation was set up as a bar to its maintenance.

The Lower Courts held that, in calculating the period of limitation, a deduction ought to be made of the period between November 1858 and the 28th January 1865, during which time the plaintiff was occupied in endeavouring to obtain the mesne-profits by proceedings in the Court of the Principal Sudder Ameen, in which she was successful, and also in the appeal which the defendant preferred to this Court against the order of the Principal Sudder Ameen, in which the decision of the Principal Sudder Ameen was reversed.

Six years from the time when the cause of action arose is the period of limitation fixed by law for suits for mesne-profits. The plaintiff was turned out of possession in August 1857. She commenced this suit in February 1865. If the period between November 1858 and the 28th of January 1865, when the review was rejected by the Division Bench, or even of the period between November 1858 and 6th September 1864, when the decree of the Division Bench was passed, be deducted, the suit is in time.

The question as to whether either of those periods ought to be deducted depends upon the construction of Section 14, Act XIV. of 1859; and it has been referred to a Full Bench for decision in consequence of a case which is reported in IV. Weekly Reporter, Miscellaneous Rulings, page 18. At the time when the case was referred to a Full Bench, I gave my reasons for dissenting from that decision, in which it was held that an application for execution was not a suit within the meaning of Section 14.

Section 14 enacts that, "in computing any period of limitation prescribed by the Act, the time during which the claimant shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature, which, *from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall*

"*have passed a decision which on appeal* "*shall have been annulled for any such* "*cause*, including the time during which such "appeal, if any, has been pending, shall be "excluded from such computation."

The points for determination are, *first*, whether the prosecution of the claim for mesne-profits in the miscellaneous proceedings before the Principal Sudder Ameen was the "prosecuting of a suit" against the same defendant; *secondly*, whether the mesne-profits which the plaintiff then claimed, being the same as those for which she is suing in the present action, can be said to be the same cause of action against the same defendant within the meaning of Section 14; and, *thirdly*, whether the Court of the Principal Sudder Ameen was a Court of Judicature, which, from defect of jurisdiction or other cause, was unable to decide upon the claim, or which had passed a decision *which on appeal was annulled on account of any such cause.*

I have already expressed my opinion upon the two first points in the judgment which I pronounced upon referring the case to a Full Bench, and I entertain no doubt that the prosecution in a Court of Judicature or a summary application to enforce the restitution of mesne-profits received under an erroneous decree which has been reversed is the prosecution of a suit within the meaning of the Act; that if the proceedings were for the same demand for which a suit is subsequently brought and against the same person, the prosecution of the claim is a prosecution of a suit for the same cause of action against the same defendant within the meaning of the Section.

The word "suit" does not necessarily mean an action, nor do the words "cause of action" and "defendant" necessarily mean cause upon which an action has been brought, or a person against whom an action has been brought, in the ordinary restricted sense of the words. Any proceeding in a Court of Justice to enforce a demand is a suit; the person who applies to the Court is a suitor for relief; the person who defends himself against the enforcement of the relief sought is a defendant; and the claim, if recoverable, is a cause of action.

The Legislature has clearly shown what it understood by the word "suit," for the Act which provides a period of limitation in the case of proceedings by process of execution to enforce judgments and decrees, as well as periods for the limitation of actions or suits in the ordinary acceptation of the words, is described merely as an "Act to provide for the limitation of suits;" and it recites that "it is expedient to amend the law relating to the limitation of suits." We ought not, in my opinion, to fritter away the law by construing words according to a mere technical sense, instead of giving them a broad meaning, so as to embrace all cases intended by the Legislature to be provided for.

We should do well, in construing the Acts of the Legislature, to take for our guidance the following remarks, which are to be found in Domat's Civil Law, Chapter 11, Section 17, page 88: "Since laws are "general rules, they cannot regulate the "time to come so as to make express pro-"vision against all inconveniences, which "are infinite in number, and so that their "dispositions shall express all the cases that "may possibly happen. It is the duty of a "law-giver to foresee only the most natural "and ordinary events, and to form his dis-"positions in such a manner as that, "without entering into the detail of singular "cases, he may establish rules common to "them all; and next, it is the duty of the "Judges to apply the laws, not only to what "appears to be regulated by their express "dispositions, but to all the cases to which "a just application of them may be made, "and which appear to be comprehended "either within the express sense of the "law, or within the consequences that may "be gathered from it."

The rule in Section 14 is as necessary in regard to miscellaneous proceedings as it is with regard to suits in the strict sense of the word, and I think we shall be giving only due effect to the law, and be putting a proper and reasonable interpretation upon it, by holding that the proceedings before the Principal Sudder Ameen for the recovery of the mesne-profits in execution of a decree of reversal was a suit within the meaning of Section 14 of the Act.

I now proceed to consider whether the Court of the Principal Sudder Ameen was a Court of Judicature, which, from defect of jurisdiction or other cause, was unable to decide upon the claim for mesne-profits, or was a Court which had passed a decision which on appeal was annulled on the ground that, from defect of jurisdiction, it was unable to decide upon it.

But for the decision of the Division Bench of the 6th September 1864, and which is reported in the 1st Weekly Reporter, Miscellaneous cases, page 5, I should have thought it clear that, as a matter of law, when the decree under which the plaintiff was turned out of possession was reversed by the Sudder Court, and it was ordered that the property should remain with the plaintiff, she had a right to be restored to the possession which she had lost, not only of the land, but also of the rents or profits which had been received by the defendant whilst he was in possession of the land by force of the erroneous decree which was reversed. When a decree orders a sum of money to be paid to a plaintiff, he is entitled to have that decree executed, although the decree is silent upon the subject of execution. It is the legal effect of a decree that it is to be executed. It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. A Court of appeal does not necessarily enter into the question whether a decree which it is about to reverse has been executed or not.

The decree of reversal necessarily carries with it the right to restitution of all that has been taken under the erroneous decree in the same manner as an ordinary decree carries with it a right to have it executed, and I should have considered that a decree of reversal necessarily authorized the Lower Court to cause restitution to be made of all that the party against whom the erroneous decree had been enforced had been deprived by reason of its having been enforced.

The Sudder Court ordered that the lands were to remain with the plaintiff. It did not order the lands to be restored to her; but the necessary consequence was that restitution was to be made, and restitution of the lands was made by the Principal Sudder Ameen without any objection. There seems to be no reason why he should not have restored to the plaintiff the rents and profits of which she was deprived during the time she was kept out of possession of her land under the erroneous decree. She applied for restitution of the lands and to have those mesne-profits restored to her, and, whether right or wrong, the Principal Sudder Ameen entertained her application, assumed that he had jurisdiction to order restitution of the mesne-profits, and proceeded to ascertain the amount, and awarded it to her. These proceedings, which were commenced shortly after the reversal of the erroneous judgment in 1857, unfortunately lasted up to 1864, when the plaintiff obtained an order for the amount of the mesne-profits of which she had been deprived. This order was reversed by a Division Bench of this Court in September 1864. The proceedings, therefore, lasted between seven or eight years without any apparent neglect on the part of the plaintiff. In giving judgment, the Division Bench, consisting of Mr. Justice Loch and Mr. Justice Seton-Karr, said: "The decree (meaning the decree of re-"versal) certainly gave Sooradhonee (*i. e.*, the plaintiff) no mesne-profits. It merely "directed that she should be retained in pos-"session. If she wished for mesne-profits "during the period she was out of possession, "she should have applied to the Court pass-"ing the decree to give an order to that effect. "But the Lower Court had no *authority* to "import into the decree what was not there. "*It went beyond its jurisdiction* in giving "mesne-profits which the Sudder Court, "passing the decree, had not provided for, or "had purposely omitted. The decree-holder "may be entitled to recover mesne-profits. "But when application for that purpose was "made to the Court below, it should have re-"ferred the applicant to the Court making "the decree, *or to a separate suit;* and we "do not think that, though the opinion of "the Lower Court was expressed so far back "as 1858, and no appeal was then preferred, "we are prevented from taking up the point "in the present appeal, which is from an order "awarding the amount of those mesne-profits "ascertained by local investigation. *As the "Court below has in this matter acted alto-"gether without jurisdiction, we quash the "order.*" The decree of the Division Bench, whether right or wrong, and we must assume it to be right, expressly reversed the decision of the Principal Sudder Ameen upon the ground that he had no jurisdiction.

It would seem that the Judges considered that the Sudder Court which reversed the decree was the proper Court to determine whether the plaintiff was entitled to mesne-profits or not. They, however, said that the Principal Sudder Ameen should have referred the applicant to the Court which made the decree, *or to a separate suit.*

In England, if a judgment is reversed for error, the person against whom the judgment was given is entitled to a writ of restitution.

It is not a mere matter of discretion with the Court which reverses a decree whether the party against whom it was given is or is not to be restored to what he has been deprived of under it.

There can be no doubt that, in point of justice, the plaintiff was entitled to have the rents which the defendant had collected from her land whilst he was in possession of it under the erroneous decree refunded. This case is not like the case No. 249 of 1865, reported in VI. Weekly Reporter, Full Bench cases, in which it was held that it was discretionary with the Court which passed the decree to award interest or not. In that case, it was very properly held that the Court executing the decree could not award interest when the decree was silent as to interest.

In the case of Rajkissen Singh, petitioner, Full Bench Decision, VI. Weekly Reporter 111, Miscellaneous Rulings, the Court said, with reference to a decree which had been reversed: "The plaintiffs must be restored without security to all that was taken from them in execution of the decree of the Lower Court." The plaintiffs ought to be put in the same position as they would have been if the decree which has been reversed had never been given.

The plaintiff was deprived for nearly a year-and-a-half of the rents and profits of her land, not on account of any fault of her own, but under the execution of an erroneous decree. She has not been guilty of laches, nor has she been sleeping over her rights; but she seems to have been a victim to erroneous decisions of the Courts of Justice. Having got the erroneous decree reversed, she has been continuously, but unfortunately without effect, prosecuting her claim for nearly ten years; and now, after she has been referred for redress to a civil action, and has prosecuted it with success, and obtained a decree in her favor, which has been upheld by the Zillah Judge on appeal, she is to be told upon special appeal to this Court that she is barred by limitation.

It is clear that in the miscellaneous proceeding before the Principal Sudder Ameen in 1858, the plaintiff, upon the reversal by the Sudder Court of the decree against her, applied for the same mesne-profits as those which she seeks to recover in this action. The Principal Sudder Ameen awarded them to her; but his decision was reversed upon the ground that he had no power to award them. It is impossible, in my opinion, to say that the decision of the Principal Sudder Ameen was not reversed on the ground that, from defect of jurisdiction or other cause, he was unable to decide upon the plaintiff's claim to mesne-profits. I am, therefore, clearly of opinion that the time during which the plaintiff was prosecuting her claim for these mesne-profits by proceedings before the Principal Sudder Ameen and in the High Court ought to be deducted in calculating the period of limitation, and that the suit is not barred by limitation.

To come to a different conclusion would, I think, bring discredit upon the law and upon the administration of justice.

I wrote my judgment before the judgments proposed to be delivered by my Hon'ble colleagues were written, and I may say that Mr. Justice Trevor concurred in my opinion that the plaintiff's suit is not barred. As he has retired, his opinion has not the effect of a judgment, and, as there are three Judges of a different opinion, it does not make any difference.

Having fully considered the arguments of my Hon'ble colleagues, I still retain the opinion I have expressed.

My Hon'ble colleagues, Mr. Justice Kemp and Mr. Justice Macpherson, agree with me in thinking that, in the proceeding which the respondent took in the former suit to obtain the mesne-profits, she was engaged in prosecuting a suit upon the same cause of action within the meaning of Section 14, Act XIV. of 1859. They admit that, although it is difficult to understand how the proceeding before the Principal Sudder Ameen could have been protracted from 1858 to 1864, no case of want of *bona fides* or of due diligence in the prosecution of the former proceedings on the part of the respondent has been established.

Their judgment is founded upon this, that the decision of the Principal Sudder Ameen awarding mesne-profits to the plaintiff was reversed, not because he had no jurisdiction to hear the proceedings or suit then before him, but because he had no authority to import into the decree of the Sudder Court that which was not there. That is in effect deciding that his decision was reversed because he had no jurisdiction to go beyond the decree of the Sudder Court, and to exercise his own independent judgment as to whether the plaintiff was or was not entitled to recover mesne-profits. The decision of

the Principal Sudder Ameen was reversed, not upon the ground that the plaintiff was not entitled to mesne-profits, but upon the ground that the Principal Sudder Ameen was not the proper Court to decide as to her right to mesne-profits, and that he ought to have referred her to the Sudder Court or to a new action.

The proceeding before the Principal Sudder Ameen is admitted by Mr. Justice Macpherson to have been a suit within the meaning of Section 14, Act XIV. of 1859, and the cause of the plaintiff's application to the Principal Sudder Ameen is admitted to be the same as that for which the present action was instituted. If the plaintiff is not entitled to recover those mesne-profits in this action, she will fail on the merits. For the purpose of considering the question of limitation, it must be assumed that she is entitled to recover them. The Principal Sudder Ameen held that she was entitled to them, and awarded them to her. His decision was reversed by a Division Bench of the High Court, whether right or wrong, upon the ground that he had no power to deal with the plaintiff's claim.

The plaintiff's claim to restitution before the Principal Sudder Ameen was not upon the ground that the mesne-profits had been awarded to her by the Sudder Court, but upon the ground that, upon the reversal of the erroneous decree, she was entitled to the mesne-profits which the defendant had received whilst he was in possession of her lands under that decree.

The Principal Sudder Ameen thought that he had power to decide upon the plaintiff's claim, and he did so by awarding the amount to her. The Division Bench thought that he had no power to decide her claim, and reversed his decision upon that ground. His decision upon the claim was, therefore, annulled upon the ground that, from defect of jurisdiction or some other cause, he was legally unable to decide upon it.

If the decision of the Principal Sudder Ameen was reversed because he had not the power to award the mesne-profits to the plaintiff—a power which, it was admitted, the Sudder Court, or a Court in which a new suit might be instituted, would have had—it must have been, because he had not the power to determine whether the plaintiff ought to have them or not, or in other words, because he had not the power, for want of jurisdiction or for some other cause, to decide the plaintiff's claim. I know of no difference between not having power by law to determine or to decide upon a question, and being unable for want of jurisdiction to determine or to decide upon it. Mr. Justice Macpherson, with whom Mr. Justice Kemp concurs, says: "The material point "was that, though the Lower Court had "jurisdiction to deal with the application, "the respondent who applied could not "show her right to the mesne-profits in "the absence of a declaration of that right "by the Sudder Court." I am at a loss to see how, if she could not do so in the miscellaneous proceeding, she could do so in a new action.

But, be that as it may, that was not the ruling of the Division Bench; they said she might have a right to the mesne-profits, and that the Principal Sudder Ameen ought to have referred her to the Court which passed the decree of reversal, or to a separate suit. What was that but saying that the Principal Sudder Ameen had not the same power to determine as to the plaintiff's right as the Sudder Court or the Court in which she might bring a separate suit would have?

We are not sitting on appeal from the Division Bench. We are not to say whether their decision was right or wrong. We are not to decide whether the Principal Sudder Ameen had jurisdiction or not. We are merely to ascertain upon what ground the Division Bench annulled his decision. If they had annulled it upon the ground that the plaintiff was not entitled to the mesne-profits of which she had been deprived by the defendant under the erroneous decree, that would have been a different thing. But they did not do so; they annulled the decision expressly upon the ground that the Principal Sudder Ameen acted without jurisdiction.

My Hon'ble colleague, Mr. Justice Loch, in his judgment says: "In saying, as we "did at the close of the judgment, that the "Lower Court acted altogether without juris-"diction, we meant only that it had exceeded "its authority, not that it had no jurisdic-"tion to try whether the plaintiff was or "was not entitled to recover mesne-profits." But how could the plaintiff know what they meant unless they meant what they said? They held that the Principal Sudder Ameen exceeded his authority in deciding that the plaintiff was entitled to recover mesne-profits, and they reversed his decision upon that

ground. It appears to me that they annulled his decision upon the ground that he was unable, from want of jurisdiction or other cause, to decide upon the plaintiff's claim. They would not have reversed the decision of the Principal Sudder Ameen if he had rejected the plaintiff's claim, and stated that, as the decree of reversal was silent upon the subject of the plaintiff's right to mesne-profits, he was unable to decide upon her claim. If he had so decided, he would have held that, for want of jurisdiction or other cause, he was unable to decide upon it. His decision was reversed, because he did decide upon it.

It seems to me to have been the object of the Legislature to prevent suitors from being barred by limitation by reckoning against them time fruitlessly, but in good faith, occupied in litigation in a Court which, for want of jurisdiction or other cause, has no power to decide upon their claims; or whose decision is annulled upon appeal for such cause. The time is to be deducted, not only when, from defect of jurisdiction or other cause, the Court in which the claim is preferred is unable to decide upon it, but also when the Court, believing that it is able to decide upon it, passes a decision, and that decision is annulled upon appeal upon the ground that it was not able to decide upon it, and was, therefore, wrong in so doing. It matters not for this purpose whether the Appellate Court is right or wrong; if wrong, it would be just as unjust to reckon the time against the suitor as it would be if the Appellate Court was right. Parties are not to be barred by limitation by reckoning against them time fruitlessly occupied whilst they are being handed about from Court to Court by reason of doubts or erroneous decisions upon questions of jurisdiction or of the powers of the Courts to entertain claims that are brought before them for decision.

Mr. Justice Macpherson says (and Mr. Justice Kemp concurs with him) that he fails to see that this case is one of any special hardship, so far as the respondent is concerned; that her remedy by way of review of the Sudder Court's decision was suggested to her, but she did not avail herself of it.

I cannot concur in this remark. At the time when the Division Bench suggested a review, they also suggested the institution of a fresh suit as an alternative remedy. According to the view of the majority of the Judges, she was barred by limitation at the time when the suggestion was made. The plaintiff availed herself of one of the two suggestions, and commenced a fresh suit almost immediately.

If she had adopted the other suggestion, and had applied to the High Court to review the judgment of the late Sudder Court, she would probably have been told that it was matter of discretion whether the application for review should be admitted after the regular time, and that she came too late.

The judgment of the Principal Sudder Ameen was in fact reversed upon the ground that he had acted without jurisdiction; and the plaintiff has acted upon the faith of what the Judges said, and she brought a new suit according to the suggestion of the Court. How could she or her advisers have possibly imagined that, when she should seek to have the time deducted which she had spent fruitlessly in a Court whose decision had been expressly reversed because it had acted altogether without jurisdiction, she would be told that that was not the ground of reversal? In my opinion, a reversal of the decision of the Principal Sudder Ameen expressed to be upon the ground of want of jurisdiction was a reversal within the meaning of Section 14 of the Limitation Act, whether the Principal Sudder Ameen had jurisdiction or not. Even if it can be said that the decision was not reversed upon the ground of want of jurisdiction, it was clearly annulled upon the ground that the Principal Sudder Ameen for some other cause was unable to decide upon the plaintiff's claim.

This case, like every other, must be determined according to law, and not with reference to hardship. Whether the case is one of special hardship or not, it is not for me to say; but I must say that this lady has good grounds to complain either of the uncertainty of the law, or of the manner in which it has been administered in her case.

She has been deprived of a large sum of money in consequence of an erroneous decree which has been reversed. She has been endeavouring continuously for the last ten years to recover that of which she has been so deprived. She has had three decrees in her favor. No laches are imputed to her. One decree has been reversed with costs, and now the other two are to be reversed, and she is to be turned round upon the

ground that she is barred by limitation.

Since this judgment was delivered, I have been referred to the case of Doorga Pershad Roy Chowdhry *versus* Tara Pershad Roy Chowdhry, 8 Moore's Indian Appeals, page 310 (same case, Sutherland's Privy Council cases 427).* The case is somewhat analogous. The Privy Council hold that, under the old Law of Limitation, the time during which the plaintiff was fruitlessly endeavouring to obtain mesne-profits in execution of an erroneous order, which was subsequently set aside, was not to be reckoned against him in calculating limitation.

Loch, J.—It appears to me that the only safe course for a Court executing a decree to take is to execute it strictly, without importing into it anything that is not distinctly comprised in it. There can be no doubt that the plaintiff in this case, when she recovered possession of the property from which she had been evicted under the erroneous decree of the Lower Court, was entitled to the mesne-profits for the period during which she was out of possession; but the decree of the Sudder Court was silent on the subject, and consequently I hold that the Lower Court, in executing that decree, should have confined itself to what that decree gave the plaintiff, *viz*, possession. If the plaintiff required mesne-profits for the period of dispossession, she had only to ask the Court which passed the decision to supply the omission, or she might have brought a suit to recover the amount. Either course was open to her, and when the order of the Principal Sudder Ameen awarding mesne-profits was reversed by a Division Bench of this Court in September 1864, she had then plenty of time to make application to the Court.

In the Shooshung case, reported at II. Weekly Reporter, page 80, Civil Rulings, the Division Bench reversed the order of the Lower Court, which had been executed before the appeal was heard, and directed that the appellant should be restored to possession, and recover from the respondent all sums realized by him during his possession under the erroneous decree, with interest. Such an order should have been made in the plaintiff's case, and, till it were made, the Principal Sudder Ameen should have confined himself to giving back possession as decreed to the plaintiff.

* Also see 3 W. R., Privy Council cases, p. 11.

With regard to the word "suits," as used in Section 14 of Act XIV. of 1859, if that and other Sections, such as 11 and 12, had been placed after Section 23, there would, I think, have been little doubt as to the meaning of the word, and that the provisions of the Section applied equally to all the previous Sections. Placed as it is in the middle of the Act, it appears to me to refer only to what has gone before, and to relate only to suits previous to judgment. Section 18 appears to me to draw a line between the two parts of the Act. Suits are not mentioned again in the remainder of the Act, and the words of that Section certainly apply to what has gone before, and not to what follows.

It may be said that proceedings in execution are only a continuance of the suit; that they are merely the necessary steps taken to secure the benefit of the suit which has been decreed, and, as such, are but the subsequent parts to make it complete. While I admit this, I must at the same time assert that in the Courts of this country, not established by Royal Charter, the suit has always been considered to come to an end with the judgment, and applications for execution were looked upon as separate proceedings; and, looking at the Act, it appears to me to be drawn up with a recognition of this distinction between the suit itself and the proceedings which followed, and related to the execution of the decree passed in the suit. The judgment of the late Sudder Court, dated 17th December 1860, reported at page 401, 2nd Volume, Sudder Dewanny Adawlut Reports, shows the distinction which used to be drawn between suits and proceedings taken in execution. I do not think that any argument in favor of the view taken of the word "suits" in the order of reference can be gathered from the title of this law, when it is remembered that, up to the passing of Act XIV. of 1859, we had no Statute Law prescribing the time within which execution of decrees should be taken out, and that "limitation," when it is used in the Regulations, applies to suits in which no judgment had been passed, and not to proceedings taken after judgment has been delivered. Wherever the word "suits" is made use of in Act XIV. of 1859, it means cases in which no judgment has been pronounced, and it appears to me that the word was not intended by the Legislature to be applied to proceedings to enforce execution of a decree.

Holding the opinion I have expressed above, it is hardly necessary for me to say more, but as I was one of the Judges who passed the order of September 1864, I think it proper to explain the meaning of the words "want of jurisdiction" used in that judgment, and which may be gathered from the earlier part of that judgment. A Court may have no jurisdiction at all, or, having jurisdiction, it may exceed its authority, and thus be said to act without or beyond its jurisdiction. The words used were—"But "the Lower Court had no authority to im-"port into the decree what was not there. "It went *beyond* its jurisdiction in giving "mesne-profits which the Sudder Court "passing the decree had not provided for, "or had purposely omitted." In saying as we do at the close of the judgment that the Lower Court acted "altogether without jurisdiction," we meant only that it had exceeded its authority, not that it had no jurisdiction to determine whether plaintiff was or was not entitled to recover mesne-profits. The Full Bench, in its judgment of the 31st August 1866, reported at VI. Weekly Reporter, page 77, in giving an explanation of the words "exercised a jurisdiction not vested in it by law," used in Section 35, Act XXIII. of 1861, held that these words comprised, not only cases in which the Subordinate Appellate Court had no jurisdiction at all, but also cases in which such Court having jurisdiction exceeds its jurisdiction. In this latter sense, I consider that the Principal Sudder Ameen acted without jurisdiction in this case.

Even if I concurred in the opinion expressed by my learned colleagues, that the proceedings taken in execution of a decree were a suit within the meaning and intention of the Act XIV. of 1859, I should not be prepared to allow the plaintiff the benefit of the time during which she was engaged in carrying out the execution proceedings in the Principal Sudder Ameen's Court, unless the words "defect of jurisdiction or other cause," mentioned in Section 14 of that Act, can be held to apply to cases in which a Court has acted in excess of its jurisdiction.

Macpherson, J. (Kemp, J., concurring).—I concur with the Chief Justice in the opinion, and in the reasons given for the opinion, that in the proceedings which the respondent took in the former suit to obtain *wasilat*, she was (within the meaning of Section 14 of Act XIV. of 1859) "engaged in prosecuting a suit upon the same cause of action." But I regret that I differ in the conclusions at which I have arrived upon the other questions which arise in this reference.

Section 14 requires that the prosecution of the suit shall have been carried on *bonâ fide* and with due diligence. I cannot say that want of *bona fides* or due diligence in the former proceedings has been proved. Nevertheless, it is difficult to understand how the proceedings before the Principal Sudder Ameen, which had for their object merely the ascertainment of the mesne-profits of less than two years, could have been protracted from 1858 to 1864, if any reasonable diligence had, in fact, been exercised by the respondent.

Then, was the decision of the Principal Sudder Ameen awarding *wasilat* annulled by the High Court (on September 6th, 1864) from "defect of jurisdiction" or "for any such cause?" In disposing of this point, I shall express no opinion as to whether the Division Court was right or not in reversing the order of the Principal Sudder Ameen, for that question does not directly arise on the present reference.

It seems to me that the order of the Principal Sudder Ameen was not annulled for a defect of "jurisdiction," *properly so called*, or "for any such cause." No doubt, in the judgment of the 6th September 1864, the word "jurisdiction" is used. But it was not used there in its proper sense, nor in the sense in which it is used in Section 14 of Act XIV. of 1859. The Court said*: "But the "Lower Court had "no authority to "import into the decree what was not there. "It went beyond its jurisdiction in giving "mesne-profits, which the Sudder Court "passing the decree had not provided for, "or had purposely omitted. The decree-"holder may be entitled to recover mesne-"profits. But when application for that "purpose was made to the Court below, it "should have referred the applicant to the "Court making the decree, or to a separate "suit, and we do not think that, though the "opinion of the Lower Court was expressed "so far back as 1858, and no appeal was "then preferred, we are prevented from "taking up the point in the present appeal, "which is from an order awarding the "amount of those mesne-profits, ascertained

* I. Weekly Reporter, Miscellaneous, 5.

"by local investigation. As the Court "below has, in this matter, acted altogether "without jurisdiction, we quash the order, "and decree the appeal with costs."

The sense in which the term "jurisdiction" was intended to be used is, I think, clear, and is to be found in the passage in which it is said that "the Lower Court had "no authority to import into the decree "what was not there." It cannot be said that the Lower Court had not jurisdiction, in the ordinary sense of the term, to deal with this matter. The original suit was one in which the Court admittedly had jurisdiction, and any application made in the course of the suit, whether with a view to execution or otherwise, was made to a Court having jurisdiction. It is one thing to say that a Court has not the power to make, or cannot properly make, a particular order in a suit, and quite another thing to say that the Court has not jurisdiction to entertain the suit, or the particular application which it ought not to grant. In disposing of the question properly before it and cognizable by it—as to how effect was to be given to the decree of the Sudder Court—the Lower Court gave to the respondent more than it should (in the opinion of the High Court) have given; and so far as it gave too much, its order was reversed. The Lower Court might, beyond all doubt (even according to the ruling of the Division Court), have made the order which it passed, if the Sudder Court had declared the respondent's right to the *wasilat* which she sought. It was not because it had no jurisdiction, but because the Sudder Court had not declared the right, that the Lower Court was deemed to be wrong in giving the mesne-profits. There was, in fact, no want of jurisdiction, nor anything of the kind; and I think that the learned Judges, in their judgment of the 6th of September 1864, said no more than that the Lower Court ought not to have acted as it did without a distinct declaration by the Sudder Court of the respondent's right to the *wasilat*. The material point was that, though the Lower Court had jurisdiction to deal with the application, the respondent, who applied, could not show her right to the mesne-profits in the absence of a declaration of that right by the Sudder Court.

I think that the appellant's contention is right, and the respondent's suit is barred by limitation.

The law of limitation often operates with much hardship upon individuals. But I fail to see that the present case is one of any special hardship, so far as the respondent is concerned. Her remedy by way of review of the Sudder Court's decision was suggested to her, but she did not avail herself of it, which, with reference to the provisions of Act XIV. of 1859, if for no other reason, she certainly ought to have done.

The 31st March 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, F. B. Kemp, and A. G. Macpherson, *Judges.**

Hindoo Law—Maintenance—Son's widow—Father-in-law.

Case No. 308 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 25th June 1866.

Kasheenath Doss and others (Defendants), *Appellants*,

versus

Khettur Monee Dossee (Plaintiff), *Respondent.*

Baboo Nil Monee Sein for Appellants.

Baboos Sreenath Doss and *Romesh Chunder Mitter* for Respondent.

HELD *by Peacock, C.J., and Macpherson, J.* (reversing the decree of the Lower Court), that, according to the law as current in Lower Bengal, the widow of a son who has died leaving nothing, cannot compel her deceased husband's father to make her a pecuniary allowance by way of maintenance if she refuses to live with him as a member of his family.

HELD *by Loch and Kemp, JJ.*—Contra.

This case was referred to the Full Bench by Norman and Seton-Karr, JJ., under the following remarks:—

Norman, J.—WE are disposed to think that the widow of a Hindoo refusing to

* Heard before five Judges (Mr. Justice Trevor being the fifth Judge) on the 22nd and 23rd March 1867.

live in the house of her father-in-law cannot maintain any suit against him for a pecuniary allowance by way of maintenance. The case of Ruggomonee Dossee *versus* Shib Chunder Mullick, 2 Hyde's Reports, page 103, in which this point was decided, is, however, at variance with two decisions of this Court (Sudder Dewanny Adawlut Report, 1852, page 796), and a case lately decided by Mr. Justice Kemp, and perhaps one or two other cases. We think the point should be argued before a Full Bench.

Seton-Karr, J.—I concur in sending this case to a Full Bench, as there appear to be conflicting judgments. I reserve my opinion.

The judgments of the Full Bench were delivered as follow:—

Loch, J.—The plaintiff in this case, a Hindoo widow, sued to obtain maintenance from the defendant, her father-in-law. Her statement is, that she was married to the youngest son of the defendant in 1260; that she received on that occasion sundry valuable ornaments from her father-in-law; that her husband died in 13th Assin 1266, and from that time she has been living with her own parents, having been obliged to leave the house of the defendant, her father-in-law, on account of the ill-usage she received. She now sues to recover the value of her bridal ornaments and arrears of maintenance at the rate of Rupees 25 a month.

The defendant admits that the marriage took place, but denies that plaintiff ever lived in his house. He says that his son was about five years old when the marriage took place, and since then plaintiff had visited his house only on two occasions: the day of his son's death, and again the day of the *Sradh*. He adds "that neither the Hindoo Shasters, nor the prevalent practice of the country, would warrant the Court in entertaining the claim of the plaintiff, especially as the plaintiff has, without the consent of the defendant, and in disregard of his orders, neglected to render him the service due to his old age, and chosen to take up her abode under another roof, he (defendant) is by no means bound to make her any cash payment for her maintenance."

The case has been referred for the decision of a Full Bench under the following order (*Norman and Seton-Karr, JJ.*), dated 11th March 1867: "We are disposed to "think that the widow of a Hindoo refusing "to live in the house of her father-in-law "cannot maintain any suit against him for "a pecuniary allowance by way of mainte-"nance. The case of Ruggomonee Dossee "*versus* Shib Chunder Mullick, 2 Hyde's "Reports, page 103, in which this point was "decided, is, however, at variance with two "decisions of this Court: Sudder Dewanny "Adawlut Reports, 1852, page 796, and a case "lately decided by Mr. Justice Kemp, and "perhaps one or two other cases. We think "the point should be argued before a Full "Bench." Mr. Justice Seton-Karr concurred in sending the case up to a Full Bench, reserving his opinion.

It has been contended before us that, under the Hindoo Law, a person is not bound to support his son's widow; that, though there be a moral obligation upon him to do so, it is not a right which can be enforced by law; that, even if the Court hold that the widow has a right to maintenance, the plaintiff is not entitled to recover it, because she does not reside with her husband's family, but lives with her own father.

Looking at the current of decisions passed since 1820, I think it now too late for the defendant to contend that the widow of a son living with her deceased husband's family is not entitled to maintenance, her right to which she may enforce by suit in Court. The decision reported in 2 Hyde's Reports, page 103, has been quoted in support of the allegation that maintenance to the son's widow is only a moral obligation on the father-in-law, not enforcible by law: and we find the learned Judge in that case lays down that, "according to Hindoo Law, "probably, the plaintiff should be maintained "in the house of her father-in-law who "ought to find her in food and raiment. "But when the father and the son are not "joint in estate, the maintenance of the son's "widow appears to be a mere moral duty "on her father-in-law, to the performance "of which he is not compellable by law. "The absolute power of a father as master "and head of the family over property ac-"quired by himself, his right to distribute "it at his pleasure, and to keep and reserve "what he thinks fit for himself, is asserted "in the most distinct manner in numerous "texts; Colebrooke's Digest, Book V., Chapter "1, Section 2, pp. 23 to 26, and Chapter "2, p. 88.

"In p. 90, the Commentator, Juggun-"natha, treats the maintenance of a family "out of a man's own wealth as pre-"ceptive merely, and says, at p. 88, that

"a father slighting such precepts commits "a moral offence, but incurs no civil penalty. "A son's widow cannot have larger legal "rights against her father-in-law than her "husband would have had if alive, and such "husband could not have compelled his "father to give him any share of his pro-"perty."

The words quoted by the learned Judge from p. 88 of Colebrooke's Digest, that "a "father slighting such precepts commits a "moral offence, but incurs no civil penalty," relate, as will be seen by reference to the passage itself, to an improper partition of his property by a father, and not to the maintenance of his family. The passage runs thus: "A father has dominion over pro-"perty acquired by himself; should he give "no share to any one son, though guilty of "no offence, and gives a share to one guilty "of offences, who shall punish him? It "cannot be affirmed that, under the authority "of the texts cited from *Catayana* and *Bun-"dhayana*, the King may punish such a father. "The law propounds the moral offence com-"mitted by a father slighting such precepts, "but ordains no fine, like the giver of gold "to an improper object, thereby committing "an offence, but incurring no civil penalty."

The passage in Colebrooke's Digest, Volume II., runs thus: "For example, equal parti-"tion may be considered as preceptive, like "the maintenance of the family out of a "man's own wealth. Thus, the support of "a married daughter residing in her father's "house (for so the term is explained by "*Vijyaneshwara*) is approved by *Yajnawalky*, "(77). although she has no title to the "estate, and there is no difference, so far as "proof of property is concerned, between the "enjoyment of a maintenance and the receipt "of a share." The duty of maintaining one's family is, however, clearly laid down in the *Dyabhaga*, page 29, Section XXIII, in these words: "The maintenance of the family "is an indispensable obligation as Menu "positively declares."

Sir Thomas Strange, in his work on Hindoo Law, Volume I., page 99, says: "Mainte-"nance by a man of his dependants is with the "Hindoos a primary duty. They hold that "he must be just before he is generous, his "charity beginning at home, and that even "sacrifice is mockery, if to the injury of "those whom he is bound to maintain. Nor "of his duty in this respect are his children "the objects, co-extensive as it is with his "family, whatever be its composition, as con-"sisting of other relations and connections, "including (it may be) illegitimate off-"spring. It extends, according to Menu "and *Yajnawalky*, to the outcaste, if not "to the adulterous wife; nor to mention such "as are excluded from the inheritance, whe-"ther through their fault or their misfor-"tune; all being entitled to be maintained "with food and raiment."

At page 160, Colebrooke's Digest, Volume IV., Cal. Ed., p. 399—page 322, Volume II., Stokes's Edition, we have a quotation from *Vrihaspati*, laying down the duties of a widow, the last clause of which sets forth: "With food consecrated to the gods and the manes let her honor paternal uncles, spiritual parents, daughter's sons, the off-spring of her husband's sister and his ma-ternal uncles, learned men, unprotected per-sons, guests, and *females of the family*."

The comment on the word females of the family is "*the widows of her husband's sons* and the rest." Daughters of her hus-band's sisters, if destitute of protectors, are included under the term "unprotected per-sons." The support of them is only neces-sary if they be so circumstanced.

Further on the commentator observes: "Consequently she whose husband is deceas-"ed should support, in proportion to her "ability, the same persons, and do the same "acts in the same manner in which her hus-"band, when living, supported those persons, "and did those acts."

It is clear, therefore, from the above com-ment, that the widow, if she have means, is bound to support the widows of her hus-band's sons, because he was bound to do so, they being members of his family.

The duty of providing maintenance for a son's widow rests, it appears to me, on the position which a Hindoo female takes upon marriage. Though not so entirely separated from her own family as to be debarred from inheriting paternal property, when there is no maiden sister, she is in all other respects considered a member of the family into which she has married, and no longer a member of her own family. And on the death of her husband she is bound by law to remain in her husband's family under the protection of his kindred, and must, under such circumstances, if there be ancestral pro-perty, be supported by them. We find in Section 2, p. 3, of the *Dycrama Sungraha*

the following passage from *Catayana:* "Let "the childless widow, preserving unsullied "the bed of her lord, and abiding with her "venerable protector, enjoy with moderation "the property until her death." And in the 4th para. is a comment on the words "venerable protector," that is, "having settled with her father-in-law in her husband's family, let her, so long as she lives, enjoy her husband's estate."

This passage clearly shows that the widow is to live with her husband's family after his death. At page 599 of Stokes's edition of Colebrooke's Digest, Volume II., page 481, is the following passage from *Catayana:* "If "suitable food, apparel, and habitation cease to "be provided for a wife, she may by force take "her own property and a just allotment for "such a provision, or she may, if he die, take "it from his heir." And the comment on this at page 600 is: "But others consider this "text as relating to widows: consequently, if "brother-in-law and the rest do not give suit-"able food and apparel to the widow of their "brother, she may claim her just allotment "from her husband's brother." At page 111, Colebrooke's Digest, Stokes's edition, Volume II., page 13, is the following text from *Nareda:* "After the death of her husband, the "nearest kinsman on his side has authority "over a woman who has no son: in regard to "the expenditure of wealth, the government "of herself, and her maintenance, he has full "dominion. If the husband's family be "extinct, or the kinsman be unmanly, or "destitute of means to support her, or if there "be no *sapindas*, a kinsman on the father's "side shall have authority over the woman." And the comment on this passage is: "Kins-"man on the husband's side, of his father's "or mother's race in the order of proximity. "Maintenance means of subsistence. Thus, "without his consent, she may not give away "anything to any person, nor indulge her-"self in matters of shape, taste, smell, or "the like, and if the means of subsistence be "wanting, he must provide her maintenance. "But if the kinsman be unmanly (deficient "in manly capacity to discriminate right "from wrong) or destitute of means to "support her; if there be no such person "able to provide the means of subsistence; "or if there be no *sapindas*, then anyhow, "determining from her own judgment on "the means of preserving life and duty, let "her announce her affinity in this mode, "'I am the wife of such a man's uncle,' and "if that be ineffectual, let her revert to her "father's kindred, or, in failure of these, re-"course may be had even to her mother's "kindred." At p. 152, Colebrooke's Digest, Stokes's edition, Volume II., we have the following text, 122, and comment: "She "who is deprived of her husband should not "reside apart from her father, mother, son, "or brother, from her husband's father, or "mother, or from her maternal uncles, else "she becomes infamous." The comment upon this is: "She also whose hus-"band resides abroad should, if possible, "take the protection of these persons, if "she be also deprived of her sons and "the rest. *She must not recur to her "father's family while there are kins-"men of her lord;* for this text is referrible "to women whose husbands have deceased. "Yet it may be also admitted under this "head (women whose husbands are ab-"sent); for she whose husband resides abroad "has no companion, and it is necessary "that her conduct should be guarded. But "the person who shall have authority "over a widow is appointed by law. The "person who shall have authority over "the wife of a man residing abroad should, "in the first instance, be selected by her "lord; in failure of that, he is appointed by "the law. This distinction should be "maintained."

The passages above quoted from the text-writers on Hindoo Law and their Commentators appear sufficient to establish this fact, that the maintenance of a Hindoo widow is not merely a moral obligation, but a charge on inheritance. Under the Hindoo Law, inheritance carries with it the obligation of maintaining the dependent members of the family who cannot take a share, and, in this category, it appears to me, the son's widow, as well as the widow of the proprietor, falls.

Baboo Shamachurn, at page 370, *Vyavashta Durpana*, 2nd edition, enumerates the son's widow among the dependent females, though he does not quote any text directly in support of it:* but at page 122, Colebrooke's Digest, Stokes's edition, Volume II., Verse 39, para. 2, we have a passage which, with the comment, explains who are the female relations of a family entitled to maintenance. "Where female relations are made miser-"able, the family of him who makes them so "very soon wholly perishes." The comment

* But see page 522 and following, Colebrooke's Digest, Stokes's edition, Volume II., quoted previously.

is, "*female relations,*" the "women of a family as sister, son's or nephew's wife, and the rest," "are made *miserable,*" are made wretched from the want of maintenance, or the like; that this obligation is binding on the members of her husband's family under whose protection and authority a widow should live under ordinary circumstances. Some of the following precedents from Sir W. Macnaghten's Hindoo Law, and the judgment of the late Sudder Dewanny Adawlut, more immediately bear on the present case, showing the rights of a son's widow to be supported by her husband's father and his family, and to what extent and in what shape maintenance is to be given to her. I exclude all cases coming from that part of the country where the Mitakshara Law prevails; for, under that law, a son, as soon as he is born, has a share in the ancestral estate with his father, and by virtue of that right his widow is entitled to maintenance when the family is joint, and she could, without doubt, enforce her right by law (Select Reports, Sudder Dewanny Adawlut, Volume III., page 223).

A case is reported at pp. 104 and 105, Chapter "Son's Widow," Macnaghten's Hindoo Law, Volume II., case 2, in which it was held that the brother's sons having succeeded to their uncle's estate were bound to provide proper maintenance for the widow of his son who had died before his father. In case 4 of the same Volume, page 106, where the son *B* died before his father, and, on the death of the father, the property devolved on his other sons *C* and *D*, it was held that the widow of *B*, though she could not succeed to a share in the property, was entitled to receive maintenance. Case 8 in the Chapter on "Maintenance" is a case in point, and there it is ruled that, though the widow of a person who had pre-deceased his father was not entitled to claim any share of the ancestral property, or of the acquisitions made by the brothers of her husband, yet she must be maintained by the heirs and representatives of her father-in-law. The inference to be drawn from this case is clearly this, that, so long as her father-in-law was *alive*, he was bound to maintain the widow of his son—a duty which devolved on his heirs and representatives at his death. Case 11, page 119 of the same Volume, is as follows: A son dying before his father, his widow living virtuously and obediently to her husband's family is entitled to obtain maintenance from her father-in-law or other successor to his property; but if her husband have received his share from his father, and been separated from him, she cannot in that case claim maintenance as against him or his heirs. In a case reported in Volume 3, Select Reports, page 33 (4th July 1820), it was held that the widow of a son who died before his father was entitled to food and raiment only, but in the case of Mussammut Bheeloo, reported at page 223 of the same Volume, the Court held that the amount of maintenance which a widow was entitled to receive was to be calculated with reference to the circumstances of the family, and in this case the Court awarded Rupees 20 monthly. In the case of Mussammut Humita, reported at page 19, Volume IV., Select Reports (14th February 1825), it was held that plaintiff, a Hindoo widow, was not entitled to a share in the estate, as her husband died before his father; but she was entitled to maintenance only, for which she was left to bring a suit. In the case of Oojulmonee, reported at page 491, Sudder Dewanny Adawlut Decisions for 1848, the Court held that the plaintiff, being the widow of a brother who died before his father, was entitled to maintenance from her legal guardians, the members of her husband's family; but that, if she voluntarily withdrew from their protection, she forfeited all claims upon them, and the case was dismissed, as the separation was the sole act of the widow. The next case is reported at page 422 of the Sudder Dewanny Adawlut Decisions of 1850 (21st August), Hur Soondry Goopta. In this case, the right to receive maintenance was not disputed. The question before the Court related to the amount of maintenance, and the Court held that, under the circumstances of the family, the plaintiff was entitled to receive Rupees 10 monthly, conditional on her return to her husband's family. The report does not state whether the husband pre-deceased his father, but, as it is a Bengal case, there can be little doubt that he had, for, had it been otherwise, the widow would not have required maintenance, but would have succeeded to her husband's share of the ancestral property. The plaintiff had been receiving for some time Rupees 2 a month with food and clothes, and the Court held that, if less were offered to her than she had a right to expect, she did not forfeit her right to maintenance by leaving her husband's house, and seeking shelter under the roof of her parents.

The next case is mentioned in the order of reference, and is reported at page 796 of the Sudder Dewanny Adawlut Decisions of 1852. The Court there held that, according to the provisions of the Hindoo Law and precedents of the Court, a widow was entitled to maintenance from the heir of the family, the defendant in the case being the father-in-law, and it was held that, as plaintiff had been expelled from the defendant her father-in-law's house, she had not forfeited her right to maintenance, as her seeking shelter in her father's house was not a voluntary act. One other case it may be as well to notice, reported at page 1220 of the Sudder Dewanny Adawlut Decisions for 1858, Shama Soondery Debea, in which it was held that, as ill-usage on the part of the deceased husband's brother was proved, the widow had not forfeited her right to maintenance by living with her husband's nephew. In the case of Sheeba Soondery Dossee, reported in 2 Taylor and Bell, pages 190 and 191, where three respectable Hindoos awarded Rupees 12 a month as a sufficient allowance, with apartments in the family-house and food, it was held that food and raiment was too vague and ambiguous an expression, and the master was directed to enquire whether the amount offered was just and proper with reference to her situation in life.

From the texts and cases quoted above, the following points appear to have been determined, that the maintenance of the dependent members of a family, among whom Baboo Shama Churn in the *Vyavashta Durpana* enumerates the son's widow, is a charge on inheritance; that a widow is under the guardianship of her husband's relations; that her father-in-law or his heirs and representatives are bound to maintain her in a manner suitable to the circumstances of the family, so long as she continues to live under their protection; and that she does not forfeit her right to maintenance if expelled from, or compelled by ill-usage or want of suitable maintenance, to leave her husband's house, and to dwell with her parents; that if her husband's family be unable from want of means to support her, she may resort for support to her father's family; and that maintenance consists, not merely of food and clothes, but may take the form of a grant of land or of a money-allowance, the amount to be regulated according to the circumstances of the family.

The remaining point to be considered is, whether a widow who voluntarily leaves her husband's house, and lives chastely, does or does not forfeit her right to maintenance.

It has been ruled in a decision of a Division Bench of this Court, reported at 2 Weekly Reporter, page 134, Civil Rulings, that, according to Hindoo Law, a son's widow is entitled to maintenance so long as she leads a chaste life, whether she elects to live with her father-in-law or with her own relatives. And the ruling in this case has been followed in a subsequent case, reported in 6 Weekly Reporter, page 37, Civil Rulings, and on reference to page 333 of the *Vyavashta Durpana*, 1st edition, we find a judgment of the late Supreme Court in the case of Judoomoni Dassee pronounced by Peel, C.J., in which it was held that a childless Hindoo widow who, after the death of her husband, *uncompelled by cruelty or ill-usage*, left the house of the family of her deceased husband to dwell at first in the house of her own father, and subsequently with her aunt, living with her own relations, the residence being in all respects a proper one, and her conduct being unimpeached, did not forfeit her right to maintenance out of the property which was that of her deceased husband in his lifetime, and which had devolved on his heirs. In his judgment the Chief Justice quoted a passage from the judgment of the Privy Council, which is in the following words: "The Privy Council has, "on the subject of the right of the Hindoo "widow to return to the home of her parents, "laid down a broad rule upon which it is not "desirable to infringe. That Court says: "'It is not pretended that she had with-"drawn herself for unchaste purposes. She "was only fourteen at the death of her hus-"band; his brothers were young men, and "she thought it more prudent and decorous "to retire from their protection, and live with "her mother and her family after her hus-"band's death; therefore it appears quite clear "from the answers given by the Pundits that "she did not forfeit the right of succession "to the husband's estate on account of remov-"ing from the brothers of her late husband; "that they had no right to insist on her "not withdrawing herself from them in "order to put herself under her mother's "protection.' The decisions of that Court "must, of course, give the law to all Courts "here." In the passage quoted from the judgment of the Privy Council, it is apparent that the widow was an heiress, and, as such, could not be deprived of her rights to succeed to the property of her husband. The Chief Justice goes on to say: "The answer of the Pundits which the "Privy Council adopts is that, 'if a widow

"from any other cause but unchaste pur-
"poses, ceased to reside in the husband's
"family and took up her abode in her parent's
"family, her rights would not be forfeited.
"This was followed in the Sudder Dewanny in
"the case of a Hindoo widow and heiress.
"It is to be observed, however, that in the
"subsequent case of August 1850, by the
"same Court, the case was considered by the
"*dissentient* Judge as one of doubtful
"authority, and the Court was of opinion
"that she did not forfeit her right by leav-
"ing the husband's house, and seeking shel-
"ter under the roof of her own parents, on
"an offer of an insufficient maintenance. In
"the case where the forfeiture was declared,
"the Judges who gave the decision observed
"that the deceased husband had never
"owned the property, and that it was a mere
"case of maintenance. We do not adopt
"the distinction, but nevertheless we regard
"the case before the Sudder as different
"from the present one.

"Strange in his book on Hindoo Law
"treats the right to maintenance as a charge
"on the property in the hands of the heir,
"and it certainly has always been so con-
"sidered in this Court. In the Privy Coun-
"cil the question was whether the Hindoo
"*heiress* forfeited *her estate* by selecting,
"without impropriety, her father's roof for
"her residence. But it is to be observed
"that the opinion of the Pundits was gener-
"ally expressed as to forfeiture of rights,
"and the Court expressed in general terms
"that the widow had a right under the cir-
"cumstances to select that residence, and
"could not be compelled to reside under
"the roof of her husband's family. This
"freedom of choice had respect to causes as
"applicable to a widow not an heiress, as to
"one who inherited.

"There are certainly texts in the Hindoo
"Law, both ancient and modern, which
"speak of the right of the relatives
"of the husband to have the widow
"resident under their roof in preference to
"that of her own family. The modern text-
"writers do not adopt as law all the ancient
"texts. The question must always be, are
"those positions in their nature capable of
"being applied by a Court of Justice, and
"how far are they to be modified with
"reference to the altered usages of society
"and the altered position of things? It is
"to be observed further, that the ancient text-
"writers do not state in any case that main-
"tenance is forfeited if the widow inverts the
"order of residence, and prefers her father's
"roof to that of her deceased husband. Mac-
"naghten, in the passage of his work which
"is referred to in the Sudder, does not state
"that the consequence of non-observance of
"the rule as to residence is a forfeiture. We
"have examined the texts of the ancient law,
"and we think they bear out the opinions of
"the Pundits in the case before the Privy
"Council. The texts say as to maintenance,
"forfeiture is incurred by unchaste life, but
"they do not say that it is incurred other-
"wise. There are many duties enjoined to
"women in the text of a moral or religious
"nature, the violation of which would never
"have involved any forfeiture. Forfeitures are
"not to be extended by construction. The
"duty to reside with the family of the deceas-
"ed husband is not enjoyed for the sake of
"thrift, merely because it may in that
"way be least burdensome to maintain the
"widow (that may be always duly re-
"garded and provided for by the exercise
"of discretion in the amount and mode of
"maintenance), but the foundation of the
"duty to reside is that she may be safe
"from being tempted to sin, and so may
"avoid disgracing herself and dishonoring
"the family. The texts speak in condem-
"nation of her resort to strangers for a
"dwelling. But the woman is presumably
"as safe under her own father's or family's
"roof as elsewhere. It is no resort to the house
"of *strangers*, and there is nothing danger-
"ous, immoral, or dishonoring in the act.
"It is not shown to be in any way abhorrent
"to the usages and customs of respectable
"Hindoos; on the contrary, we believe it
"to be a common practice not disapproved of.
"The reasons which existed in the olden
"time for placing restraints on females ap-
"plied just as much to female heiresses as
"to females entitled to mere maintenance.
"Nothing can be found in the old texts which
"imposes the condition of forfeiture on
"widows and heiresses not acting strictly on
"the rules as to preferential residence. The
"stronger words have been controlled by
"the Privy Council with a declaration of
"the widow's right, founded on reasons of
"decorum and propriety which are applicable
"to all cases alike. The majority of the
"Court in the case in the Sudder declare the
"Hindoo widow to be always in a depend-
"ant state. This view is, however, dissent-
"ed from by Mr. Welby Jackson with much
"force of argument and expression. Un-
"doubtedly such was the ancient *status*, and
"to a limited extent it is true still. But the

"*status* of the Hindoo female has improved, "and is improving."

In a suit decided by a Division Bench of the High Court, reported at page 497 of Marshall's Reports (Norman and Kemp, JJ.), it was held that, where the maintenance of a Hindoo widow was not made by her deceased husband dependant on her living with her family, she is entitled to it, notwithstanding she leave the house of his family, and go to that of her father. And in the case of Shiba Soonduree Dossee, already referred to, it appears that she was the widow of Goluck Chunder, who died during his father's lifetime, and that she voluntarily left the family-house, and sued the defendants who were the surviving sons and representatives of Ram Mohun, her father-in-law, for separate maintenance, and the Court held that she was entitled to separate maintenance—*Vyavashta Durpana*, page 331, 1st edition.

These arguments clearly lay down the principle that a widow is entitled to maintenance, even though she voluntarily leaves her husband's family, and lives with her own parents after her husband's death. These are all Bengal cases, and from the fact that the plaintiff in each sued for maintenance only, instead of possession of her husband's share, it is evident that the husband must have pre-deceased his father. The right of the widow to receive maintenance does not appear to have been contested in these cases. These judgments, however, appear to me to go beyond the strict provisions of the Hindoo Law. They take into consideration the change which time has effected in the customs of the people, and they remove certain restrictions imposed by that law. As the law originally stood, it appears to me from some of the texts quoted above that no separation was ever contemplated, but that the widow entitled to maintenance was expected to remain in her husband's house and among his relations. It may, however, be said that the position of the widow of a proprietor and that of his son's widow are different, and that the decisions quoted are applicable only to the former; that while the support of the widow of the proprietor is obligatory on the proprietor's family, the support of his son's widow is not obligatory on the proprietor. It is apparent from the cases quoted that the sons of a proprietor are bound to support the widow of a brother who has pre-deceased his father, and that she can enforce a right to maintenance from them. On what does this right rest? It rests, I apprehend, from their having succeeded, along with his property, to the obligations of their father. If he were not bound to maintain his son's widow, they are not bound to maintain their sister-in-law, and yet both texts and cases go to the extent of holding that they are.

There can, I think, be little doubt that one of the reasons for requiring the childless widow to live under the immediate charge of her deceased husband's relatives, and in his house, was the facility of maintaining her. It might prove exceedingly inconvenient were a widow voluntarily to leave the protection of her husband's family and insist upon a separate maintenance. The circumstances of the family might be such that though willing to support her, if she lived with them, they might not be able to afford her a money-allowance, or to transmit to her articles of food and clothing. The principal reason, however, why the Hindoo Law required the widow to live with her husband's relatives, appears to have been that she might be prevented from dishonoring the family by living unchastely. There is, however, another reason, namely, the authority given by the Hindoo Law to a brother or near relative, to beget a son on the widow of the deceased, which son would be called the wife's son, and be entitled to receive the divided property of the deceased. The custom is, I believe, now obsolete and reprehended by all classes.

In Chapter IX. of Menu, verse 167, it is written: "He who was begotten according "to law on the wife of a man deceased or "impotent or disordered, after due authority "given to her, is called the lawful son of the "wife;" and, again, in verse 146: "He who "keeps the fixed and moveable estate of his "deceased brother, maintains the widow, "and raises up a son to that brother, "must give to that son at the age of "fifteen the whole of his brother's "divided property." I quote these passages out of several in Menu relating to the same subject, which appear to me to give an additional reason why the widow was expected to live in the house of her husband's relations. The permission to procreate a son in this manner did not, it must be observed, extend to the twice-born classes: for Menu says, in Chapter IX., verses 64 and 65: "By men of twice-born classes "no widow or childless wife must be "authorized to conceive by any other than

"her lord." "Such a commission to a bro-"ther or other near kinsman is nowhere "mentioned in the nuptial texts of the "*Veda.*"

From all that has been said above, it appears to me that, under the Hindoo Law, as originally promulgated, the rule was that the widow should live with, and be supported by, the relatives of her deceased husband so long as she continued to lead a chaste life. It does not appear to have been contemplated that a widow would ever voluntarily leave her legal protectors while they were able to support her, and consequently no provision for her maintenance has been declared. The absence of such a provision does not, I think, raise the inference that, if the widow left voluntarily, she was still entitled to maintenance so long as she remained chaste. Judging according to the strict rules of Hindoo Law, I think the widow would not be entitled to maintenance. But there can be no doubt that in the present day many of these rules are not strictly observed, and that the customs of the present time are not in strict conformity with the rules as laid down by the old text-writers; and it may be said that, owing to the effects of education or other causes, this, with many other rules, has become almost obsolete. This may be true as regards the Hindoo population in and near the Presidency-towns, but is hardly true of the more distant parts of the country where old customs still prevail; and hence the difficulty of laying down any general rule which shall be applicable to all parts of the country alike. The course of all the more recent decisions has, no doubt, been to consider the widow independent as to residence, and entitled to maintenance so long as she remains chaste, and we should have no difficulty in applying that rule to the present case, but we cannot say that it is applicable to all cases.

If we look only to the Hindoo Law, I think that the rule is that the widow of a son should remain with the family of her husband and be supported by them; that, if she leave their protection, she is not entitled to demand maintenance from them except she be able to show that her departure from the family was occasioned by ill-treatment, neglect, or insufficiency of necessary support. No doubt, for any of these causes, she might leave the house, and be entitled to maintenance from her husband's family so long as she continued to lead a chaste life. The decisions quoted above* certainly show that, in Calcutta and its neighbourhood, it is not unusual for Hindoo widows to leave the residence of their husbands, and to return to that of their own parents or relatives. But if we have to decide the question according to the authorities on Hindoo Law, I have no hesitation in saying that the widow is bound to remain with her husband's family, and that his father, if living, and the family, if he be deceased, are bound, so long as she continues chaste, to maintain her; that, if the family be too poor to provide maintenance, she may return to her father's family; but if the family be able to support her, she can only claim maintenance if she separate on the ground of ill-usage or insufficiency of maintenance, or the like. Where there is ancestral property, there can, I think, be no doubt that the widow is entitled to support; and, looking at the obligation to support his family, which the law imposes on every Hindoo, it appears to me that, where the means are self-acquired, the father is as much bound to maintain his widowed daughter-in-law as if he was in possession of ancestral property.

* Shibo Soonduree Dossee and Judoomonee Dossee.

The case should, I think, be returned to the Lower Court to determine whether any sufficient ground for leaving the protection of her father-in-law has been made out by the plaintiff; and if this be proved, that the Court award her maintenance, calculating it according to the circumstances of the husband's family.

Peacock, C.J.—The question referred for the decision of a Full Bench is whether the widow of a Hindoo, refusing to live in the house of her father-in-law, can maintain a suit against him for a pecuniary allowance by way of maintenance.

In the present case, the plaintiff left the house of her father-in-law, and went to reside with her own father, and she alleged that she was driven to do so by ill-usage on the part of her father-in-law.

There is no allegation in the plaint that the defendant has any ancestral property or any property upon which the plaintiff's maintenance is a charge.

Two questions seem to arise out of the point submitted for the opinion of the Full Bench, *viz., first,* whether the widow of a Hindoo refusing to live in the house of her

father-in-law can sue him for a pecuniary allowance by way of maintenance, if she leave his house without reasonable cause; and, *secondly*, is she entitled to maintenance if she leave on account of ill-usage or other reasonable cause?

In the case cited from the 2nd volume of the Weekly Reporter, page 134, it was held that a daughter-in-law has a right to maintenance from her father-in-law, so long as she is chaste, whether she continues to live with him or not, and Mr. Justice Kemp is still of that opinion.

It appears to me, however, that, according to the law as administered in Lower Bengal, a daughter-in-law has not in either case a legal ground of action to recover maintenance against her father-in-law.

The rights of a wife or of a widow, and those of a son's widow, to maintenance appear to me to be governed by very different principles. A son's widow has not the same legal rights against her father-in-law as a wife has against her husband, or as a widow has against the heirs of her husband who take his estate by inheritance. The father is not heir to his son in preference to the son's widow.

A son's widow has no right in her father-in-law's estate, and, upon partition of such estate, she is not, like a daughter, entitled to a share, even though the estate was ancestral.

The rule laid down in Ruggomonee Dossee *versus* Shibchunder Mullick, Hyde's Reports for 1864, page 103, *viz.*, that the maintenance of a son's widow is a mere moral duty on the part of her father-in-law, and that the case is distinguishable from those in which an heir takes property subject to the obligation of maintaining persons who are excluded from inheritance, or those whom the deceased proprietor was morally bound to maintain, appears to me to be correct.

The obligation of an heir to provide out of the estate which descends to him maintenance for certain persons whom the ancestor was legally or morally bound to maintain is a legal as well as a moral obligation, for the estate is inherited subject to the obligation of providing such maintenance. A son who takes his father's estate by inheritance is bound to provide maintenance for his father's widow. The obligation is a charge upon the estate which continues as long as the widow remains chaste, whether she continue to live in the family of the heirs or not.

I apprehend that a son's widow has no geater right to sue her father-in-law for maintenance after her husband's death, than she would have in her husband's lifetime, if he were unable to maintain her. If there is a legal obligation, does it extend to every widow whom every son (however numerous the family) may leave without a sufficient provision for her maintenance? Does it extend to cases in which the marriages are contracted after the sons are of mature age, and whilst they are living separate? If not, to what extent is the rule limited by the Hindoo Law?

I have looked carefully into the authorities, and cannot find anything to satisfy me that a son's widow is entitled to sue to compel her father-in-law to maintain her where he has no ancestral property, and nothing beyond his separate estate which has been acquired by himself.

Some of the books speak of the husband's relations generally, but I apprehend that a brother, or other distant relation, cannot be legally, although he may be morally, bound to support all the widows of all his brothers or other near relations, who have no means of subsistence, unless he takes some property which renders him liable to the charge.

The dependent members referred to in the *Vyavashta Durpana*, and who are spoken of as being entitled to maintenance, are said to have claims to be maintained out of the late proprietor's estate. (See page 317, para. 154; page 321, para. 163.)

If a son takes his father's estate, or a widow her husband's estate by inheritance, it is only reasonable that they should be held legally liable to do what the father or husband was morally liable to do, and which it is to be presumed he would have done out of the estate if he had lived, but I am not sure that even in such cases the legal liability is carried to that extent.

In the case cited from Sudder Decisions, 1852, page 796, it was said that the father-in-law was bound to maintain the widow of his eldest son, as "according to "Hindoo Law and the precedents of the Court, "the widow is entitled to maintenance from "the heir of the family." The father was not the heir of his son during the widow's life, and the case seems to have confounded the case of a widow seeking for maintenance from the son as heir of her husband, or to have referred to the father as the heir of the family in respect of ancestral estate.

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The maintenance of a widow being a moral obligation on the late proprietor, the son who inherits takes the estate, not for his own benefit, but for the spiritual benefit of the late proprietor, and he ought to perform the obligation of maintaining the widow. (See *Vyavashta Durpana*, 1st edition, page 317.)

If the father-in-law is legally responsible for the maintenance of his daughter-in-law, where is the legal obligation to stop, if he dies without leaving property? This is not the case of a widow or heiress such as are spoken of by the Chief Justice in the case referred to by Mr. Justice Loch. There is no ancestral property upon which the daughter-in-law has a charge for maintenance. This is not a question of a charge upon inheritance. The father-in-law is not stated to have inherited anything. He states that he is a pensioner of Government with a small pension, not more than sufficient to maintain himself and his own family. It is not necessary to determine that he is so; but for the sake of argument, it may be asked, is such a pensioner bound to maintain all the widows of all his deceased sons? Is he to save nothing for his own widow lest he should die before her when his pension would cease?

According to the decision in II. Weekly Reporter 134, the daughter-in-law would be entitled to have a part of the pension to be spent by her in her own father's family, though the father might be willing to provide for her in his own. Is the father-in-law to send food or money, and to what distance is he to send it, if the daughter-in-law chooses to live with her own father? If a son and a father, joint in food and estate, should separate, and each take his own share of the estate, and the son, after partition, should enter into business and lose all that he has taken, would the father, after the death of the son, be bound to support his widow? We must not convert all the moral obligations enjoined by the Hindoo Law into legal liabilities. We should do much mischief by want of care in this respect.

I am of opinion that in the present case, the plaintiff has no legal right to be maintained by her father-in-law so long as she elects to live with her own father, and that the decree of the Lower Court must be reversed with costs, and the plaintiff's suit dismissed. As the Judges are equally divided in opinion, the case is decided according to the opinion of the Chief Justice.

Kemp, J.—I concur generally in the view of the Hindoo Law on the subject of maintenance taken by Mr. Justice Loch, but I would not remand this suit but dismiss the appeal, as I am of opinion that a Hindoo widow is entitled to maintenance as long as she leads a chaste life, whether she live with her father or her husband's relations. The maintenance of the female members of the family, and amongst them ranks the daughter-in-law, is obligatory on a Hindoo. The law on the subject has been carefully and very fully stated by Mr. Justice Loch, and I have nothing to add to his remarks.

Macpherson, J.—I concur with the learned Chief Justice in the answer which he proposes to give to the question referred in this case.

I think that, when a son dies in his father's lifetime, leaving no estate whatever, his widow has not such a right to maintenance as can be enforced at law.

The 31st March 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Succession—Adopted son's rights of inheritance—Hindoo Law.

Case No. 341 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rungpore, dated the 22nd August 1867.

Tara Mohun Bhuttacharjee (Plaintiff), *Appellant,*

versus

Kripa Moyee Debia (Defendant), *Respondent.*

Baboo Nil Monee Sein for Appellant.

Baboos Sreenath Doss and *Romesh Chunder Mitter* for Respondent.

HELD (following the ruling of the Privy Council in the case of Shumboo Chunder Chowdhry, dated 6th February 1835)* that, according to the authorities on Hindoo Law and the weight due to them, an adopted son succeeds, not only lineally, but collaterally, to the inheritance of his relations.

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* *Vide* Sutherland's Privy Council Judgments, page 25, and 5 W. R., Privy Council cases, page 100.

An adopted son represents his adoptive father, and is entitled to the share which his father would have obtained; when he comes to share with heirs other than the legitimately begotton sons of his adoptive father, in the property of kinsmen, he takes the same share that they would have.

Loch, J.—THE suit was brought to have plaintiff declared the reversioner to the property left by Radhanath Bhuttacharjee by setting aside the adoption of one Woomanath made by the defendant, Kripa Moyee, his widow, without permission, and to declare plaintiff to be the sole heir of Romanath Chuckerbutty, his widow Chunder Monee Debia having deceased.

The Lower Court held that the adoption was valid, the defendant Kripa Moyee having full permission to adopt, and that all the objections to the mode of adoption and to the character of the natural father of the child adopted by Kripa Moyee were refuted by the evidence. The Principal Sudder Ameen, therefore, dismissed this part of the plaintiff's claim. With regard to his claim to be considered sole heir to the deceased Romanath Chuckerbutty, the Principal Sudder Ameen found that the plaintiff and the adopted son were both in the same degree of relationship to the deceased, and, as such, were both entitled to share; but as Woomanath was an adopted son, the Principal Sudder Ameen, referring to a case reported in II. Macnaghten's Hindoo Law, page 69, held that plaintiff was entitled to two-thirds, and Woomanath only to one-third, of the property.

An appeal has been preferred by the plaintiff against the whole decision; but on the case coming up for hearing, the appellant's pleader gave up so much of the claim as asked the Court to declare him to be the reversioner to the property of Radhanath Bhuttacharjee, but prayed the Court to try his right to the whole estate of Romanath Chuckerbutty by setting aside the adoption of Woomanath, and he urges that, even if the adoption of Woomanath be found valid, plaintiff is nevertheless entitled to the whole estate.

A cross-appeal is taken by the respondent under Section 348, to the effect that the adopted son is entitled to take a moiety of the estate of the deceased Romanath Chuckerbutty, and not a third, as supposed by the Principal Sudder Ameen.

The pleader for the appellant, after ascertaining the opinion of the Court in regard to the terms of the deed of permission, dated 8th Aghran 1259, which he read out, withdrew his objection as to the fact of the adoption and of the defendant's right to adopt.

He then urged that, as laid down in the *Dyabhaga*, an adopted son, though entitled to succeed as heir to the property of his adoptive father, cannot succeed to the property of his adoptive father's relatives; he can succeed lineally, but not collaterally; and, in support of his allegation, the pleader read a passage from *Devala* quoted in Section 7, Chapter X. of the *Dyabhaga*, and the author's comment thereon in Section 8 to the effect that the true legitimate son and the rest, to the number of six, are not only heirs of their father, but also heirs of kinsmen, that is, of *sapindas* and other relations. The others are successors of their (adoptive) father, but not heirs of collateral relations (*sapindas*); and then, as to the share of the adopted son, the pleader quoted Section 9 from the same book — "They "take the whole estate of a father who "has no legitimate issue by himself begot-"ten; but if there be true son, such of "them as are of the same tribe as the father "take a third part."

With regard to the question of the right of an adopted son to succeed collaterally as well as lineally, we think it sufficient to quote the Privy Council Decision in the case of Shumboo Chunder Chowdhry, dated 6th February 1835, reported at page 25, Sutherland's Privy Council Judgments, which ruled that, according to the authorities on Hindoo Law, and the weight due to them, an adopted son succeeds, not only lineally, but collaterally, to the inheritance of his relations.

We have now to determine whether Woomanath, being an adopted son, would take only a third, or is entitled to share equally with plaintiff in the property left by Romanath Chuckerbutty. There is no contention that, if after a son be adopted, a son be born of the body, the latter is entitled to the larger portion of the inheritance whether two-thirds or three-fourths, and the former only to the remainder. There can also, we believe, be no doubt that an adopted son is entitled to all the rights and privileges of a son of the body legitimately begotten, where there is no such son subsequently born. The decisions of the late Sudder Court quoted in the margin, and the following passage from the *Vyavashta Durpana*, page 887 of the 2nd edition, verse 584, supported by authorities, prove that such is

I. Select Reports, page 206.
VI. Select Reports, page 203.
Sudder Decisions for 1858, page 1863.

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the case.—"An absolute Dattaka properly "adopted, ceasing to belong to the gotra of his "natural father, becomes a member of the "family of his adopter, and represents his "legitimately begotten son, and the duties "and the rights of the legitimately begotten "(*Ourasa*) son devolve upon him." A case is quoted to us from II. Macnaghten, page 69 *ff*. Looking at the answer given, we have some doubt whether there was not some confusion in the Pundit's mind as to the position of the adopted son in that case, but whether this be so or not, that case is not applicable to the present.

It appears to us that the position of an adopted son is affected only by the birth of a subsequent legitimately begotten son of the adopting father, that when an adopted son comes to share, with heirs other than the legitimately begotten sons of his adoptive father in the property of kinsmen, he takes the same share that they would have. He represents his adoptive father, and is entitled to the share which his father would have obtained. In the present case, plaintiff and defendant are in equal relationship to Romanath Chuckerbutty: their respective grandfathers were his first cousins, and their respective fathers were his first cousins once removed, so that, if the property had been inherited either by their grandfathers or by their fathers, the shares of each would have been equal; and, such being the case, there is no reason why the plaintiff and defendant should not each take the share to which their respective fathers were entitled.

A passage from the *Dattaka Chundrika*, Section V., para. 25, has been quoted to us to prove that the adopted son of a brother does not receive the same share as his uncle; but all that the passage appears to rule is, that the adopted son of one adopted succeeds only to his adoptive father's estate. In the present case, we find that the adoptive father would have been entitled to a moiety of the property left by Romanath Chuckerbutty, and his son is, we think, entitled to that share. The rule requiring an adopted son to take a smaller share than a son of the body does not, in our opinion, hold good in this case, for the claimants do not derive their title from the same father.

We dismiss the plaintiff's appeal with costs, and correct the Principal Sudder Ameen's judgment in regard to the defendant, and assign to Woomanath a moiety of the property left by Romanath Chuckerbutty. The defendant, cross-appellant, will obtain her costs.

The 31st March 1868.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges*.

Unregistered lease—Section 13, Act XVI., 1864—Sale by ryot without transferable rights.

Case No. 2244 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 27th July 1867, reversing a decision passed by the Moonsiff of that District, dated the 24th August 1866.

Shaikh Omar (one of the Defendants), *Appellant*,

versus

Abdool Guffoor and others (Plaintiffs), *Respondents*.

Moulvie Murhamut Hossein for Appellant.

Baboo Sreenath Banerjee for Respondents.

By Act XVI., 1864, no unregistered lease for a term exceeding a year can be received in evidence in any civil proceeding, however small the value of the property leased.

Where proprietors purchased a tenant's rights, and sued to eject one who alleged that he held a pottah from the tenant, it was held that the tenant, being a simple ryot without transferable rights, could not give a third party any right of possession as against the proprietors of the estate, and that the holder of the pottah from the tenant was a mere trespasser.

Glover, J.—The plaintiffs in this case, who are the zemindars of the entire estate, purchased the right of one of their tenants, named Rung Lall, and then sued to eject the defendant (whom they found in possession, and who claims through Rung Lall) from

the land as well as from two houses, and two clumps of bamboos situate on it.

This defendant, Shaikh Omar, alleges that Rung Lall gave him a pottah for the land, and sold to him one of the houses and the two clumps of bamboos. He admits the plaintiffs' proprietary title, but denies that they have any power to dispossess him so long as he pays rent. The other defendants make a similar defence.

The first Court found the defendant's pottah to be proved, but dismissed his suit as regards the houses and the bamboos. But the Principal Sudder Ameen held that, under the Registry Act, XVI. of 1864, the pottah could not be pleaded in evidence, it being for a period longer than one year, and for the rest that the sale to Omar by Rung Lall was not proved. He, therefore, decreed the plaintiffs' case in full.

The points taken in special appeal are :—

(1.) That the pottah, being only for a jumma of 1 rupee, need not have been registered, and was, therefore, receivable as evidence; and

(2.) That as the defendant was admittedly in possession with the consent of Rung Lall, he is entitled to retain that possession so long as he pays rent to the plaintiffs.

Neither of these objections appears to me tenable.

Section 13 of the Registration Act is very distinct, and lays down that no lease of immoveable property for any period exceeding one year shall be received in evidence in any civil proceeding in any Court (after a certain date), unless the same shall have been registered. This clause of the Section has no reference to the one that immediately succeeds it, which refers to instruments not being deeds of gift or leases in which a question of valuation comes in. So far as leases are concerned, the question is one of time, and not of value. I think, therefore, that the pottah was properly rejected by the Principal Sudder Ameen.

With regard to the *second* point taken, Rung Lall was apparently a simple ryot without any transferable rights in the land, and could not give to a third party any right of possession as against the proprietor of the estate. The latter, who bought Rung Lall's rights, were undoubtedly empowered to enter upon their purchase, and to oust Omar, who was a mere trespasser. He may have a cause of action against Rung Lall, but he has none against the zemindar.

The Principal Sudder Ameen has found as a fact that there was no purchase by Omar of the houses or of the bamboos, and that he did not build the cow-house. This last fact is rather implied than actually found; but from the whole tenor of his decision, I am of opinion that the Principal Sudder Ameen did substantially decide all the points against the special appellant; and in any case, as it has been found that Omar's pottah was worthless, and that he never purchased either houses or bamboos from Rung Lall, the special appellant would have no right to remove the cow-house even if it had been erected by himself.

The special appeal should be dismissed with costs.

Macpherson, J.—This appeal is dismissed with costs.

The Lower Appellate Court finds properly that the appellant's pottah is worthless, because unregistered, and finds as a fact that the purchase of the bamboos, &c., is not proved. The facts being thus all found against him, the appellant has no right to remove any of the thatched houses on the land, whether alleged to be bought from Rung Lall, or to be erected by himself.

The 13th March 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson and J. B. Phear, *Judges*.

Sections 2, 3, and 8, Regulation X. of 1822—Boundary-lines — Survey-awards — Acts of ownership—Section 5, Regulation IX. of 1825.

Case No. 17 of 1867.

Appeal under Section 15 of the Letters Patent, dated the 28th December 1865, against a judgment of the Hon'ble W. S. Seton-Karr and the Hon'ble A. G. Macpherson, Judges of this Court, dated 13th August 1867, in Regular Appeal*

* For judgment of the Division Bench, see 8 W. R. 343.

No. 303 of 1866 from a decision of the Judge of Mymensingh, dated 11th June 1866.

The Government (Defendant), *Appellant*,

versus

Rajah Raj Kishen Singh (Plaintiff), *Respondent.*

The Advocate-General and *Baboos Kishen Kishore Ghose* and *Juggodanund Mookerjee* for Appellant.

Mr. R. V. Doyne and *Baboos Unnoda Pershad Banerjee, Onookool Chunder Mookerjee,* and *Shoshee Bhoosun Sein* for Respondent.

The rules laid down by Regulation X. of 1822 were intended to take effect only within the tract of country described in Section 2, within which the administration of civil and criminal justice, &c., was, by Section 3, declared to be vested in an officer to be denominated the Civil Commissioner of the north-eastern parts of Rungpore. The proviso in Section 8 was not intended to give substantive powers to the Governor-General in Council in respect of *other* tracts of the country, and Clause 2 of the same Section did not intend to take away the power of any Civil Court, except within that tract.

The proviso contained in Section 8 does not authorize Government to separate any part of the Garrow Country beyond that described in Section 2 from the district and from the General Regulations, but merely directs the separation of such tract from the estates of neighbouring zemindars, and the discontinuance of the collection of cesses by the zemindars from the Garrows.

By Clause 2, Section 8, the jurisdiction of the Civil Courts is taken away only with respect to acts of the above description, done under the authority of the Government; but that does not take away the right of a zemindar to contest a survey-award drawing a line which deprives him of part of his zemindary and his permanently-settled estate.

Where a Rajah had exercised rights and collected dues in certain hills and forests north of an alleged line, and it was the unanimous opinion of all the Revenue Authorities that the forests were within his permanently-settled estate, the assumption by them and Government of such line as the boundary of the Rajah's estate, throwing upon him the *onus* of proving his claim to any portion north of that line, was held to be arbitrary and anomalous. If adopted under Clause 12, Section 5, Regulation IX. of 1825, they were wholly irregular; and the irregularity can be no ground for excluding the Court from examining them.

When a man is found exercising, on both sides of a boundary-line, without objection, rights of ownership or incorporeal rights, and when it is not shown that there is any other owner of the soil, or that any objection to the exercise of such rights was made during a long course of years, his acts cannot be treated as the encroachments of a wrong-doer.

HELD (by *Phear, J.*).—Where Government wrongfully draws a boundary-line cutting off a portion of an estate settled with a zemindar's ancestors, and forbids his enjoyment of zemindary-rights beyond such line, a cause of action is constituted upon which the zemindar can sue for a declaration of right under Section 15, Act VIII., 1859.

Where acts of user illustrate all the modes of enjoyment of which a disputed property can reasonably be expected to be capable, it can be rightly attributed to proprietorship of the tract upon which they were exercised.

Judgment on preliminary point raised by the Advocate-General, to which reference is made in the final judgment in this appeal.

Peacock, C.J.—WE think that the jurisdiction of the Civil Courts of Judicature is not taken away beyond the tract of country comprised in the second Section of the Regulation X. of 1822.

By Regulation XLI. of 1793, certain rules were laid down as to the framing of the Regulations, in order that the Courts of Justice should apply the Regulations according to their true intent and import. One of those rules was that every Regulation should have a title explaining the object of it as concisely as possible; and another that there should be a preamble to every Regulation, stating the reasons for the enactment of it.

Looking to the title and preamble of Regulation X. of 1822, it is clear that the rules laid down by that Regulation were to take effect only within the limits described by that Act.

The only limits which we can find described as applicable to the places within which Regulation X. of 1822 was to have effect, is the tract of country described in Section 2 of that Regulation, within which the administration of civil and criminal justice, &c., was, by Section 3, declared to be vested in an officer to be appointed by the Governor-General in Council, to be denominated the Civil Commissioner for the north-eastern parts of Rungpore.

The proviso in Section 8 of that Regulation has been referred to, and it has been contended that, by virtue of that proviso, it is competent to the Governor-General in Council to direct the separation of any tract of country occupied by Garrow mountaineers from the estates of neighbouring zemindars in other parts of the country than those included in the tract mentioned in Section 2. But the proviso in Section 8 is merely a proviso upon the general enactment in the first part of that Section, which is expressly confined to the tract of country placed under the Commissioner; and we can hardly suppose that the Legislature intended, by a proviso upon an enactment limited to that

tract of country, to give substantive powers to the Governor-General in Council in respect of other tract of the country.

Further, it appears to us that Clause 2 of Section 8 did not intend to take away the power of any Civil Court, except within that tract of country in which the civil and criminal jurisdiction had been placed in the Commissioner.

We, therefore, think that the Civil Court has jurisdiction in this case; that the decision of Mr. Justice Kemp and Mr. Justice Seton-Karr was correct;* and that the last judgment, from which the present appeal has been preferred, is not subject to the objection taken in the first ground of appeal, *viz.*, that the Court had no jurisdiction in the subject-matter of the plaintiff's suit.

Under these circumstances, we think we must proceed to hear the appeal upon the merits.

Judgments on the merits.

Peacock, C. J.—This is a suit brought by Rajah Raj Kishen Singh against the Collector of Mymensingh on the part of Government. The suit is for a declaration of the plaintiff's right to certain hills, villages, &c., specified in the plaint as part of Pergunnah Shooshung, by setting aside a survey-award and proceedings—by which, I understand, is meant the boundary of the plaintiff's estate as laid down by the survey—the order of Mr. Campbell, the Officiating Collector of Mymensingh, dated the 15th of April 1859, and the subsequent orders of the Revenue Authorities.

It appears from the order of Mr. Campbell that, on the occasion of the survey of Pergunnah Shooshung, the plaintiff laid claim to a permanently settled estate co-extensive with that pergunnah; that, owing to that claim, the Superintendent of Survey and other officers were deputed in 1856 to lay down the boundary of the Rajah's permanently-settled estate. Mr. Campbell further states that, from various causes, the expedition proved rather a failure; that some correspondence then passed between the Superintendent of Survey, the Board, and the Government, when it was determined that the clearly-defined line of demarcation at the foot of the large hills should be assumed as the boundary of the pergunnah; and that the *onus probandi* should be thrown on the zemindar as to any portion of the hills to which they might lay claim to the north of that line. A line was laid down accordingly, and the case was transferred to Mr. Campbell as Officiating Collector of Mymensingh for disposal. He upheld the boundary-line so laid down by the survey, and held it to be the extreme limit of Pergunnah Shooshung. Upon appeal to the Commissioner of Dacca, that decision was upheld on the 19th of November 1859, and it was also upheld by the Board of Revenue on the 22nd of May 1862, upon a further appeal to them.

The plaintiff filed this suit on the 4th of December 1862. It was originally filed in the Court of the Principal Sudder Ameen of Mymensingh. He held that, in consequence of the order of Government made under Regulation X. of 1822, to which I shall have to refer presently, the Government was entitled to separate the land claimed by the plaintiff, and that it must be considered to be within the District of Gowalparah and beyond the jurisdiction of the Mymensingh Court. The plaint was, therefore, returned, and it was afterwards presented in the Court of the Deputy Commissioner of Gowalparah, who held that, as the lands in dispute had been made over to the special tribunal appointed by Regulation X. of 1822, the Civil Court had no jurisdiction, and he dismissed the claim.

The case was appealed to this Court, and on the 4th of August 1865 Mr. Justice Kemp and Mr. Justice Seton-Karr, for reasons in which I substantially concur, held that the Civil Courts were not ousted of jurisdiction, reversed the decision of the Deputy Commissioner of Gowalparah, ordered the case to be tried before the Judge of Mymensingh upon the merits, and transmitted the case to him for that purpose.

The case was tried by Mr. Simson, who, on the 11th June 1866, decided in favor of the plaintiff. A regular appeal was preferred from the judgment of Mr. Simson to this Court, which was heard before Mr. Justice Seton-Karr and Mr. Justice Macpherson. Mr. Justice Macpherson was of opinion that the decree of Mr. Simson ought to be reversed with all costs, both in this Court and in the Court below, subsequent to the remand-order. Mr. Justice Seton-Karr, who was the senior of the two Judges, considered that Mr. Simson's judgment ought to be affirmed

* Holding that the Civil Courts had jurisdiction to entertain the matter—*See* 3 W. R. 180, Civil Rulings.

substantially, and the appeal dismissed with costs; and, in consequence of the decision of the senior Judge, the appeal preferred by the Collector on the part of Government was dismissed with costs.

From that decision an appeal was preferred to the High Court under Section 15 of the last Letters Patent, and the case has been argued before us.

It appears to me that there are four questions to be determined—

First, whether the boundary line has been correctly laid down; *secondly*, if not, whether we can set aside the proceedings of the survey; *thirdly*, whether the plaintiff is entitled to all the lands which he claims between the line as laid down in the Survey Map, and what the plaintiff claims as his northern boundary; and, *fourthly*, whether the jurisdiction of this Court has been taken away by the order made by the Bengal Government under Regulation X. of 1822.

As to the last question, the Court has already expressed its opinion when it was raised by the learned Advocate-General as a preliminary objection. I then expressed the reasons for considering that the jurisdiction of the Court had not been taken away, and I see no reason to change the opinion which I then expressed. It is in accordance with the opinions expressed by Mr. Justice Kemp and Mr. Justice Seton-Karr when they remanded the case.

I would add to the reasons which I then expressed, that the proviso in Section 8 does not authorize the Government to separate any part of the Garrow tract of country, beyond that which is described in Section 2, from the district, and from the general regulations, but merely to direct the separation, temporarily or permanently, of any tract of country occupied by Garrow mountaineers from the estates of any neighbouring zemindars, and to discontinue the collection by zemindars of any cesses from such people. But the separation contemplated by that proviso, if carried into effect, would not remove the lands separated from a zemindary, like the tract included in Section 2, from the general regulations as regards the administration of civil and criminal justice; nor does it authorize the Government to place the administration of civil and criminal justice in the lands so separated from a zemindary in the Civil Commissioner for the north-eastern parts of Rungpore, appointed by Section 3. Such Commissioner is authorized to administer justice only within the tract described in Section 2.

If, therefore, the proviso in Section 8, applied to the separation of lands beyond the district mentioned in Section 2, from the general regulations, there would be no power to administer justice in the lands so separated, nor any officer authorized by law to administer it.

Further, whatever may be the effect of the proviso in Section 8, it is clear that the jurisdiction of the ordinary Civil and Criminal Courts is not taken away except within the tracts of country mentioned in Section 2.

Clause 2, Section 8 of the Regulation above referred to, enacts that no suit or action shall be entertained by any Civil Court having jurisdiction, or that may hereafter have jurisdiction, within the tract of country, *subject to the authority of the Commissioner*, on account of any act of the above description done under the authority of the Governor General in Council.

Further, upon the removal of any portion of a zemindary under the proviso of Section 8, the Government was to make compensation to the zemindars; but the compensation to be made would be very different in the case of taking away a portion of the estate of a zemindar under that proviso from what it would be if the right of the zemindar to collect certain cesses only was discontinued.

The jurisdiction of the Civil Courts by Clause 2 of Section 8 is taken away only with respect to acts of the description above enumerated, done under the authority of the Government; but that would not take away the right of a zemindar to contest a survey award drawing a line which takes away from him part of his zemindary, and saying that the lands above that line form no part of his permanently-settled estate. That is the ground of action in the present case, and that is not an act of any description mentioned in Regulation X. of 1822.

With these additions to the reasons which I expressed in the course of the argument, the opinion will stand as part of this judgment. It is not necessary to repeat it.

I will now consider the first question, *viz.*, whether the boundary line drawn by the survey correctly points out the northern boundary of the plaintiff's permanently-settled estate. It appears to me that it does not.

The *firmans* which have been put in evidence do not show the boundaries of the plaintiff's estate, but they show that the zemindary of Pergunnah Nusruthshahye, otherwise called Shooshung, had been granted to the plaintiff's ancestors by the Native Government prior to the East India Company's accession to the Dewanny. It is not necessary to rely upon these *firmans* for any purpose beyond that of showing that the estate was co-extensive with the Pergunnah Shooshung. It has been shown that the estate called Shooshung was permanently settled with the ancestors of the plaintiff upon a mokurruree jumma, and there can be no doubt that the estate which was settled permanently at a mokurruree jumma was the same estate which was held under the *firmans* from the Native Government, and was co-extensive with Pergunnah Shooshung. Indeed, in the sixth ground of appeal to the High Court from the Judge's decision, it is stated that the papers filed by the Government show that a settlement was entered into with the Rajah's ancestors for the lands of Pergunnah Shooshung.

The quinquennial register of 1212, which was put in evidence, gives the name of the estate as Shooshung, but does not describe the villages, as it ought to have done according to the provisions of Regulation XLVIII. of 1795, Section 7, Clause 5, which enacted that under the head of each estate, the names of all the pergunnahs or other local divisions, and the villages contained therein, should be specified.

The first quinquennial register was to be made out in the year 1202 B. S., corresponding with the year 1795 of the Christian era, and that was to be numbered 2. Another register was to be made out for the year 1197, corresponding with 1790, which was to exhibit the villages of the estates as they existed at the time of the Decennial Settlement; and that register, when made out, was to be numbered 1. A third register was to be made out for the year 1207, corresponding with 1800, and every five years subsequently.

The quinquennial register provided by Regulation XLVIII. of 1793 was a register of estates. If the estate of the plaintiff's ancestors included the Garrow Hills, it is not improbable that there would be a difficulty in giving a description of all the villages included in it, in the register of 1202, and probably the description of the villages was left until further information should be obtained of the state of the pergunnah, as it existed at the time of the Decennial Settlement, for the purpose of register No. 1. Be that, however, as it may, it is clear that the register did not comply with requirements of the Regulation of 1793, but it must be borne in mind that it was the duty of the Collector, who was an officer of Government, to make it out.

Regulation VIII. of 1800 repealed the provisions of Regulation XLVIII. of 1793, so far as it required the quinquennial register of estates to specify the names of the villages included in them. It required a quinquennial register of pergunnahs in addition to the quinquennial register of estates. That pergunnah register was to give the names of the villages in the pergunnah, and when that portion of the Regulation of 1793 which required the names of the village to be given in the register of estates, was repealed, it was stated that a reference to the pergunnah register would always enable the officers of Government to ascertain the several villages and portions of villages of any estate included in the register of estates (See Section 11, Regulation VIII. of 1800). If the two registers had been properly kept up by the Collectors as required by law, many difficulties, both in this and other cases, would have been avoided.

The first pergunnah register was to be made out for the year 1207, corresponding with the year 1800. Both the register of estates and the pergunnah register were to be made out by the Collector who had power to call upon the zemindars to give him the necessary information; and the zemindars were bound to do so under a penalty to be inflicted by the Governor-General in Council. The register was to be signed by the Zillah Judge, and a copy sent by the Collector to the Board of Revenue and to the Zillah Courts for information, and the Board of Revenue was to send a copy to the Sudder Court for a similar purpose.

A document was put in evidence which was stated to be a quinquennial register for 1207, and that document contains the names of certain villages as the villages of Pergunnah Shooshung. Up to the close of the argument, I was under the impression that it was the pergunnah register of 1207. If that document had really been a quinquennial register, it would have been strong evidence against Government, from whose Collector's records it came, that Pergunnah Shooshung contained the villages enumerated in it.

The Judge, in his judgment in this case, says that the *kyfeut* of the Collector's omlah of the time shows that the date of the deposit of the document with the Collector is uncertain, and that it was found at the arrangement of the records which took place in 1234 or 1817. There is nothing to show under what circumstances that *kyfeut* was written, or what means of knowledge the writer of it had.

Assuming that the document was not a quinquennial register, it came, at any rate, from the Collector's office, where it has been preserved at least ever since 1817, without any dispute as to its correctness, and is some evidence that the Pergunnah Shooshung did contain those villages. If it had contained a false representation, or was considered so by the Collector of the time, there is no reason why it should have been preserved. Further, the document was treated by the Officiating Collector of Mymensingh in his rooboocaree which he sent to the Revenue Commissioner of Assam, dated the 22nd September 1837, as a document worthy of some credit. He there says: "In the "quinquennial paper of 1207, which specially "contains the names of the *parahs* or hamlets "which are recorded in the first quinquen-"nial paper, the villages of Lekhung and "Deno Ryuk, which are the *parahs* or ham-"lets of Mouzah Aghur, which is recorded "in the first quinquennial papers, have been "distinctly written." These are on the north side of the boundary laid down by the Survey.

I do not think that much importance can be attached to the letter of Mr. Wroughton, the Collector, as to the estate of the pergunnah prior to the settlement, for there is considerable ambiguity in his expressions; but we have the letter of Mr. Scott, the Collector, to the Board of Revenue, dated the 24th of May 1820, in which, with reference to the question as to whether a *canoongoe* should be appointed to this zemindary, he evidently considered that the zemindary extended into the Garrow Hills; for he says: "The "introduction of a new system of *canoongoe* "or *patwarees* among them (speaking of the "Garrow people) I should think liable to "many objections. I am inclined to believe "that they pay no fixed rent, either in money "or in kind, to their landlord." He certainly did not intend the Government when he used the word "landlord;" the word evidently referred to the zemindar. On the other hand, he saw no reason for introducing the office of *canoongoe* into that part of the estate which was in the low country.

It appears, further, that in the year 1837, a Sub-Assistant was deputed from Gowalparah with a party of sepoys to collect arrears of tribute which had been withheld by certain refractory Garrows. Upon that occasion, certain rents were collected from the Garrows for villages on the north side of the boundary-line laid down, upon which the Rajah instituted a suit against Government in the Court of the Revenue Commissioner of the Province of Assam; and it appears that for the purpose of ascertaining whether the villages belonged to the Rajah or not, a rooboocaree was sent from the *Kutcherry* of the Commissioner of Zillah Gowalparah to the Collector of Mymensingh. An answer was sent by the Collector of Mymensingh to that rooboocaree, in which, as I have before remarked, he referred to the paper of 1207 as a quinquennial register. He stated that "the evidence of witnesses had been taken" and proceeds to state that, "from their "evidence, it appeared that the four Mou-"zahs Lekhung and others are the *parahs* or "hamlets of Mouzah Aghur recorded in the "quinquennial papers; that many other "mouzahs are situated in the hills apper-"taining to the zemindary of the Rajah; and "that the hills and mouzahs and kis-"muts which are bounded by the Nittai "River on the west, Bellei River and the "state of the Khashia Rajah on the north, "and the River Moheshkhala on the east, are "included in the Rajah's zemindary, and "he is in possession of them for genera-"tions."

A rooboocaree was also sent to the Political Agent for the Cossyah Hills, and Mr. Henry Inglis, the Assistant Political Agent, reported in favor of the Rajah's right to the villages which were under dispute in the Commissioner's Court.

A perwannah was also sent to some neighbouring proprietors on the western boundary, and they replied that they did not claim any portion of the hills.

Finally, on the 17th of March 1841, the Revenue Commissioner of Assam decided that the order of the Collector releasing Mouzahs Lekhung, Shurkejhora, and others in question, to the possession of the plaintiff from the claim of Government to realize rents, and allowing a refund to them of the rents realized from those mouzahs, was in his opinion correct.

With reference to this order, Mr. Campbell in his order of the 15th April 1859, which is one of the matters impeached in this action, says: "It is quite true that they "(speaking of the Gowalparah authorities) did "argue, and indeed declare, that the hills be-"longed to the permanently-settled Pergun-"nah Shooshung, but such a declaration can "carry no weight so far as Mymensingh is "concerned. They had perfect power to de-"cide that the villages did not belong to "Gowalparah; but no one but the Mymen-"singh authorities could decide that they "were within the limits of the permanently-"settled estate of Pergunnah Shooshung." But if they are not in the Gowalparah District, and are in the Mymensingh District, where are they except in Pergunnah Shooshung? It is not pretended on the part of the Mymensingh authorities that there is any other pergunnah or district, or part of a district, in Mymensingh to the north of Pergunnah Shooshung. This point was very properly pointed out by the Judge in giving judgment on the appeal before him. He appears to me to have given a very sensible judgment on the whole case, and I concur in many of his remarks, though upon one point he appears to have fallen into error, as I shall presently point out.

But it is to be further remarked that the decision of the Revenue Commissioner of Assam was given after considering the rooboocaree of the Officiating Collector of Mymensingh, dated the 27th September 1837. Of the three officers of Government, the Collector of Mymensingh, the Assistant Political Agent of the Cossyah Hills, and the Revenue Commissioner of Assam, all of whom knew of the proceedings before the Commissioner of Assam, none of them claimed the lands in dispute, and the Revenue Commissioner of Assam ordered the rents which had been collected to be refunded to the Rajah.

Some time after the decision of the Commissioner of Assam, it appears to have been represented to the Board of Revenue that the Rajah was capturing elephants in the forests north of the line which is now laid down, and the Board was asked by the Commissioner of Revenue for the Division of Dacca whether the Government order of the 14th of January 1854, with reference to catching elephants, was to be enforced in those forests. Mr. Kemp, who was then the Collector of Mymensingh, was directed to enquire whether the forests were situate within or without the limits of the Rajah's permanently-settled estate. Unfortunately in this case, we have not a copy of the whole correspondence. We have sometimes letters without a copy of those to which they are a reply, and sometimes replies without the letters in answer to which they were sent. We have not, therefore, all the light which might have been fairly thrown upon the case by the Government officers; but we find from Mr. Kemp's letter of the 25th of August 1854 to the Commissioner of Dacca, what was the belief of the Board of Revenue at that time upon the subject; and that was, that the forests where the elephant-catching was going on were within the Rajah's permanently-settled estate. He says: "The Board in reply observe that, if, "as they believe, the Rajah's estates (meaning "the forests) came within the limits of the "permanent settlement, there would be diffi-"culties probably in dealing with the question "of elephant-catching there, which do not "occur in dealing with it in the forests of "Sylhet." Mr. Kemp, who was then the Collector of Mymensingh, reported in substance, as his predecessors had done, that the Rajah's forests were within the limits of his permanently-settled estate.

We have, therefore, the opinion of Mr. Scott, the Collector, on the 24th of May 1820; the report of the Officiating Collector of Mymensingh of the 27th of September 1837; we have the paper called a quinquennial register of 1207, upon which no Collector has ever attempted to cast discredit; we have the report of Mr. Henry Inglis, the Assistant Political Agent of the Cossyah Hills; we have the decision of Mr. Jenkins, not only deciding in favor of the plaintiff, but ordering rents which had been collected from the Garrows by the Revenue Authorities of Assam to be returned to the Rajah; we have the report of Mr. Kemp, the Collector of Mymensingh, to the same effect in 1854; and if Mr. Kemp's report is correct, as to the Board's reply to the Commissioner of Revenue of the Division of Dacca, of which a copy has not been put in evidence, we have the belief of the Board of Revenue, that the forests north of the disputed line belonged to the Rajah's permanently-settled estate. Mr. Kemp's letter must have been sent to the Board of Revenue, and there is nothing to show that they ever repudiated the statement that they had expressed that belief. Yet we find from the decision of Mr. Campbell of the 15th of April 1859 that,

notwithstanding the Rajah had exercised rights and collected dues in the hills and forests north of the alleged line, and notwithstanding the unanimous opinions of all the officers, and even of the Board of Revenue, that the forests were within the Rajah's permanently-settled estate, it was determined by the Superintendent, the Board, and the Government, that a demarcation line should be assumed as the boundary of the Pergunnah which should exclude those hills and forests from the Rajah's estate; that the *onus probandi* should be thrown on him as to any portion of the hills to which he might lay claim north of that line. The line was accordingly drawn, the case was transferred by the Board to Mr. Campbell, the Collector of Mymensingh, and in an anomalous kind of proceeding of a judicial character, Mr. Campbell decided against the Rajah. His order was affirmed upon appeal by the Commissioner of Revenue, and finally upheld on appeal in a proceeding of a judicial nature by the Board of Revenue, who, contrary to the expressed belief of the Board of Revenue, had ordered the line to be assumed in order to throw the *onus* on the plaintiff. I must say that the proceeding appears to me, to say the least of it, to have been one of a very arbitrary and anomalous character.

On the 23rd of March 1861, after the decision of Mr. Campbell and of the Commissioner, and before the decision of the Board of Revenue of the 22nd of May 1862, Mr. Seton-Karr, as Secretary to the Government of Bengal, wrote to the Agent of the Governor-General on the North-East Frontier:—

"The specific recommendations made by "Lieutenant Morton, in all of which Colonel "Jenkins has expressed his concurrence, are "as follows: first, to extend to the "Garrow villages on the frontiers of the "Mymensingh District the same system of "Revenue collection as is adopted in the "Garrow Mehals of the Gowalparah District, "or, as Colonel Jenkins expresses it, 'to "take all the Garrow villages from which "the zemindars of Sherepore and Shooshung "claim to have the right of taking reve-"nue under the direct management of Gov-"ernment, the Government officer collect-"ing the revenue and paying it over to "the zemindars.' As this arrangement "has worked well in Gowalparah, the "Lieutenant-Governor sees no reason to "doubt that it would work as well on the "other side of the hills, and the Commis-"sioner of Dacca will be requested to "adopt measures for its immediate introduc-"tion into Mymensingh."

From this paragraph it is clear that the right of the zemindar to collect the revenue was not even disputed by the Government. The Government officer was to make the collections, but he was to pay them over to the zemindar, which would not have been the case if the lands had not been included in the zemindary, and the zemindar had no right to them. Consequently it seems clear that when the Commissioner of Dacca was requested to adopt measures for the introduction of the system of revenue collections alluded to in the letter into Mymensingh, it was admitted that this part of the Garrow Hills was in Zillah Mymensingh and in the Rajah's estate. This letter was written before the decision of the Board on the appeal.

But after the decision of the Board of Revenue, Mr. Gordon, as Officiating Junior Secretary to the Government of Bengal, writing to the Officiating Commissioner of Assam on the 18th November 1862, says: "This is not, the Lieutenant-Governor observes, a question of disputed boundary, but a question as to the right of the zemindars of Sherepore and Shooshung to collect revenue from the Garrow villages on the north side of the Mymensingh boundary, and within the limits of the Garrow country under the administration of the Deputy Commissioner of Gowalparah. In other words, the lands in the Garrow country, in which the revenues were to be collected by Government and paid over to the Rajah, are now said not to be in Mymensingh at all but to be to the north of the Mymensingh boundary under the administration of the Deputy Commissioner of Gowalparah; if so, they are out of the permanently-settled estate of the Rajah in Zillah Mymensingh. It has been decided, however, by Mr. Jenkins, the Commissioner of Assam, that they were not in Assam, and he ordered the rents collected to be returned to the Rajah; and Mr. Campbell held that the Gowalparah authorities, although they had a right to decide that the lands were not in Gowalparah, had no right to decide that, if in Mymensingh, they had been permanently settled. If they are not in Mymensingh, where are they? The plaintiff's boundary and the boundary of Pergunnah Shooshung are conterminous. If that portion of the estate which is claimed by the Rajah is not in Pergunnah Shooshung, it is not in his perma-

nently-settled estate; and if by the assumed line drawn by direction of the Board of Revenue and the Government of Bengal, the lands are put out of Pergunnah Shooshung, they are at the same time put out of the permanently-settled estate of the Rajah: so if the lands are put out of Zillah Mymensingh, they are necessarily put out of the Rajah's permanently-settled estate, which was settled with him in Pergunnah Shooshung, Zillah Mymensingh.

In the 3rd para. of the letter to which I last referred, it is said: "The Lieutenant-"Governor is not aware that there is any "doubt as to the exact boundary between "the District of Mymensingh and the "Garrow country. But, be that as it may, "His Honor directs that all lands to the "north of the boundary, as laid down in the "Revenue Survey Map, may be separated "from the estates of the zemindars of Shere-"pore and Shooshung, and managed by the "Deputy Commissioner of Gowalparah as "directed in Section 8, Regulation X. of "1822."

When the plaintiff commenced his suit to try the question whether the line of boundary, as laid down in the Survey Map, was correct, it was contended that the Civil Courts had no jurisdiction. If not, the line assumed by the Board of Revenue and laid down as the northern boundary of Zillah Shooshung, can never be disputed, and the plaintiff must be bound by the decision of the Board of Revenue, who, having ordered the line to be assumed for the purpose of throwing the *onus* on the Rajah, decided, in their capacity of the highest Court of appeal in revenue matters, that the line which had been assumed was the correct one. Even if the Government had had the power under Regulation X. of 1822, to separate any portion of the plaintiff's estate from the remainder, and to place it under the Commissioner of Gowalparah, the plaintiff would have been entitled to compensation under the Regulation. But the amount of compensation might be very different if the Rajah was the owner of the soil as part of his permanently-settled estate from what it would have been if he was merely entitled to some incorporeal rights over it.

I do not understand under what Regulation the proceedings of the Revenue authorities can be, or are attempted to be, justified. If those proceedings were adopted under Regulation IX. of 1825, Section 5, Clause 12, they were wholly irregular, inasmuch as the *onus* of proof was thrown upon the Rajah, not by an independent opinion of the Collector, but by an act done in which the Board of Revenue took the initiative. Having ordered the line to be assumed and drawn as it was, they sent the case to the Collector for disposal. If the lands are in Gowalparah, how could the case be sent to the Collector of Mymensingh? It is not necessary that the proceedings should be regular in order to give the Civil Courts jurisdiction to set them aside. The more arbitrary and irregular the proceedings, the more necessary is the interference of the Civil Courts to prevent them from working injustice. The form of a proceeding, in its nature judicial, was gone through; and, if wrong, the irregularity of the proceedings can be no ground for excluding this Court from examining them. If the proceedings had been regular, this Court would have had jurisdiction. That jurisdiction cannot be excluded by the irregularity of them.

We, therefore, have power to look into the facts, and to decide upon the plaintiff's rights. Judging from the parol evidence which has been adduced in the cause, the opinions expressed by the various Collectors of Mymensingh, and the decision of the Revenue Commissioner of Assam, we are of opinion that the line assumed and laid down in the Survey Map was not correct.

There can be no doubt from the parol evidence that some rights were exercised by the zemindar in portions of the forests and lands much to the north of the assumed line. Whether the payments which he received from the Garrows for the *chungs* are to be considered as payments of rent or not, I think it is clearly proved that payments of some kind were made to the Rajah by the Garrows in respect of the *chungs* and other matters.

There can be no doubt that when the Revenue Authorities of Assam interfered, and accompanied by Sepoys, compelled payments from the Garrows, such payments were claimed and received as rent. Having been received as rent, the amount was ordered by the Revenue Commissioner of Assam, in a suit by the Rajah against the Government, to be paid to the Rajah.

The cutting of timber would be strong *primâ-facie* evidence of an act of ownership. If it was in the exercise merely of a right to cut timber, how did the latter right originate,

and who are the owners of the soil over which such right was exercised? One question is whether the acts done by the Rajah and his ancestors on the north side are to be treated as mere unwarrantable encroachments by a wrong-doer, or to be taken as the exercise of rights; and, if they are to be attributed to the exercise of rights, whether such rights were rights of ownership in the soil, or mere incorporeal rights over the soil of another?

In a case of disputed boundary, if you find a man exercising rights of ownership on the one side and on the other side of the disputed line of boundary, doing, without objection, acts which may be attributed either to ownership or to the exercise of incorporeal rights, such as the right to cut timber and other rights of that nature, they must, I think, be *primâ facie* attributed to ownership, especially when, as in the present case, the rights exercised are all which, according to the nature of things, an owner would, or probably could, exercise, and when it is not shown that there is any other owner of the soil, or that any objection to the exercise of such rights was ever made during a long course of years. They certainly cannot be treated as the mere encroachments of a wrong-doer without showing that some one else was the owner of the soil, and that he objected. There can be no doubt that the Government permanently settled some lands with the Rajah's ancestors. The boundary only is in dispute. We find the Rajah and his ancestors for a long course of years doing acts which may be attributed either to ownership or to the exercise of incorporeal rights on the north side of the disputed boundary-line. It is not shown that the Government or any other person ever objected to such acts. I cannot, in the absence of all evidence to the contrary, attribute those acts to anything but to ownership, and I am of opinion that the Rajah has proved that the line laid down in the Survey Map was not correct, and that his permanently-settled estate includes lands much to the north of that line, and I am of opinion that the plaintiff ought to have a declaration that he is not bound by the line so laid down as the boundary of his estate.

In the course of my remarks on the 2nd question, I have indirectly given my opinion on the third point, *viz.*, that this Court has the power to set aside the survey-proceedings, although they were irregular. But it does not follow that, because the plaintiff is entitled to lands to the north of the boundary-line laid down, he is entitled to all the lands up to the line which he claims as his northern boundary. The Judge of Mymensingh has, in my opinion, fallen into an error in deciding that upon the evidence the plaintiff is entitled to the lands up to the boundary-line which he contends for. He has not merely declared that the line drawn by the Survey Authorities is not the northern boundary of Pergunnah Shooshung, but he has proceeded to declare that the right and title of the plaintiff in the land claimed is established, that is to say, that he is entitled up to the hills lying to the north of the Villages Aboolgarrai and Lensengarrair. There is no sufficient evidence to prove such a right, or to enable us to declare with certainty what is the correct boundary of the plaintiff's estate.

Mr. Justice Seton-Karr also seems to have fallen into an error similar to that of the Zillah Judge. He says: "Even if it be conceded for Government that the Rajah has "not shown, by precise and documentary "evidence, that this hill tract actually "formed part of the assets of his estate at the "Perpetual Settlement, I would still say that "he has shown a prescriptive right to *collection*, and receive tribute from the tract "in question, and that the Government, in "opposition to the case which he has set up, "has shown literally nothing to debar him "from the future exercise of those rights."

But that is not what the plaintiff claims. He does not merely claim certain incorporeal rights over the land to the north of the line laid down in the Survey Map, but he claims to be entitled to the lands up to the northern boundary described in his plaint as part of his permanently-settled estate; and it appears to me that he has failed in proving his case to that extent.

Mr. Justice Seton-Karr proceeds: "I "would simply confirm the judgment of the "Lower Court, and declare the Rajah "entitled to the privileges and dues which "he has always enjoyed till a recent "date. It is obvious that the collection of "these cesses, however primitive, irregular, "and uncertain, may form an important part "of the plaintiff's income. Dealing with the "case, as a judicial tribunal ought to deal with "it, I have only to say that I think the "judgment ought to be affirmed substantially, "and the appeal dismissed with costs."

It appears to me that Mr. Justice Seton-Karr, although right in other respects, has fallen into a mistake in declaring that the

plaintiff is entitled to the lands as part of his permanently-settled estate, merely because he considers that he has a right to the privileges and dues which he has enjoyed. I am of opinion, therefore, that the decisions of the Zillah Court and of the Division Bench ought to be modified, and that it ought to be declared that the line laid down by the Survey as the northern boundary of the plaintiff's estate is not the correct boundary-line, and that the plaintiff is not bound by the survey-proceedings; and that that part of the decision of the Zillah Court, which declares that the plaintiff is entitled to the land claimed, should be reversed. In other respects the decision of the Lower Court is affirmed. Although the plaintiff has, in my opinion, shown that he is entitled to some lands to the north of the boundary laid down, he has failed to prove, to my satisfaction, that he is entitled to the lands up to the boundary-line which he claims. That being the case, I can only declare that he is not bound by the line laid down, and not that he is entitled up to the boundary which he has claimed.

It appears to me that the appeal must be allowed; that the decisions of the Lower Court and of the Division Bench of this Court must be reversed so far as they declare that plaintiff is entitled to the lands specified in the plaint; and that we must merely declare that the boundary-line laid down in the Survey Map as the boundary line of his permanently-settled estate is not the true boundary-line; and that the plaintiff is not bound by the Survey Map or by the order of the Collector of the 15th April 1859 and the subsequent proceeding thereon. The Government has failed substantially in the suit. They ought to pay the costs of the appeal to the High Court, and the appeal from the First Division Bench to this Court. The result is that the Government will pay all the costs in the Lower Court and in this Court.

Jackson, J.—I concur with the Chief Justice on all the points.

Phear, J.—I substantially agree with the Chief Justice on all the points.

But I confess that I have, during the course of the case, felt very much difficulty as to what was the exact cause of action which we have been trying, and I am still not without hesitation as to the propriety of the form of decision which the Chief Justice and my brother Jackson think is correct.

If the plaint itself alone be looked at, it is, I think, almost impossible to say that anything actionable on the part of the defendant, that is, the Government, is there disclosed. The written statements that I have seen afford no aid whatever with regard to this point, and it is only now at the last moment that I have been able to discover there were issues settled between the parties. But from the course the litigation has taken in the different Courts, and from the arguments of the Counsel before us, I come to the conclusion, which I believe to be substantially correct, that plaintiff's intended ground of complaint is this, *viz.*, that the Government who settled Pergunnah Shooshung with his ancestors have wrongfully drawn a boundary-line cutting off a portion of the estate so settled, and have forbidden the plaintiff the enjoyment of zemindary-rights in the portion beyond and on the hill side of that line. If this be so, I think that that constitutes a cause of action upon which the plaintiff can ask for a declaration of right under Section 15, Act VIII. of 1859, because it constitutes a cause of action upon which he could have come to a Civil Court for relief independently of that Section.

But it seems to me that a declaration of right to be made under Section 15 in the contemplation of the Legislature must be such a specific right as the Court would be obliged to arrive at and find to exist in the case, before it would be justified in giving other relief than a mere declaration of right itself.

I think, therefore, that, if we come to the conclusion in this case that the Government has committed a wrongful act, we ought to specify distinctly the proprietary right which we consider that the plaintiff has established beyond the line wrongly drawn by the Government, and has shown to be violated or threatened by the drawing of that line. This is the right which I suppose he asks us to declare, because I do not think that he could, under the Act, ask for the declaration of any other right than that which is attacked by the defendant's wrong-doing. The specification of such a right necessarily involves a specification of the locality or area over which it extends. Indeed, it seems to me that a proprietary right is not fully defined until at least the property to which it relates is indicated. To say that a claimant has the right to possession of some land beyond a given line, without giving any clue to the specification of that land, appears to me to

be as vague and indefinite as if the declaration had simply been that he was entitled to some sort of proprietary right, and had gone no further towards distinguishing it.

It seems to me, too, that we shall be doing much to encourage great additional and mischievous litigation if we hold that Section 15 does in effect create a cause of action, for if this Section justifies the indefinite declaration of right which is now proposed to be made, it justifies the plaintiff in coming into Court with just so much materials, and no more, as will be enough to lead to such a declaration, and to my mind this will be a cause of action which Courts have not hitherto recognized as sufficient. Thus, for instance, it will be always competent to a plaintiff who is desirous of bringing a possessory action, to confine himself in the first instance to bringing a suit to obtain a general declaration that his possessory rights extend beyond, or exist within, a specified boundary, before he makes up his mind to bring a suit to obtain possession of any definite area of which that boundary may be a part definition.

For my own part, I am prepared, on the facts of this case, to go beyond the decision of my colleagues. I am prepared to declare that the plaintiff has proprietary rights in certain specified villages beyond the disputed line. That the Government line is wrong, and that the drawing of it has been a wrongful act on the part of the Government, I have no sort of doubt. Indeed, I think that the Chief Justice has clearly pointed out that the act was most arbitrary and high-handed.

The evidence, with which the Chief Justice has so fully dealt, is to my mind absolutely conclusive against the line being the northern boundary of the pergunnah which was settled with the plaintiff's ancestors. No doubt, if a proprietary right is to be proved by user alone, it must be always remembered that any particular acts of user are only evidence of just so large a right as will justify the act of user. If an easement will suffice for that purpose, the right of easement is all that the evidence proves. But when acts of user of different kinds are established, such that they can only be justified by attributing them to several easements, if to easements at all, then it becomes a matter of consideration, on the facts of the case, whether they are not rather referable to the one paramount right of ownership, than to several minor rights of easement; and the best guide to a conclusion on this point is, that which I believe the Chief Justice has before laid down in this Court, and which is certainly to be found in many of the decisions of the Courts at Westminster, *viz.*, this, to see whether or not acts of user exhibit all the modes of enjoyment, which under the circumstances of the case it would be reasonable to expect would be displayed in regard to the property.

To English lawyers a familiar example is that of the seashore between high and low water. If a person shows that he has always been accustomed to take sand from it, that alone may be justified by presumption of a grant to take sand; and so with seaweed, mooring dues, or any other single act of enjoyment. But if he shows that he has been accustomed to do all these things, or a large number of them, it would be proper for the Jury to infer that he did so by reason of a right of ownership, rather than because he had originally obtained so many separate grants.

So here, if the acts of enjoyment which Mr. Justice Seton-Karr appears to think illustrated all the modes of enjoyment of which this disputed property could reasonably be expected to be capable, then I think that that learned Judge would have been right had he drawn the conclusion of fact, that those acts of user were attributable to proprietorship of the tract upon which they were exercised; and in that case, his confirmation of the judgment of the Lower Court would have been unimpeachable, had he also gone on to specify that he found that these acts were done, and the enjoyment had, throughout the whole of the area claimed by the plaintiff. As, however, he did not draw that inference of fact, but came only to the conclusion of Mr. Justice Macpherson that nothing more than the particular rights which Mr. Justice Macpherson found had been made out by the plaintiff, I cannot understand, I confess, how the senior Judge of the Division Bench could escape from the necessity of passing the judgment which Mr. Justice Macpherson recommended.

For my own part, I am not indisposed to say that, as a Juryman, I should have drawn the inference of fact from the evidence of user alone, which Mr. Justice Seton-Karr seems to have avoided; but I think, had there been any doubt left upon this point, so far as concerns the evidence of user, that is entirely removed by the documentary evi-

dence in the case, showing the acts and acknowledgments of the Government officials, and the fact that Garrow Mehals in the hills were recognized as belonging to Pergunnah Shooshung, as well as the other pergunnahs mainly lying at the foot of the hills, from the earliest period to which our evidence goes back.

It is perfectly unnecessary for me to support what I have just said by a detailed reference to the evidence itself, as that has been so effectively done by the Chief Justice.

I am of opinion that we ought to declare that the so-called boundary-line drawn by the Government, and confirmed by the various decisions of the Commissioner and Board of Revenue, which are sought to be set aside, is not the boundary of plaintiff's settled estate Pergunnah Shooshung, and I think, further, that we ought to declare that the villages mentioned in the rooboocarees of Mr. Irwin, Mr. Scott, and Mr. Inglis, and in the decision of Mr. Jenkins, form part of the settled Pergunnah Shooshung.

The 31st March 1868.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Practice—Finding on remand—Memorandum of objection.

Case No. 278 of 1866.

Regular Appeal from a decision passed by the Judge of Tirhoot, dated the 28th May 1866.

Ashrufoonissa Begum (Plaintiff), *Appellant,*

versus

Mr. Stewart and others (Defendants), *Respondents.*

Mr. A. T. T. Peterson, Baboo Bama Churn Banerjee, and *Moonshee Ameer Ali* for Appellant.

Mr. R. V. Doyne for Respondents.

In a case in which an issue referred under Section 354 of Act VIII. of 1859 to the Lower Court was tried there, and the finding was returned with the evidence as no memorandum of objection was filed within the time fixed by the Court, the Court declined to allow objections to be taken when the appeal came in for final determination.

Macpherson, J.—THE issue referred to the Lower Court for trial having been tried, and the Court having returned its finding thereon together with the evidence, and no memorandum of objection to the finding having been filed within the time fixed by the Court (one month from the 13th February) or up to this day, it is ordered that a decree be entered (setting aside the original decree of the Lower Appellate Court) for the appellant for Rupees 20,000 with costs, including the costs (if any) of the reference back to the Lower Court under Section 354.

Mr. Doyne applies to be heard to object to the finding of the Lower Court, although no memorandum has been filed. Mr. Peterson opposing the application, we decline to hear Mr. Doyne.

The 2nd April 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Benamee sale—Long possession—Claim by ostensible purchaser—Onus probandi—Sections 259 and 260, Act VIII. of 1859.

Case No. 2007 of 1867.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 29th May 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 18th February 1867.

Zoolfekar Ali (Defendant), *Appellant,*

versus

Mahomed Tukee and others (Plaintiffs), *Respondents.*

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Mr. R. E. Twidale for Appellant.

Mr. C. Gregory and *Baboo Rajendra Narain Bose* for Respondents.

Where plaintiff as heir of the ostensible auction-purchaser sued to oust defendant who had been 12 years in possession, and the latter pleaded that the sale was made *benamee*—HELD that the long possession would go to prove the truth of defendant's allegation that the auction-purchaser was merely a trustee for him, and it would be for plaintiff to show that his ancestor paid for the purchased property.

HELD that Sections 259 and 260, Act VIII. of 1859, did not apply, as the sale was made before that law came into operation.

Loch, J.—WE think that the Judge has wrongly applied the provisions of Sections 259 and 260, Act VIII. of 1859, to this case. The suit was instituted on the last day of the 12th year from the date of sale. The defendant had all along been in possession. Plaintiff comes in as heir of the ostensible auction-purchaser, and seeks to oust the defendant. He pleaded that the sale was made *benamee*. Now, where defendant is in possession, as in this case, we see no reason why he should not be allowed to plead that the auction-purchaser in whose name the purchase was made was merely a trustee for him, and his long possession would go to prove the truth of this allegation; and it would be for plaintiff to show that his ancestor purchased it and paid for it. The present case is very different from the case of a person claiming a property on the ground that he was the real purchaser, and that the auction-purchaser's name was used for convenience, and that he was entitled to obtain possession as the real purchaser as against the certified purchaser. We remand the case with instructions to the Judge to determine whether plaintiff is the real purchaser, and, as such, entitled to obtain possession. He must prove this.

Mitter, J.—I concur generally in this judgment. I think that Sections 259 and 260 of Act VIII. of 1859 cannot apply to this case, inasmuch as the sale in question was made under the old law, before Act VIII. of 1859 came into operation. I also wish to point out that the admitted long possession of the defendant is an important element to be taken into consideration for the purpose of determining as to which of the contending parties is the real purchaser of the property in dispute. The case is, accordingly, remanded to the Lower Appellate Court to re-try it with reference to the whole evidence on the record.

The 2nd April 1868.

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

Suit by heir for possession—Onus probandi.

Case No. 444 of 1866.

Application for review for judgment passed by the Hon'ble Justices Loch and Jackson, on the 5th July 1866, in Regular Appeals Nos. 29 and 30 of 1866.

Teelucko Kooer, *Petitioner,*

versus

Nirban Singh and others, *Opposite Party.*

Messrs. R. V. Doyne and *C. Gregory* for Petitioner.

Baboos Onookool Chunder Mookerjee, Unnoda Pershad Banerjee, and *Mohendro Lall Shome* for Opposite Party.

In a suit for possession, where plaintiff had a clear title as heir to her deceased husband as against defendant—HELD that the latter was bound to show adoption or some other matter which would prevent the plaintiff from succeeding.

Loch, J.—WE have heard the Counsel on both sides of this case with regard to the admission of the review. The general allegation brought by the applicant is, that the burden of proof has been wrongly put upon the plaintiff; that the Court weighed the plaintiff's evidence against the defendant's, and then says that it thought the latter more worthy of credit, whereas the Court should have looked at the defendant's evidence first of all, and come to the distinct finding whether the defendant had really proved adoption and possession. When the case was before us, I believe that the course taken by the Court was that indicated by the applicant; that we did look into the evidence given by the defendant, and we found that he had made out a case of adoption, and we found that he had made out his

possession. We then went into the plaintiff's evidence, and we did not think that evidence was sufficient to rebut the evidence which had been given by the defendant; and for this reason we reversed the order of the Lower Court, and I do not see from anything that has been said to-day that our judgment was erroneous.

I would, therefore, reject this application for review with costs.

Jackson, J.—I am of the same opinion as Mr. Justice Loch.

Observations, no doubt, occurred in the judgment which we delivered after the hearing of this case, which afford a certain color to some of the objections which Mr. Doyne has urged this day before us. Those observations were addressed to the arguments advanced by the pleaders at the hearing; and they also relate in part to some of the arguments used in the judgment of the Court below. But there can be no doubt whatever that our judgment substantially rested upon the credit which we allowed to the witnesses for the defendant as compared with those on the side of the plaintiff.

It seems to me that Mr. Doyne is mistaken in contending that in this case we laid the entire burden of proof upon the plaintiff. It is a case in which we should not have been right in doing so, the plaintiff having a clear title to hold the estate as heir to her deceased husband as against the defendant, unless he could show an adoption or some other matter which would prevent the plaintiff from succeeding. This state of facts unquestionably imposed upon the defendant the necessity of proving the adoption. He, accordingly, adduced evidence to that effect, and we had then to consider whether that evidence was sufficient to establish the special allegation of the defendant, and whether it was answered or rebutted by the evidence for the plaintiff. Now, undoubtedly, there were various blots in the case for the defendant, and upon those blots we freely observed in our judgment. One of them was the attempt to give secondary evidence of the contents of the deed by which the defendant is said to have been adopted. We stated unhesitatingly our disbelief of that evidence, but we did not for that reason declare that there had been no deed, or that there had been no adoption; we put that part of the case as it were aside, discredited it, and disregarded it.

It constantly will happen in this country, and does happen in our daily experience, that cases perfectly true in themselves are, by the folly and wickedness of the parties, supported, or an attempt is made to support them, by evidence which is perfectly false and worthless. It is our duty, when cases of that description come before us, to express our opinion upon such conduct, but we are not for that reason to deprive parties of the benefit of the remaining facts as they actually appear in evidence. Upon the whole of this case, which was certainly heard and weighed with care, we came to the conclusion that the evidence of the defendant's adoption, and as to his possession consequent upon that adoption, was sufficient, that is, that he had sufficiently discharged the burden which lay upon him of meeting the plaintiff's case. The plaintiff, we understand, has preferred an appeal against our decision to Her Majesty in Council. Their Lordships in the Judicial Committee of the Privy Council have of late, in frequent instances, shown that they will not hesitate to deal with questions of native evidence and usage, and if they differ from the judgment of the Courts in this country upon such questions, they will reverse the judgment given here. If in this case their Lordships should think fit to do so, and if they are of opinion that our judgment is based upon erroneous or insufficient grounds, I have no doubt that they will reverse our judgment, and that justice will be done. But I am quite clear that in such a case as this, appeal, and not review, is the proper course of the dissatisfied party.

The 2nd April 1868.

Present:

The Hon'ble C. Hobhouse and Dwarkanath Mitter, *Judges.*

Appeal—Collector's refusal to execute on ground of limitation—Section 151, Act X., 1859.

Case No. 459 of 1867 under Act X. of 1859.

Miscellaneous Appeal from an order passed by the Officiating Collector of Rungpore, dated the 23rd April 1867.

Nubo Kishore Roy (Decree-holder), *Appellant,*

versus

Huro Soonduree Dossia and others (Judgment-debtors), *Respondents.*

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Baboo Nuleet Chunder Sein for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

No appeal lies from the order of a Collector refusing to execute a decree on the ground that the decree was barred by the Law of Limitation.

Miller, J.—THIS is an appeal against an order of the Officiating Collector of Rungpore, rejecting the prayer of the petitioner for the execution of a decree obtained by him upon the ground that the decree was barred by the Law of Limitation. We are of opinion that such an appeal cannot lie under the provisions of Section 151, Act X. of 1859. We have been asked by way of motion to interfere with the order of the Lower Court under the powers vested in us by Section 15 of the Charter Act; and a Full Bench Ruling of this Court, reported in page 520, Sutherland's Weekly Reporter, Volume VII., was cited in support of this request. But we are of opinion that this is not a proper case for interference under the provisions of Section 15 of the Charter Act. In the Full Bench case, the Deputy Collector had refused to exercise a jurisdiction which he ought to have exercised under the law; but in the case before us, the Collector has exercised the jurisdiction vested in him, but he has refused to carry the decree into execution in consequence of its being barred by limitation. If we were to interfere in such a case, merely because the Collector might have committed an error in applying the Law of Limitation, Section 151 of Act X. of 1859 would become a mere dead-letter. The application is accordingly rejected with costs.

The 3rd April 1868.

Present:

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

Arbitration-awards—Section 327, Act VIII., 1859.

Case No. 2415 of 1867.

Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of Patna, dated the 16th July 1867, reversing a decision passed by the Moonsiff of that District, dated the 3rd October 1866.

Ramyad Sahoo (Plaintiff), *Appellant,*

versus

Doolar Sahoo (Defendant), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Tarucknath Sein for Respondent.

Arbitration-awards not brought into Court under Section 327, Act VIII., 1859, are not on that account necessarily invalid.

Jackson, J.—THIS was a suit to recover certain lands. The plaintiff put forward as his title-deed to those lands a bill of sale in the name of Byjnath Sahoo, and an arbitration-award made between plaintiff and Doolar Sahoo. Plaintiff alleged that, the lands had been purchased jointly by himself and Doolar Sahoo, in the name of Byjnath Sahoo, the minor son of Doolar Sahoo; and that, in a separation of estate between himself and Doolar Sahoo, which had been carried out by arbitrators, these lands had fallen to his share. Doolar Sahoo did not contest the claim, but Byjnath Sahoo being of age alleged that the purchase by his father had been made for his (Byjnath's) benefit, and with money belonging to him (Byjnath Sahoo).

The first Court decreed the plaintiff's claim. The Appellate Court, however, was of opinion that the arbitration-award was rendered null and void by the plaintiff not having brought it into Court to be enforced within six months of its being passed, and quoted Section 327, Act VIII. of 1859, in support of this view of the law. On this ground the Appellate Court dismissed the plaintiff's suit.

On special appeal it is urged that the Appellate Court has taken an erroneous view of the law. We think that it is erroneous. Section 327 enacts that if an arbitration award is brought into Court within six months, it may, if no objection is raised to it, be enforced as a decree, and execution taken out upon it. But it does not follow that all arbitration-awards not so brought in are invalid. As Doolar Sahoo has not contested the plaintiff's claim under the award, that award is good as between the plaintiff and

Doolar Sahoo. As between the plaintiff and Byjnath Sahoo, the issue was properly raised in the first Court, whether the lands were purchased by Doolar Sahoo for himself and the plaintiff jointly with their funds, or whether they were purchased by Doolar Sahoo for Byjnath Sahoo with Byjnath Sahoo's funds. The Principal Sudder Ameen must proceed to try the same issue. His decision is reversed, and the case remanded to him.

The 3rd April 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Decree against wife—Execution against husband—Section 105, Act VIII., 1859.

Case No. 83 of 1867.

Application for review of judgment passed by the Hon'ble Justices Jackson and Hobhouse, on the 11th September 1867, in Miscellaneous Appeal No. 373 of 1867.

Bindabun Chunder Sircar Chowdhry and another, *Petitioners,*

versus

Mr. A. B. Mackintosh, *Opposite Party.*

Mr. Piffard and *Baboo Nil Madhub Bose* for Petitioners.

Baboos Romesh Chunder Mitter and *Nil Monee Sein* for Opposite Party.

A party having died while a suit against him was pending, his widow was brought upon the record as defendant, and judgment was given against her, which was subsequently affirmed on appeal. The original decree embraced an award of certain *wasilat* (accruing after the husband's death) for which the widow was personally liable. Between the original and final judgments she married again, and execution of the decree was accordingly sought against her second husband.

HELD that he was not liable to summary proceedings in execution, and that the term "judgment" in Section 105, Act VIII., 1859, did not include the judgment in appeal.

Jackson, J.—THIS is an application to review our judgment, dated 11th September last, in the execution-case of Bindabun Chunder Sircar and another against Mr. A. B. Mackintosh.

The grounds upon which error is alleged are, in fact, the two grounds which were mainly urged before us at the hearing of the special appeal. They are, *first*, that Mr. Mackintosh was bound by a previous decision against him upon the very point now raised, *viz*, his liability under the decree against Mrs. Harris. This point, however, has not been greatly pressed by the learned Counsel, Mr. Piffard; and looking at the circumstances of the case, we see no reason to think that our ruling on that point was erroneous. We think—and we believe we so held at the time—that the determination of the point of law against Mr. Mackintosh was so accompanied by a determination of the Court for other reasons not to execute the decree against him, that he was not bound at that time to appeal against the decision upon the first point.

The second question is whether, looking upon the matter as one for decision now, we were right in holding that Mr. Mackintosh was not liable in this execution-proceeding.

The suit was one commenced against the first husband of Mrs. Mackintosh, Mr. Harris, in the year 1841. It is only necessary to say that Mr. Harris died while that suit was pending; that Mrs. Harris was brought upon the record as defendant, and the judgment was given against her on the 13th April 1844; that she appealed against that judgment, and the judgment was affirmed in 1848. Mrs. Harris, in the meantime, that is to say, in 1846, married Mr. Mackintosh, against whom execution is now sought. In our first judgment in this case, we were of opinion that the decree was not against Mrs. Harris (now Mackintosh) personally, but was wholly against her in her capacity of representative of her deceased husband.

It appears that on that point we fell to a certain extent into error, and that, although the original defendant was the husband, yet the decree embraced an award of *wasilat* accruing after the husband's death and during the possession of the wi-

dow, and for which, consequently, she would be personally liable. Whether it was right to make that award in the decree upon the suit against the husband is a question into which it is now too late to enter; but, rightly or wrongly, it seems judgment was given against her personally, as well as in her representative character. The case, then, stands that for certain *wasilat* decreed in that suit, Mrs. Harris was personally liable. Mr. Mackintosh married her after judgment had been given, and while the appeal against that judgment was pending; and the question is whether under such circumstances execution can be taken out against Mackintosh. Mr. Piffard relies, and wholly relies, upon the terms of Section 105 of the Civil Procedure Code. That Section is in these words: The marriage of a woman, plaintiff or defendant, shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and the decree thereupon may be executed upon the wife alone; and, if the case is one in which the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also.

Mr. Piffard's contention is that the word "judgment" in this Section must include the final judgment. We think he went so far as to contend that it would include the final determination of *wasilat*, but at any rate he contended that it must include the determination of the appeal in the suit. Upon the best consideration which we can give to the Section, it appears to us that we should not be justified in extending the liability to summary proceedings in execution which that Section allows against the husband beyond the strict words of the Section itself. The part of the Procedure Code from which this Section is taken is that part which relates to "suits previous to judgment." It is altogether disconnected from, and independent of, that portion of the Code which relates to appeals; and we feel satisfied that, if the Legislature had meant to declare that execution might be taken out against a husband marrying a wife against whom a judgment had been given, or was then pending in appeal, its intention would have been expressed in distinct terms and in a different portion of the Code. That being our view of Section 105, the execution-creditor is seeking now to execute this decree against Mr. Mackintosh who was neither a party to the suit nor a personal representative of any such party. There is no provision of the Code which, under such circumstances, will enable proceedings to be taken against him in execution; but the decree-holder, if he seeks to make him liable for the debt of the wife whom he has married—whom he has married subsequent to the giving of judgment against her—must establish that liability, it seems to us, by separate suit. We think, therefore, that, although we fell into a slight error of fact in our judgment in this case, it does not affect the determination of the appeal, and consequently this application should be rejected with costs.

The 3rd April 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Limitation—Proceedings under Section 20, Act XIV., 1859—Bona fides—Onus probandi.

Case No. 84 of 1867.

Application for review of judgment passed by the Hon'ble Justices Jackson and Hobhouse, on the 7th August 1867, in Miscellaneous Appeal No. 230 of 1867.

Tabbur Singh and others, *Petitioners,*

versus

Motee Singh and others, *Opposite Party.*

Mr. A. T. T. Peterson and *Baboo Roopnath Banerjee* for Petitioners.

Baboo Mohinee Mohun Roy for Opposite Party.

Application for notice, notice itself, service of notice, issue of process, and execution of process, are all separate and distinct acts, which the judgment of the Full Bench in the case reported at page 98 of the Weekly Reporter, Vol. VI., contemplates as proceedings, which, if *bonâ fide* taken, would bar the operation of the Law of Limitation, but no proceeding would be effectual within the meaning of Section 20, Act XIV., 1859, unless it were *bonâ fide.*

The Court will generally presume that the proceedings were *bonâ fide*, and it lies on the party who impugns them to show or suggest something from which the Court may infer that they were not *bonâ fide*.

Quære.—Whether a question of *bona fides* is one of law or one of fact.

Jackson, J.—It appears to me that this application ought not to be admitted. The principal point on which the learned Counsel has urged a reconsideration of our judgment is, that whereas we declared that the Lower Appellate Court had found upon the question of *bona fides*, so that we were precluded from coming to any decision on that point, or from questioning its decision, that question of *bona fides* is a question of law, and not a question of fact, and is one upon which, if the Lower Appellate Court had drawn an erroneous inference, this Court would be bound, as matter of law, to set it right. It so happens that in this case it is not very material whether the position taken by the learned Counsel is correct or not, because upon a review of the facts of the case, as far as they have been before us, I am quite clearly of opinion that we should not be justified in saying that we have no ground for saying that the Lower Appellate Court did draw an erroneous inference from the facts upon the question of *bona fides*. It must be borne in mind that the practice of these Courts, the usages of this country, and the universally received doctrine upon the subject of executions, is widely different from what prevails in England. It might be salutary, and I myself was much inclined, to lighten the rules which regulate the execution of decrees, and to subject parties, who sought to execute after the lapse of considerable time, to satisfy the Court that they had been duly diligent on former occasions in seeking to obtain satisfaction of their decrees. But the opinion which I originally entertained has been overruled by the decision of a Full Bench, and subsequent experience and reflection have led me to the belief that, if we were to draw unduly close limits within which parties would be allowed to execute their decrees, considerable hardship would be the result, and judgment-debtors would derive the benefits of rules which they had never relied upon, and which are contrary to the usages and the understood law of the country. The old practice upon these points was that a man might execute his decree at any time within 12 years from the date of the last proceeding in the case; and so lax was the practice that a mere order removing the case from the files of the Court, although possibly nothing might have been done for years antecedently, was looked upon as a proceeding taken by the judgment-creditor, and one from which he might reckon a fresh period of 12 years. Now, Act XIV. of 1859 has nowhere prescribed or laid down what should be considered a proceeding; and if we were at once to rush from the extreme of the old lax proceedings into anything analogous to what I understand to be the practice of the English Courts, we should be sacrificing an amount of property and producing an amount of hardship which, I believe, would be almost incalculable.

The Full Bench in the case reported in the VI. Weekly Reporter, page 98, has allowed a very considerable latitude to decree-holders. The Chief Justice observes: "We think the words 'some proceeding' in Section 20, Act XIV. of 1859, include every application for execution *bonâ fide* made, and all acts done either by the Court or by an officer of the Court, or *bonâ fide* by the applicant for enforcing a decree or keeping it in force. For instance, if a decree or order of the Court were more than one year old, the application made to the Court for execution would be a proceeding to enforce the decree," &c. So also the service of such notice if made *bonâ fide*; so also the issue of process of execution, or the execution of such process: these would all be proceedings, but no proceeding would be effectual within the meaning of Section 20, unless it were *bonâ fide*. Therefore, the application for notice, notice itself, service of notice, issue of process, the execution of process, all these are separate and distinct acts which the judgment of the Full Bench contemplates as proceedings, which, if *bonâ fide* taken, would bar the operation of the Law of Limitation.

I have always understood—and I believe the view to be endorsed by the majority of my learned colleagues, if not all of them—that where the question of good faith arises, the Court will generally presume that proceedings were *bonâ fide* taken, and that it lies upon the party who impugns those proceedings, or alleges them to be insufficient, to show, or at any rate to suggest, something from which the Court may infer that they were not *bonâ fide*. The law has not required that any proceeding of a particular kind

should be taken; it has not directed either that property should be attached, or that the person of the judgment-debtor should be seized, or that any other specific act should be done, in order to keep the decree in force. It is only required, apparently, that the execution-creditor should act in such a manner that the Court should collect from his proceedings that he desired *bonâ fide* to keep his decree in force, and had an intention of enforcing the just claim which he had upon the judgment-debtor. The question raised by the learned Counsel in this case is one upon which there may be some diversity of opinion; and if the question should hereafter arise, it may be necessary to refer it for the opinion of a Full Bench. In the present case I think the reference not necessary. I think that, whether we regard the question of *bona fides* as one of fact or one of law, in the one case we are bound to act upon the finding of the Lower Court, and in the other case there is no reason for questioning the correctness of the view which has been taken below.

I think therefore that the application must be dismissed with costs.

Hobhouse, J.—I concur in thinking that the application in this case must be refused. I think that, whether the question of law arises or not, those proceedings upon which the Lower Court relies, that is, the proceedings of the 15th December 1862 and of the 16th April 1863, were proceedings of that nature that we cannot say that the Lower Court was wrong when it held that they were sufficient to keep the decree alive.

The 4th April 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble W. S. Seton-Karr, L. S. Jackson, A. G. Macpherson, and C. Hobhouse, *Judges*.

Wasilat—Indigo-crops.

Case No. 362 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Gya, dated the 30th May 1867.

Ranee Asmed Kooer and others (Judgment-debtors), *Appellants*,

versus

Moharanee Indurjeet Kooer (Decree-holder), *Respondent*.

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Mr. R. T. Allan, Moonshee Ameer Ali, and *Baboo Romanath Bose* for Respondent.

The proper principle applicable to a case in which the person liable to mesne-profits has not let the lands to tenants, but has himself occupied and cultivated it, growing on it indigo and other crops, is not to assess wasilat according to the value of the manufactured indigo or other crops, but according to what would have been a fair and reasonable rent for the land, if the same had been let to a tenant during the period of the unlawful occupation of the wrong-doer.

This case was referred to the Full Bench by Seton-Karr and Macpherson, JJ., under the following remarks:—

Macpherson, J.—The plaintiff, having in another suit got a decree for possession of certain lands, now sues for mesne-profits.

In her plaint she alleges that the lands in question were kept by the defendant in his own *khas* possession, and were cultivated by him; and she prays "for the recovery of Rupees 7,762-2-8, on account of *pucca* or boiled (manufactured) indigo, rubbee, and other crops," with interest.

The Lower Court was of opinion that, assuming it to be true that the defendant had himself occupied and cultivated the land as alleged, the plaintiff could recover as mesne-profits only such a sum as might have reasonably been realized from tenants, supposing that the land had been let out to tenants. And the Court accordingly gave the plaintiff a decree for Rupees 293-14, being the amount at which it estimates the rents which might have been realized from tenants.

The plaintiff appeals, and, while abandoning her claim to the value of the *manufactured* indigo, contends that she is entitled to the actual value (less cost of production) of the various crops of indigo, rye, muttur, &c., which have been produced on the lands during her dispossession. And she relies

in the form of a suit for damage occasioned by the defendant's trespass in carrying away the crop from the plaintiff's land, I would remark that suits in that form are not, I think, generally known in our Courts. This was clearly a suit in the ordinary form for *wasilat*—not a suit for damages on account of trespass.

The 4th April 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble W. S. Seton-Karr, L. S. Jackson, A. G. Macpherson, and C. Hobhouse, *Judges*.

Stay of execution—Section 338, Act VIII., 1859—Security—Section 36, Act XXIII., 1861.

In the matter of Ranee Ismaid Kooer and Ranee Soonyat Kooer, widows of the late Rajah Modh Narain Singh.

(*Miscellaneous Appeal No. 358 of 1867.*)

Messrs. R. V. Doyne, R. E. Twidale, and *C. Gregory* for Petitioners.

A party wishing to stay execution, under Section 338, Act VIII., 1859, of a money-decree, is bound to show sufficient grounds to the Court for staying it, and the rule is equally applicable to decrees for immoveable property and to other decrees.

When an order is made for the execution of a decree against which an appeal has been preferred, the Court, under Section 36, Act XXIII., 1861, may, if it thinks fit, require security to be given.

This case was referred to the Full Bench on the 6th August 1867 under the following orders, recorded by Loch and Hobhouse, JJ :—

Hobhouse, J.—In the case before us, the petitioner was appellant in an appeal against a decree for money, and he applied under Section 338, Act VIII. of 1859, for stay of execution on security given.

Mr. Doyne for the petitioner, when called upon to show cause why execution should be stayed on security given, contended that, inasmuch as the decree was a decree for money, it was not necessary for him to show cause at all, for that the practice of this Court in decrees for money, as interpreted by its decision, was at once to stay execution without cause shown on good and sufficient security being given ; and he relied on a decision of the late Sudder Dewanny Adawlut, page 240, 24th December 1861, Mahomed Wajid Ally Shah, appellant.

In that decision the learned Judges remark as follows :—

"The principle laid down by the Court regarding the staying of the execution of decrees appears to be this. When the decree is for land or other immoveable property, the decree-holder is allowed to execute his decree, unless good and sufficient cause for staying it be shown. When the decree is for money, the Court, in the exercise of its discretion under Section 338, allows the debtor to stay execution on giving good and valid security, and we think that course should be followed in the present case."

In these remarks the learned Judges seem to lay down the principle that, when a decree is a decree for immoveable property, then execution shall not be stayed unless good and sufficient cause be shown ; but that, on the other hand, when a decree is a decree for money, execution may at once be stayed on good security given, whether good and sufficient cause be shown or not.

I venture to think that this principle is not warranted by any terms in the law (Section 338) ; and that, on the contrary, the words "for sufficient cause shown" and "if sufficient cause be shown" apply equally to all decrees, whether for moveable or immoveable property, and to hold that execution of decrees of any kind may be stayed without sufficient cause shown seems to me equivalent to holding that a decree shall be stayed "by reason only of an appeal"—a proceeding which the law expressly forbids.

I believe my brother Loch, who was one of the Judges in the case of 1861, now concurs in this view ; but as it is at variance with a previous decision of other learned Judges, I would suggest that it be submitted for the decision of a Full Bench.

The question is, whether or not execution of a decree for money may, on security given, be stayed without sufficient cause shown.

Loch, J.—I concur in submitting the points to the consideration of a Full Bench.

The judgment of the Full Bench was delivered as follows:—

Peacock, C. J.—I think it is quite clear that, if a party wishes to stay execution under Section 338 of Act VIII. of 1859, he is bound to show sufficient ground to the Court for so staying it. Under Section 36, Act XXIII. of 1861, when an order is made for the execution of a decree against which an appeal has been preferred, the Court, if it thinks fit, may require security to be given for the restitution of any property which may be taken in execution of the decree or the value thereof.

It may be very inconvenient to a plaintiff who has been looking forward to the receipt of a certain sum of money which is due to him, if, as soon as he obtains a decree for it, he should be prevented from levying the amount, merely on the application of the judgment-debtor and upon his giving security. Such a measure might be most injurious to a plaintiff who has depended upon the realization of debts due to him as a means of meeting his own liabilities.

The foregoing remarks apply to money-decrees; but the rule above laid down is equally applicable to decrees for immoveable property and to other decrees.

The 6th April 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Possession—Fraud—Section 6, Act X., 1859.

Case No. 1517 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 8th April 1867, affirming a decision passed by the Moonsiff of Kooshtea, dated the 31st August 1866.

Bhoobunjoy Acharjee (one of the Defendants), *Appellant,*

versus

Ram Narain Chowdhry and others (Plaintiffs), *Respondents.*

Baboos Mohinee Mohun Roy and *Issur Chunder Chuckerbutty* for Appellant.

Baboo Sreenath Doss for Respondents.

Possession obtained and continued by fraud is not possession within the meaning of Act X. of 1859.

Phear, J.—THIS is a suit for ejectment.

As to part of the land in question, called Huro Soonduree's share, the defendant set up that he held under a mowrosee pottah granted by the ijaradar under Huro Soonduree; as to the remainder, that he held under a pottah from the plaintiffs, and that the plaintiffs had received rent from him thereunder. The defendant admitted the plaintiff's zemindaree-title.

On this state of pleading, the Lower Appellate Court has found that Huro Soonduree had only a life-interest, by way of maintenance, in her so-called share; that she is dead; and that the defendant's title is gone with her.

The Lower Appellate Court has, as we think, also found that the pottah set up by the defendants relative to the remaining portion of land was obtained by fraud from the plaintiff's gomashta without the plaintiff's knowledge, and that the rent said to have been received under it was paid to the plaintiff's servants acting in collusion with the defendants in pursuance of the fraud.

Both the Lower Courts have decreed the plaintiff's claim, and we think that the above-mentioned findings of fact, with which we have no reason to interfere, entirely justify this decision.

But it is said that the defendants have been in possession of the land more than 12 years, and are, therefore, protected from eviction by Section 6 of Act X. of 1859. This defence, however, cannot be allowed to prevail in the face of the fraud found by the Lower Court. Possession obtained and continued by fraud is not possession within the meaning of that enactment. And in regard to Huro Soonduree's share, the first Court came to the conclusion that the defendants were not ryots within the scope of Section 6, that consequently they were not entitled to the benefit conferred by it, and against this decision the defendants did not appeal.

Therefore, as regards the whole of the land, it appears to us that the defendants were unable to make out a right of occupancy, and that, therefore, their last contention ought to fail.

We dismiss this appeal with costs.

The 6th April 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Evidence—Written statement—Contested deed.

Case No. 1523 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 10th April 1867, affirming a decision passed by the Moonsiff of Hurripal, dated the 14th April 1866.

Puran Chunder Chatterjee (one of the Defendants), *Appellant,*

versus

Grish Chunder Chatterjee (Plaintiff), *Respondent.*

Mr. M. L. Sandel and *Baboos Onookool Chunder Mookerjee* and *Otool Chunder Mookerjee* for Appellant.

Baboo Obhoy Chunder Bose for Respondent.

In a case in which *A* sued on a *kobalah*, and *B* relied on a deed of gift from a third party (*C*), who was the vendor of the former and the donor of the latter, the Lower Court was held to have committed an error in law in having looked into a written statement made by *C* subsequent to defendant's deed in a case to which *B* was no party, and in having taken for a standard a signature in a deed sought to be set aside as spurious.

Bayley, J.—In this case plaintiff sued on a *kobalah* of 1268, and defendant relied on a gift of 1269. The first and second Courts have deemed plaintiff's case proved by evidence, and considered defendant to have failed in rebutting that evidence.

The Lower Appellate Court says that it does think plaintiff's witnesses truthful and credible, and defendant's to be "tutored." But it also says that a written statement of Gopal Chunder, who is the vendor of plaintiff and donor of defendant, made eight or nine days after the defendant's alleged deed of gift, and a comparison of Gopal's signature on the *kobalah* and *urponnamah* sought to be set aside, which does not tally, affords reasons for coming to the judgment it does. It is urged by special appellant that the Lower Appellate Court could not legally look into a written statement subsequent to his (defendant's) deed made in a case to which he was no party, or properly make comparisons of signatures taking for a standard a signature on a deed sought to be set aside as spurious. Further, that this Court is not in a position to say how far these reasons might have affected the decision on the merits.

On the whole, we think there is clearly an error in law in the procedure on the two points above noticed, and we do not feel satisfied in saying that there would have been the same decision if those errors had not occurred. We, therefore, remand the case to be re-tried with reference to these remarks.

The 6th April 1868.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Attachment under Regulation II. of 1819—Mesne-profits.

Case No. 264 of 1867.

Application for review of judgment passed by the Hon'ble Justices Kemp and Glover, on the 12th September 1867, in Regular Appeal No. 53 of 1866.

Ram Coomar Ghose, Defendant (Respondent), *Petitioner,*

versus

Gobindnath Sandyal and others, Plaintiffs (Appellants), *Opposite Party.*

Mr. R. V. Doyne and *Baboos Romesh Chunder Mitter* and *Nuleet Chunder Sein* for Petitioner.

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l Chunder Mookerjee and *un Roy* for Opposite Party.

te is attached under Regulation II. chment includes its mesne-profits.

J.—We have heard both parties, of opinion that our order of remand correct, and must be carried out. It out questions of fact which cannot be decided by us on the evidence on the record. We think that the opinion thrown out in our order of remand, to the effect that, if an estate be attached under Regulation II. of 1806, the mesne-profits which flow out of that estate are attached also, is correct.

The object of an attachment of a property under Regulation II. of 1806 is not only to prevent alienation, but to ensure the ultimate satisfaction of the decree that may be obtained against the defendant. If the mesne-profits are made away with, the object of the attachment is frustrated, and becomes without fruit.

We remand the case for trial with reference to the remarks contained in our decision dated the 12th September 1867.

Application rejected with costs.

The 6th April 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Presumption under Section 4, Act X., 1859—Jummabundee papers — Evidence.

Case No. 1992 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 24th June 1867, reversing a decision passed by the Deputy Collector of that District, dated the 11th March 1867.

Chamarnee Bibee (Defendant), *Appellant,*

versus

Ayenoollah Sirdar and others (Plaintiffs), *Respondents.*

Baboo Bungshee Dhur Sein for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

The fact of a ryot having relied upon a mokurruree tenure cannot prevent his falling back on the presumption arising under Section 4 of Act X., 1859.

Jummabundee papers can never be treated as independent evidence of any contested fact.

Mitter, J.—This was a suit for a *kubooleut* at enhanced rates. The defendant in the Court below, who is now special appellant before us, pleaded that the rent of his tenure had never been changed from the time of the Permanent Settlement, and that, therefore, it was absolutely protected from enhancement. The plaintiff in his execution before the Deputy Collector admitted that there had been no change in the *jumma* payable by the special appellant, either during the term of his own ijarah, which lasted for 15 years, or during that of his father which preceded it. The Deputy Collector, evidently supposing that this statement amounted to an admission that the rent had not been changed for 20 years next before the institution of the suit, called upon the plaintiff to rebut the presumption arising therefrom under the provisions of Section 4, Act X. of 1859; and, on his failure to do so, a decree was passed for a *kubooleut*, but at the rate admitted by the special appellant. On appeal, the Judge has held that the tenure is not protected from enhancement.

We are of opinion that the decision of the Judge cannot stand. The Judge says that the special appellant, having relied upon a mokurruree tenure existing from the time of the Permanent Settlement, could not be permitted to fall back upon the presumption arising from Section 4 of the Act. This view of the law is quite erroneous.

The Judge is also wrong in relying upon the *jummabundee* paper of 1250. There was no evidence on the record to show that the rent mentioned in that paper was ever realized from the defendant, or that he ever agreed to pay it. We think also that *jummabundee* papers, like books of accounts, can never be treated as independent evidence of any contested fact whatsoever. The decision of the Judge must, therefore, be reversed.

We are of opinion, however, that this case ought to be remanded to the Deputy Collector. That officer was wrong in assuming that the rent of the special appellant's tenure had not been changed at any time within the last 20 years, for there was no clear statement on the part of the plaintiff as to how long his father's ijarah had continued. We think also that, under the circumstances of the case, the ends of justice require that the plaintiff should be re-examined for the purpose of clearing up the above point, and that both parties should be allowed to adduce any further evidence they think proper for the purpose of proving their respective allegations. The case is, accordingly, remanded to the Deputy Collector to be re-tried by him with reference to the foregoing remarks.

The 7th April 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Joint-family property — Sale of one member's rights and interests.

Cases Nos. 2163 to 2165 of 1867.

Special Appeals from a decision passed by the Judge of Rungpore, dated the 6th June 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 19th December 1866.

Sreepershad Surmah Bhuttacharjee (Plaintiff), *Appellant,*

versus

Shuroopa Dossia and others (Defendants), *Respondents.*

Baboo Bhugobutty Churn Ghose for Appellant.

Baboos Mohinee Mohun Roy and *Issur Chunder Chuckerbutty* for Respondents.

In a sale of the rights and interests of one member n a joint-family property, the purchaser obtains no more than that member's share in the property.

Loch, J.—It appears to us that the Judge has very unnecessarily gone into the question whether the debt for which the property was sold was contracted for the benefit of the family, or only for the benefit of the judgment-debtor, Bhyrub Chunder. We find that the decree was against Bhyrub Chunder alone, and the rights and interests of Bhyrub Chunder alone were sold. The plaintiff Kaleenath came into Court, and claimed the whole property as belonging to Bhyrub Chunder solely. The opposite party averred that it was joint-family property. The only question, therefore, to be determined was whether it was joint property or not; and, if it were, what was the share of Bhyrub Chunder. Both the Lower Courts held that it was joint-family property, and, as such, Bhyrub Chunder was entitled only to a moiety. The auction-purchaser can obtain no more than he purchased, *viz.*, the rights and interests of Bhyrub Chunder. The case reported at page 647, Marshall, is in point. We reverse the judgment of the Judge, and restore that of the first Court in all three cases. The appellant will obtain his costs in all Courts.

The 7th April 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation — Kuboolent — Evidence.

Case No. 1539 of 1867.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 23rd March 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 26th July 1864.

Kashee Chunder Turkobhoosun and others (Plaintiffs), *Appellants,*

versus

Kally Prosunno Chowdhry and others (Defendants), *Respondents.*

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Baboos Onookool Chunder Mookerjee, Bama Churn Banerjee, and *Chunder Madhub Ghose* for Appellants.

Baboos Kalee Mohun Doss and *Hem Chunder Banerjee* for Respondents.

A plea of limitation overruled in the Court of first instance, and not brought before the Lower Appellate Court, cannot be entertained by the High Court in special appeal.

Kubooleuts proved in the ordinary way as to their genuineness ought to have due weight given them, even though not filed so early in the litigation as the Judge would have expected.

Phear, J.—THIS is a suit to set aside a certain thakbust award to recover possession of certain lands from which the plaintiff says he has been dispossessed by the defendant under color of the award.

The Lower Appellate Court has dismissed the suit on the ground that the plaintiff has been out of possession for more than 12 years previous to the institution of the suit, and that his cause of action is consequently barred by lapse of time.

It is objected in special appeal that the Judge, in dealing with the Ameen's report as evidence on the point of possession, has put a wrong construction upon it, inasmuch as he says in his judgment, "although "it (the report) states that he (the plaint-"iff) was in possession formerly, it does not "show that he was in possession within 12 "years previous to the institution of suit;" whereas, in fact, the Ameen's report says that the plaintiff was in possession before and up to the making of the thakbust award on 20th September 1859, and that he was dispossessed by the defendant by means of, or upon, that award.

We think this objection good. It seems to us that the Ameen distinctly reported that the plaintiff was in possession of the disputed land before and at the time of the award, and was then for the first time ousted from it.

This being so, the case must go back for re-trial, because we are unable to say what effect the Ameen's report, with this reading, might have on the mind of the Judge towards rebutting the other evidence, which the Judge states was sufficient to satisfy him that the plaintiff had not been in possession within the 12 years immediately preceding the institution of the suit.

The defendant by cross-appeal objects that the suit, being one for the reversal of a survey-award, is barred, because it was not instituted until the 24th July 1863, *viz.*, more than three years after the making of the award on the 20th September 1859. We find, however, that this objection, although somewhat feebly made in the Court of first instance and there overruled, was not brought before the Lower Appellate Court at all. We, therefore, decline to entertain it. Had this plea of limitation been pressed before the Lower Appellate Court, the plaintiff would have had the opportunity of satisfying that Court upon the facts that, although a period of more than three years had perhaps elapsed, still, under all the circumstances of the case, the plaintiff had extended time for the bringing of the suit. Sitting here as a Court of special appeal, we cannot determine any matter of fact, and we must take the case, as regards the cross-appellant, in the condition in which he chose to leave it in the Lower Appellate Court. We therefore dismiss the cross-appeal without costs.

We remand the case for re-trial, and we take this opportunity of observing that, in the event of the Lower Appellate Court considering it proper to entertain the case on the merits, he ought not to reject the *kubooleuts*, to which he has spoken in his judgment, for the reasons there given. If they are *proved* in the ordinary way, *viz.*, by evidence of their execution or delivery, or in any other mode, that shows their genuineness; they ought to have their due weight given to them, even though they were not filed so early in the litigation as the Judge would have expected. Of course, non-production at an earlier stage of the case than that at which they were first produced is only evidence of their non-existence at that earlier time, on the supposition that, if they had then existed, they would have been produced by an honest and prudent litigant.

We wish also to add that the Government resumption-chittahs are not evidence between the parties in this case, unless the parties have agreed that they shall be so.

The 7th April 1868.

Present:

The Hon'ble Dwarkanath Mitter and C. Hobhouse, *Judges.*

Decree for possession of ijmalee property—Execution—Sections 223 and 224, Act VIII., 1859.

Case No. 652 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Midnapore, dated the 23rd November 1867.

Adoremonee Dossee (Decree-holder), *Appellant,*

versus

Prem Chand Mussaut and others (Judgment-debtors), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboos Onookool Chunder Mookerjee and *Hem Chunder Banerjee* for Respondents.

Where in a suit against certain sutputtees and putneedars to recover possession of a share of an ijmalee family-talook plaintiff obtained a decree, it was held that the Court executing was bound, under Section 223, Act VIII., 1859, to put her in possession of the immoveable property adjudged, and, if necessary, to remove any person who might refuse to vacate, and that her having already been put in possession under the provisions of Section 224 was no bar to her being put into the more direct and actual possession contemplated by Section 223.

Hobhouse, J.—The material facts of the case are as follow:—

Appellant sued respondents and others to recover possession of a one-third share of an ijmalee family-talook called Belki, alleging that respondents and their co-defendants had fraudulently ousted her of the same.

Respondents affirmed that the said talook was the self-acquired property of their co-defendants, the sutputtees, and that they held it under a putnee created by the said co-defendants.

The Courts held that the said talook was ijmalee, and not self-acquired, and gave appellant a decree for possession.

In execution of this decree, appellant first applied for and obtained possession of the said talook under the provisions of Section 224, and then alleging that a more perfect possession was required from the Mussauts (respondents) in order to nullify certain obstructive acts of theirs, applied for possession as between herself and the said Mussauts, under the provisions of Section 223.

The Mussauts (respondents) objected to such possession being given, *first*, because the decree did not declare their putnee to have been set aside; and, *secondly*, because appellant had already taken possession under the provisions of Section 224.

The Lower Court has not adjudicated on the second objection, but on the first objection it has refu ed execution to appellant.

We think that the Court below was in error in refusing execution on the ground taken.

The Mussauts (respondents) were defendants in the suit, the property in suit was immoveable property in their occupancy, the prayer of the suit was for the recovery of that property, and the decree directed such recovery to be had.

Clearly, therefore, under the provisions of Section 223, the Court was bound "to order "delivery to be made by putting the party "to whom the immoveable property was "adjudged in possession thereof, and, if "need be, by removing any person who "might refuse to vacate the same."

And admitting, for the sake of the argument, that appellant, as between herself and the Mussauts (respondents), has been already once put into possession under the provisions of Section 224, we think that this is no bar to her being put into the more direct and actual possession contemplated by Section 223.

The delivery of possession contemplated by Section 224 is a formal and general delivery applicable only to immoveable property decreed as "in the occupancy of ryots or others entitled," but the delivery contemplated in Section 223 is applicable to immoveable property decreed as "in the occupancy of a defendant;" and in this case

the decree was such a decree, and the respondents were such defendants, and it follows that, whether appellant has had delivery under Section 224 or not, she is yet entitled to have it under Section 223 also.

In this view of the case, we set aside the order of the Court, and direct that delivery be made to appellant under Section 223.

The Mussauts (respondents) to pay costs in this Court and in the Court below.

The 7th April 1868.

Present :

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

Limitation—Deduction under Section 14, Act XIV., 1859.

Case No. 1983 of 1867.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 9th May 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th July 1864.

Oodoy Monee Dabee and others (Plaintiffs), *Appellants,*

versus

Bishonath Dutt and others (Defendants), *Respondents.*

Baboos Sreenath Dass and *Mohinee Mohun Roy* for Appellants.

Baboo Unnoda Pershad Banerjee for Respondents.

Where limitation is pleaded, a plaintiff is not entitled, under Section 14, Act XIV. of 1859, to deduction for the time of the pendency of a suit brought by defendants upon the same cause of action, if it was not a suit in which the Courts were unable to decide the question from defect of jurisdiction or other such cause.

Macpherson, J.—THIS appeal must be dismissed with costs.

The Judge has, in substance, found that the plaintiffs have failed to prove that their suit was brought within twelve years from the time the cause of action arose, or from the time when the plaintiffs' title first accrued; so that, whether the case falls under Clause 14, or under Clause 12 of Section 1 of Act XIV. of 1859, it is barred.

The plaintiffs are not entitled to any deduction (under Section 14 of Act XIV. of 1859) for the time during which the suit instituted by the defendants in 1861 was pending, because that (if a suit upon the same cause of action) is not a suit in which the Courts, *from defect of jurisdiction or other such cause*, were unable to decide the question now in issue.

As to the fourth share, of which the plaintiffs are in possession—as it is not even alleged that that possession has been disturbed in any way or disputed by the defendants, the Lower Courts rightly refused to make the decree which was asked for.

The 8th April 1868.

Present :

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Pre-emption—Vicinage—Onus Probandi—Mahomedan Law.

Case No. 2432 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 10th July 1867, reversing a decision passed by the Moonsiff of that District, dated the 24th September 1866.

Beharee Ram (Defendant), *Appellant,*

versus

Mussamut Shoobhudra (Plaintiff), *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

Baboo Grish Chunder Ghose for Respondent.

In a suit to establish a right of pre-emption on the ground of ownership of contiguous land, no amount of misstatement on the part of the defendant as to the ownership of such land can relieve plaintiff of the *onus* of proving his ownership.

Mere possession gives no "Huk Shuffa" according to Mahomedan Law; there must be ownership ("*milik*") in the contiguous land.

Glover, J.—THIS was a suit to cancel a deed of sale of the 29th April 1866, and to recover possession from the defendant of a thatched house and courtyard, or compound, on the ground of right of pre-emption as a "neighbour."

The defence was that the plaintiff had no land contiguous to the plot claimed by her, and was, therefore, not a "neighbour." The defendant, who was in possession by purchase from the owner, one Seeta Ram, further alleged that the disputed house and courtyard abutted on to his property, and that he, and not the plaintiff, had the right of pre-emption—a right which he had duly exercised.

The Moonsiff, not being satisfied with the evidence of vicinage, held a local investigation, and found that the house and land on account of which the plaintiff claimed the "Huk Shuffa" in the disputed plot did not belong to her, but to her nephew, the minor son of Motee; and that, as she did not sue on behalf of the son, she had no ground of action, her own property not being contiguous to that claimed, but at some distance from it. He found, moreover, that she had not performed the necessary ceremonies ("Tulub-i-moasibat").

The Principal Sudder Ameen reversed this decision on the ground that the defendant's statement as to the ownership of the contiguous land had been proved to be false, and also because, in his opinion, a Civil Court decision (No. 206), to which both plaintiff and defendant were parties, showed that the plaintiff was then in possession of the contiguous land, and had, therefore, the right of pre-emption over the land now in suit. He found also that the necessary ceremonies had been performed.

It appears to me that this decision is wrong on the face of it. The plaintiff claiming as "Shuffee" by reason of neighbourhood was bound to prove her case, and to show that the contiguous land belonged to her. So far as her claim went, it was absolutely immaterial that the defendant pleaded that that land was part of a Government road, for any amount of misstatement in this particular would not help to prove what the plaintiff was bound to prove, namely, that she owned the contiguous land, and the Principal Sudder Ameen was clearly wrong in allowing this to influence his decision.

Then, as to the Civil Court decision, there is nothing on the record to show that the land is identical; but it is said that, during the trial of the present suit, the defendant's pleader admitted that the land then in question was the same as that on the ownership of which the plaintiff now claims as "Shuffee;" but, even if this be admitted, it does not advance the plaintiff's case in the least. That was a suit for permission to demolish a wall, and the plaintiff in this case was allowed so to demolish it. The Principal Sudder Ameen takes this as proof of the plaintiff's possession, and holds that, being in possession of the contiguous land, she is entitled to the right of pre-emption which she seeks.

But mere possession gives no "Huk Shuffa" according to Mahomedan Law. There must be ownership ("*milik*") in the contiguous land (*vide* Baillie's Mahomedan Law 473); and it has been found as a fact that this land does not belong to the plaintiff, but was originally the property of Motee, her brother, and that Motee has left a minor son now under his aunt's care. These facts are nowhere denied; and therefore, although the plaintiff may be in possession of the contiguous land, it is clear that she is not the owner of it, the title being with her nephew. The plaintiff does not sue as guardian of the minor, but in her own right, and therefore, as it seems to me, has, on the admitted facts of the case, no *locus standi* whatever.

The Principal Sudder Ameen has considered that possession and ownership of contiguous land give similar rights of "Shuffa," but this is a clear error of law. There is no doubt that the contiguous land belonged to Motee, and that his son is the proper person to claim the right of pre-emption. The plaintiff has no case.

I would reverse the decision of the Principal Sudder Ameen, and restore that of the first Court with all costs on the special respondent.

Macpherson, J.—I concur.

The 8th April 1868.

Present:

The Hon'ble Louis S. Jackson and C. Hobhouse, *Judges.*

Mesne-profits—Collection-charges.

Case No. 621 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 9th September 1867.

Erfoonissa Chowdhrain (Judgment-debtor), *Appellant,*

versus

Mussamut Rukeeboonissa (Decree-holder), *Respondent.*

Messrs. G. C. Paul and *M. L. Sandel* and *Baboo Onookool Chunder Mookerjee* for Appellant.

Mr. R. T. Allan and *Baboo Obhoy Churn Bose* for Respondent.

The principle on which *wasilat* should be assessed where defendant has been compelled to relinquish possession is, that he should be made to pay that which plaintiff (decree-holder) would have enjoyed if he had not been kept out of possession by the wrongful act of defendant.

Surunjamee should be allowed upon the amount actually collected, and not upon the net proceeds coming to the zemindar.

Jackson, J.—The order of the Judge in this matter of execution is open to several grave objections. In the first place, he appears to have awarded a large amount of *wasilat* upon that which is not, and could not, be evidence, that is to say, upon certain papers called *stheeth* papers, which have been filed by the decree-holder, but which are not attested or verified in any way whatever, and as to the origin and preparation of which there is no information before the Court. Indeed, as to these papers, it may be said that there was an antecedent improbability as to such papers being in the hands of the decree-holder, inasmuch as she had been for many years out of possession of the estate, and was not therefore likely to have materials for preparing such papers; still she may be enabled to get over this difficulty, and, if put to the proof, to show that the papers were regularly prepared, and may be relied on for the purposes of this investigation.

Another objection which was urged before us is, that, relying upon these papers, the Judge has made the defendan's answerable for sums of money which they did not collect, and could not have collected, that is to say, rents due from ryots who had died or absconded. It is again urged that collection-charges, instead of being allowed on the gross amounts collected, have only been allowed on the net amount, which went as profit into the hands of the defendants after deducting payments made. It is further objected that a deduction in respect of sudder jumma of 75 rupees only has been allowed, whereas the plaint itself shows that the amount payable on account of the plaintiff's share was considerably in excess of this, and it is not suggested that the amount so payable had been left unpaid; and, lastly, it is urged that a mistake has been made by the Judge in respect of the proportion of the *wasilat* of talook Aumjad, for which the defendants were liable.

It is quite clear that the *stheeth* papers referred to were not, as they stand, evidence on which the Court could act. On the other hand, the defendants, it appears, put in their accounts at a very late period it is true, but still about one month before the date of the Judge's decision, and consequently in time to have been taken into consideration by him. Mr. Allan urges before us that the defendants had persistently refused to file their accounts in a manner which amounted, in fact, to a contempt of Court, and that their conduct is deserving of no consideration whatever. If they committed contempt of Court, they should have been dealt with by the Judge; but it is not an appropriate punishment for a contempt of Court either to refuse to look at evidence which is before the Court, or to condemn a party to pay an amount which he is not justly liable to pay. The principle on which *wasilat* should be assessed in cases of this description has been laid down in a recent Full Bench decision. That decision, we

believe, has not as yet been reported; but the principle generally is that a defendant should be made to pay that which the plaintiff would have enjoyed if he had not been kept out of possession by the wrongful act of the defendant. It seems unreasonable that the defendants should be obliged to pay sums of money which they could not possibly have collected, and which also the plaintiff would have been unable to collect, such as amounts due from ryots who had died or absconded.

In respect of the *surunjamee* allowed, whatever be the proper percentage to be allowed, it should be upon the amount actually collected, and not upon the net proceeds coming to the zemindar. It matters not to the persons collecting where the amounts go, or how they are disposed of. If collected, they are included in the sums on account of which commission is allowed; and it is only reasonable that they should also be included in computing the *surunjamee* for which the defendant is to have credit.

There appears to have been a mistake also in respect of the sudder jumma to which the defendants have had credit. This must be corrected by reference to the plaint.

As to the objection relating to the rents of talook Aumjad, it appears that the Judge has misapprehended the defendants' complaint. The Judge says: "The account "shows, however, that the objector has not "been charged as though liable for 16 "annas, but that she has merely been "charged for the one-third which she is "liable for." Now, the defendants' objection was not that they had been charged as liable for 16 annas, but that they had been charged as if *Aflab Bibee* had been the proprietor of 16 annas of the mehal; whereas, in fact, her share was only a fractional part of the mehal, to one-third of which share the plaintiff was entitled. Under the circumstances which I have stated, it is obviously necessary that the case should go back to the Zillah Court. He will put the parties to strict proof of the accounts and papers which they have respectively filed. It is quite true that the defendants in this case are the accounting parties, and that, in the event of their failing to account, all reasonable presumptions will be drawn against them. Still, there must be something on which the judgment of the Court can go, and no presumption will support an inference founded upon that which is not evidence. After taking proof from both parties of the papers which have been filed, the Judge will proceed to re-assess the *wasilat*, and, in doing so, will be guided by the observations which we have made.

In respect of costs, it appears to us that in this case the entire difficulties have arisen from the conduct of the defendants. They have omitted and refused to produce their accounts, and by such refusal have caused all the difficulty and complication in the case, and we think, therefore, they ought to bear the costs of these proceedings.

The 8th April 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Order for costs in execution—Limitation—Sections 20 and 22, Act XIV., 1859.

Case No. 1 of 1868.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Rajshahye, dated the 24th September 1867.

Puresh Narain Roy (Decree-holder), *Appellant,*

versus

Mr. J. Dalrymple (Judgment-debtor), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. R. T. Allan for Respondent.

An order for costs made in execution is not of the nature of a summary award described in Section 22, but comes within the word "order" in Section 20, Act XIV., 1859.

Jackson, J.—We think the Principal Sudder Ameen is mistaken in applying the limitation of one year prescribed by Section 22 of Act XIV. of 1859 to the present case.

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We think that the order for costs made upon a contested matter in execution of a decree is not of the nature of summary awards for decisions, as described in that Section, but that it comes within the word "order" contained in Section 20, the order being made by the Court in the course of executing a decree made in a regular suit.

The decision of the Court below must, therefore, be reversed with costs.

The 8th April 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Costs—Application for certificate under Act XL., 1858.

Case No. 8 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Purneah, dated the 23rd November 1867.

Feda Hossein (Objector), *Appellant,*

versus

Ranee Khajoorunnissa (Opposite Party), *Respondent.*

Messrs. R. V. Doyne and *C. Gregory* for Appellant.

The Advocate-General and *Moonshee Ameer Ali* for Respondent.

Where the widow of a deceased proprietor, as the guardian of his minor son, put in a petition for a certificate under Act XL. of 1858, in which she represented that she was in possession of the whole of the deceased's property, specifying a particular pergunnah and its appurtenances—HELD that, though she did not expressly ask for a certificate to manage the particular pergunnah named, as her petition was so worded as to obtain, and had the effect of obtaining, a certificate of that tenor, she must be held liable for the costs of a party entitled to object to the grant of such a certificate, and appealing with a view to its amendment.

Jackson, J.—WE have had no doubt as to the order which we ought to make in respect of the certificate granted in this case. In point of fact, the learned Counsel on both sides were agreed from the first that the certificate could not be sustained. The only question upon which any doubt existed in our minds is as to costs.

The petitioner, Ranee Khajoorunnissa, applied to the Judge, reciting that her husband, Rajah Enaet Hossein, had recently died, leaving a minor son named Syud Ata Hossein, to whom he had, by a will made some time before his death, bequeathed the whole of his landed and other property. She then alleged that under this will she, as guardian of the minor, was in possession of the whole of this property, specifying the Pergunnah Soorjapore; and the appurtenances thereof. She then represented to the Court that for the efficient management of the zemindaree, and for the purpose of conducting suits on behalf of this minor son, as the representative and successor of the deceased Rajah, it was necessary for her to take out a certificate, and she therefore prayed the Court to grant her a certificate under the provisions of Act XL. of 1858.

Now, it is quite true that she does not in the petition expressly ask the Court to grant her a certificate to manage the Pergunnah Soorjapore; but it seems to me quite clear that the language of her petition was so worded as to solicit, and to lead the Court to grant her, a certificate of that tenor, and that precisely in accordance with that petition, the Judge did, in fact, grant her a certificate, in which the Pergunnah was specified, and the minor was described as the proprietor of the same estate.

We have no doubt that the appellant before us was entitled to appear in the Zillah Court, and to object to the grant of a certificate of the nature which the petitioner obviously desired, and that, when the Court granted such a certificate, its terms being manifestly of a kind likely to be prejudicial to him, he was further justified in coming in appeal to this Court.

The certificate, it appears to us, must be cut down, so as to be in precise conformity with the terms of Act XL. of 1858, Section 3, that is to say, it must be a certificate enabling the petitioner Ranee Khajoorunnissa to administer the property of her minor son Syud Ata Hossein. As the Ranee is the mother and natural guardian of this minor, it becomes necessary to appoint her to be guardian under the terms of the will, and the certificate must contain no specification

whatever of the extent or nature of the property to which the minor is entitled.

Under the circumstances we have above stated, it appears to us that the appellant, having succeeded in obtaining this material amendment of the certificate, is entitled to his costs both in this Court and in the Court below.

We think, also, it should be added that that portion of the Judge's decision which speaks of the appellant under the name of Meer Bubroo as an impostor put forward by Syud Ahmed Reza should be declared to be extra-judicial, and to have no effect upon the rights or claims of the appellant. The Judge, we observe, has not pronounced in favor of the will or against it, but the expressions we have just read are such as might undoubtedly be prejudicial to the appellant in future litigation.

The same order will apply to the appeal No. 27, in which Mr. Gregory appears on behalf of a distinct objector.

The 8th April 1868.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Limitation — Adverse possession of Hindoo widow's estate — Reversioner — Declaratory decree.

Case No. 2493 of 1867.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 29th June 1867, affirming a decision passed by the Moonsiff of Gowas, dated the 30th January 1867.

Brinda Dabee Chowdhrain (one of the Defendants), *Appellant,*

versus

Pearee Lall Chowdhry (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

As regards property of which a Hindoo widow never gets possession, and which is held adversely to her and to her husband's estate, limitation runs during her lifetime; and, if the ordinary period of limitation has elapsed since the cause of action accrued to her, the reversioner will be barred.

The mere fact of a widow making alienations during her life which are not binding on the reversioner after her death does not entitle him to a declaratory decree.

Macpherson, J.—We think that this case must be remanded.

It has been decided by a Full Bench of this Court recently in special appeals 460 and 1931 of 1867 (which were tried upon the 11th of March last) that, as regards property of which the widow never gets possession, and which is held adversely to her and to her husband's estate, limitation runs during her lifetime, and that, the cause of action having accrued to her in her lifetime, the reversioner will be barred if the ordinary period of limitation has elapsed since the cause of action accrued.

Applying that rule to the present case, the Judge must find whether or not there has been such adverse possession on the part of Brinda Dabee, that Binode Monee and Romonee Monee had a cause of action in their lifetime. If they had, and if more than 12 years have elapsed since the cause of action accrued, the plaintiff, although he be the reversioner, is barred.

With regard to the other question as to the right of the plaintiff to a declaratory decree, the case must be decided according to the principles laid down in the case of Pran Putty Kooer *versus* Lalla Futteh Bahadoor Singh, reported in 2 Hay's Reports, page 608. If the plaintiff can make out any distinct waste or fraud on the part of the widow, and not merely a case of alienation which is binding upon her during her lifetime, although it may not be binding as against the reversioner, the plaintiff's suit may perhaps lie. But it has been decided in the case of Pran Putty Kooer that the mere fact of making alienations that are not binding after the widow's death on the reversioner will not entitle the reversioner to come into Court, and get such remedy as he asks for in the present suit.

The Lower Court must re-try this case with reference to the above remarks, and

will then determine whether the plaintiff is or is not entitled to any relief, and, if to any, to what sort of relief.

Glover, J.—I am of the same opinion.

The 9th April 1868.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Joint-family property—Onus probandi.

Case No. 2582 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 20th April 1867, reversing a decision passed by the Moonsiff of Kylee, dated the 28th December 1866.

Hurish Chunder Bhuttacharjee (Plaintiff), *Appellant,*

versus

Nufur Chunder Kooer and others (Defendants), *Respondents.*

Baboo Judoonath Mookerjee for Appellant.

Baboo Kalee Prosunno Dutt for Respondents.

In a suit to recover a share of a tank on the allegation of its being joint-family property—HELD that the mere fact of plaintiff's having at some previous time been in possession could be no proof of his title, or shift the *onus* on defendant.

Macpherson, J.—THERE is no ground of special appeal in this case.

The plaintiff sued to recover a share of a joint ancestral tank, alleging the same to have been the joint rent-free property of the family. The defendant pleaded separate ownership of the tank under a lease from the talookdar.

The Principal Sudder Ameen found as a fact on the evidence that the plaintiff had failed to prove that the tank was family joint-property, or that he was entitled to a share.

It is contended in special appeal that, under the circumstances of the case, it was sufficient for the plaintiff to prove that he had been at one time in possession, and that the *onus* of proving that the tank was mâl should have been laid on the defendant.

The mere fact of the special appellant's having at some previous time been in possession could be no proof whatever of his title. Like all other plaintiffs, he was bound to prove his case, which was that the tank was joint-family property. This he, in the judgment of the Lower Appellate Court, altogether failed to do. The *onus* was very properly laid upon him, there being no question of mâl or lakheraj involved; and there is no ground for interference in special appeal.

Dismissed with costs.

The 9th April 1868.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Estoppel.

Case No. 2373 of 1867.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 20th June 1867, affirming a decision passed by the Moonsiff of Gungarampore, dated the 2nd March 1867.

Kishen Dhun Nundee and another (Plaintiffs), *Appellants,*

versus

Bhookto Polly and others (Defendants), *Respondents.*

Baboo Otool Chunder Mookerjee for Appellants.

Baboo Gopal Lall Mitter for Respondents.

The dismissal of a suit for the declaration of plaintiff's right to receive rent from a tenant of a portion of an estate cannot be pleaded as an *estoppel* in a suit to establish plaintiff's general right as proprietor of the whole estate.

Macpherson, J.—We think that the decree in the former suit is no *estoppel*. That suit was brought because a suit under Act X. of 1859 for rent at 2 annas a year had been dismissed, the zemindars, who are defendants in the present case, having intervened. The rent-suit having been dismissed, the plaintiffs instituted the civil suit (the decree in which is now pleaded as an *estoppel*) to obtain a declaration of their right to the rent of 2 annas. It is true that in that suit the plaintiffs alleged themselves to be sole proprietors of the whole julkur within certain limits. But there was no adjudication upon that point, because the suit was dismissed as barred under Section 77 of Act X. not having been instituted within one year from the decision of the rent-case. The suit was, in fact, barred only so far as the right to receive the rent of 2 annas a year was concerned, and was not barred as regards the general right of the plaintiffs (if any) as proprietors of the whole julkur.

The case is remanded for re-trial, the issue being whether the plaintiffs do or do not prove their right to the rent claimed by them from those defendants who, they allege, are their tenants.

The 9th April 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Payments under pressure of process—Section 206, Act VIII., 1859.

Case No. 634 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 23rd September 1867, reversing an order passed by the Sudder Ameen of that District, dated the 13th March 1867.

Bidhoo Beebee (Decree-holder), *Appellant,*

versus

Keshub Chunder Baboo and others (Judgment-debtors), *Respondents.*

Baboos Mohendro Lall Mitter and *Obhoy Churn Bose* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Where a judgment-debtor pays the amount decreed to the officer of the Court under the authority and pressure of the Court's process, he is entitled to protection, the latter Clause of Section 206, Act VIII., 1859, relating, not to such payments, but to voluntary adjustments.

Jackson, J.—In this case the appellant must be dismissed with costs. The appellant had a decree against Lalla Keshub Lall. In execution of that decree, process of arrest was issued, and the warrant is before us. It distinctly directs the officer of the Court to arrest and proceed against the debtor according to law, unless he forthwith pays him the amount of the debt, 160 rupees 13 annas and 5 pie, together with costs of execution.

The Judge has found upon the evidence as matters of fact that, in execution of this warrant, the officer of the Court did take the defendant, and that the defendant thereupon paid him the money, which money was paid over to the execution-creditor.

It is contended that this is not a payment which ought to be recognized by the Court, inasmuch as it is an adjustment of a decree which has not been made through the Court, or certified to the Court by the person in whose favor the decree is made.

It seems to us, however, quite clear that the latter Clause of Section 206 does not relate to payments made under pressure of the process of the Court, but relates to voluntary adjustments of a decree made between the parties to a suit. If parties paying money to the officer of the Court under authority of the Court's process, and under pressure of that process, are not to be protected, it appears to us that no judgment-debtor would be safe. The Judge having found as a fact that this appellant has received his money, we think he is not in a position to ask for "remedies," or object to the payment as not being made through the Court.

The 9th April 1868.

Present:

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Execution of decrees—Procedure before Act VIII., 1859.

Case No. 612 of 1867.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 26th September 1867.

Nil Komul Ghose (Judgment-debtor), *Appellant,*

versus

Nobin Chunder Bose (Decree-holder), *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Baboos Ashootosh Chatterjee and *Romesh Chunder Mitter* for Respondent.

The ruling of the High Court (published at page 51, Vol. VI., Weekly Reporter), which lays it down that a Judge must execute his own decrees, refers entirely to executions under Act VIII., 1859, but not to proceedings before that year, when Judges were competent to refer cases of execution to the Principal Sudder Ameen.

Jackson, J.—THE Judge has allowed the execution in this case to proceed on the ground that Dhun Monee, who is a representative of one of the original judgment-debtors, had acknowledged the debt, and that such acknowledgment gave the decree-holder a fresh start for the purpose of execution.

It is unnecessary for us to decide in this case how far that acknowledgment of Dhun Monee would enable the decree-holder to execute this very old judgment (originally passed in 1817) against other parties who did not join in that acknowledgment, because, from the proceedings which have been laid before us, it appears that, irrespective of that acknowledgment, the execution was not barred.

Certain proceedings in execution had been taken in the Principal Sudder Ameen's Court before 1859; the Judge considers those proceedings to be void, because the decree was one made by the Judge's Court, and he cites a decision of this Court (Rajeeb Ram Dass and others, appellants, *versus* Mahomed Hossein), which is reported in the 6 Weekly Reporter, page 51, where it is laid down that the Zillah Judge must execute his own decrees, and has no power to direct the Principal Sudder Ameen to take up and dispose of an application for execution. That ruling, however, refers entirely to executions under Act VIII. of 1859, but these proceedings, which we have just referred to, took place before 1859, and there can be no doubt that, under the law before the Civil Procedure Code, Judges were competent to refer cases of execution to the Principal Sudder Ameen, and in practice did so constantly.

At the passing of Act XIV. of 1859, this decree was not barred; and, under Section 21 of that Act, plaintiff had three years after the passing of the Act, within which he might execute his decree. He did take proceedings within those three years, *viz.*, in February 1862, and thereupon some of the judgment-debtor's property was sold, and something was realized. The decree, therefore, appears not to be barred by limitation, and the appeal must be dismissed with costs.

The 14th April 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. Hobhouse, *Judge.*

Succession—Brothers and brothers' sons—Declaratorydecrees—Adoption—Stranger's right to sue—Onus probandi—Evidence—Written declaration.

Case No. 307 of 1864.

Regular Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 25th May 1864.

Brojo Kishoree Dassee, guardian of Rądhanath Bose, her adopted son (one of the Defendants), *Appellant,*

versus

Sreenath Bose, for self and as guardian of his minor sons, Judonath Bose and others (Plaintiffs), and others (Defendants), *Respondents.*

Mr. W. Montriou and *Baboos Ashootosh Dhur* and *Mohendro Lall Shome* for Appellant.

Mr. R. V. Doyne and *Baboos Chunder Madhub Ghose* and *Nil Monee Sein* for Respondents.

In default of brothers, brothers' sons succeed, taking according to numbers, and not by representation as grandsons; but brothers' sons are totally excluded by the existence of brothers.

A stranger, having no interest in the matter, has no right, even with the consent of presumptive reversionary heirs, to sue for an order declaring an adoption to be valid.

A plaintiff suing for a declaration that an adoption is invalid is bound to prove the invalidity.

Declaratory orders ought not, as a general rule, to be made in cases which are wholly one-sided, and in which the decrees would not be binding upon the parties really interested, if the defendant should succeed in establishing his right.

A writing under the hand of a deceased husband, declaring that he gave his wife power to adopt, though not complete as a testamentary disposition, may yet be evidence of a declaration of fact.

Peacock, C. J.—THIS suit is brought by Sreenath Bose, son of Buddinath Bose, on his own behalf and as guardian of his minor sons, against Brojo Kishoree Dassee, the widow of Muthooranath Bose, as guardian of her alleged minor adopted son Radhanath Bose; also against the widow of Gobind Pershad Bose, and the widow of Raj Krishto Bose.

The plaint sets out that the deceased Muthooranath Bose was a cousin of the plaintiff, being the son of his father's elder brother, Ram Dhun; that Muthooranath's widow, Brojo Kishoree, after the death of Muthooranath, namely, in the year 1260, adopted a son, although her husband had left her no permission to do so; that, under color of that adoption, she had applied for a certificate under Act XX. of 1841 to the estate of Golucknath, her husband's brother; that the Judge trying the case summarily had granted the certificate; and that that judgment had been upheld on appeal to the late Sudder Court. The suit was brought to set aside the said certificate, to declare the adoption invalid, and to declare that, in the absence, meaning upon the death, of the female defendants, the plaintiff and his sons successively would be the heirs of the husbands of the female defendants and of Golucknath Bose, deceased.

The suit was commenced on the 31st of December 1861, and the judgment of the late Sudder Court affirming the grant of the certificate was given in December 1858, nearly three years before the commencement of this suit.

The plaintiff was the son of Buddinath, one of the four sons of Nund Coomar Bose. Ram Dhun was the eldest of those four sons. Gobind Pershad, whose widow is one of the defendants, was the second son and a brother of Ram Dhun. Buddinath, the father of the plaintiff, was the third son, and Raj Kishen, whose widow is also a defendant, was the fourth son. Ram Dhun, the eldest of the four brothers, had two sons, Golucknath and Muthooranath, and a daughter Phool Kishoree. Golucknath died without issue on the 12th of April 1842, leaving a widow Unopoorna Dassee, who died on the 1st March 1857. Muthooranath, the alleged adoption by whose widow is the matter in dispute, died in 1833. The daughter, Phool Kishoree, had two sons, Soorjo Coomar Roy and Jadub Coomar Roy. Radhanath is alleged to have been adopted in 1853.

It is clear that, under the circumstances above stated, Soorjo Coomar Roy and Jadub Coomar Roy were the heirs of Golucknath and the presumptive reversionary heirs of Muthooranath, if the adoption of Radhanath was invalid, they being the sons of a sister, and the plaintiff being merely a cousin.

If the adoption of Radhanath was valid, he was not the reversionary heir of Gobind Pershad, nor of Raj Kishen, inasmuch as he was one degree further removed than the plaintiff, the plaintiff being a nephew, and Radhanath being the son of a nephew.

In default of brothers, brothers' sons succeed. They take according to numbers, and not by representation as grandsons, and brothers' sons are totally excluded by the existence of brothers.

As regards, therefore, the widow of Gobind Pershad and the widow of Raj Kishen, there was no necessity to make them parties to this suit, inasmuch as Sreenath would not have to get rid of the adoption of Radhanath, who, if validly adopted, was merely a nephew's son, in order to establish his own reversionary heirship as nephew. Therefore, as far as the estates of Gobind Pershad and Raj Kishen are concerned, there is no necessity for a declaratory decree as regards the validity or invalidity of the adoption.

I understand that the plaintiff has withdrawn, or that he gives up now, that part of his prayer which asks for a declaration that,

upon the death of the female defendants, he and his sons successively will be the heirs of the husbands of the female defendants. But, even if he did not give it up, he would not be entitled to have any such declaration, inasmuch as he would not be the heir of their husbands unless he should survive them, and it was a matter of contingency whether he would survive them or not.

The question, therefore, is reduced simply to whether the adoption is invalid, and whether the plaintiff is the heir of Golucknath.

He cannot be entitled to a declaration that he is the heir of Golucknath, inasmuch as he is not such heir even if the adoption is invalid. Whatever may be the effect of the consent of Soorjo Coomar Roy and Jadub Coomar Roy, it cannot have the effect of making the plaintiff the heir of Golucknath.

The only question which remains to be decided is, whether the Court should declare the said adoption invalid. To this extent the suit does not ask for relief, but merely asks for a declaratory order.

It has been decided in several cases in England that, under the 15 and 16 Vic, C. 86, which contains words similar to those of the 15th Section of Act VIII. of 1859, it is in the discretion of the Courts in what cases a declaratory decree ought to be made. By discretion we do not mean caprice, but a discretion to be exercised according to sound principles. The cases were particularly referred to by me in the case No. 424 of 1866. VIII., Weekly Reporter, page 64, Civil Rulings.

One of the principles upon which the Courts are guided is, that a declaration will not be made at the instance of a stranger, who has no right to come to and interfere with the affairs of other men. That was decided in Cazee Muzhur Hossein *versus* Dino Bundho Sein by Mr. Justice Phear in Bourke's Reports, page 8; and it appears to us to be a sound principle. For instance, in a case of this sort, a stranger who has no interest in the matter has no right to commence a suit, and to ask a Court for a declaratory decree that the adoption of a particular individual is invalid. It might be very reasonable, at the instance of a presumptive reversionary heir whose estate would not accrue until the death of the widow, to try whether an adoption made by a widow was valid or not, and, upon proof of the invalidity of the adoption, to declare that it was invalid. In such a case, if the reversionary heirs should be compelled to wait until the death of the widow, before they could get the question tried as to the validity of the adoption, they might have to wait until after all the witnesses who could prove the invalidity of it were dead, for the widow might outlive all the witnesses. Such a suit might, we apprehend, be maintained by the presumptive reversionary heirs for the benefit of the persons, whether themselves or others, who might be the heirs of the husband at the time of the widow's death, in the same manner as the presumptive reversionary heirs may sue to restrain a widow from committing waste, although, if the widow should survive them, they would sustain no injury by the waste. It is unnecessary for the Court now to determine whether, if in such a case the defendant should succeed in establishing the validity of the adoption, the decree would not be binding upon the persons who might eventually succeed upon the death of the widow in the same manner as a decree against the widow respecting the rights of her husband in an estate is binding upon the reversionary heirs. It has been decided by the Privy Council that such a decree is binding upon the reversionary heirs in Ranee Surno Moyee's case, reported in the 2nd Weekly Reporter, page 13. This, of course, is upon the assumption that the suit is honestly brought and conducted.

A decree establishing the adoption in a suit brought by a stranger would not be binding upon the reversionary heirs. It would be binding only upon the stranger and persons claiming through him, or persons such as Soorjo Coomar Roy and Jadub Coomar Roy in the present case, who had given their consent to his carrying on the suit.

It is very necessary that the Court should be careful in making declaratory decrees as to rights. They ought not, as a general rule, to be made in cases which are wholly one sided, and in which the decrees would not be binding upon the parties really interested, if the defendant should succeed in establishing his right.

Now, in this case, Sreenath, the plaintiff, as regards the estates of Golucknath and Muthooranath, irrespective of the deed of compromise which was the subject of the

third voice case,* was a mere stranger when he commenced the suit. It has been shown that he was not the heir either of Golucknath or of Muthooranath; and if the case had remained in the same state as that in which it was when the suit was commenced, I for my part should have had no difficulty in deciding that he was not entitled to a declaratory decree with reference to the validity or invalidity of that adoption.

But an *ikrarnamah*, dated the 26th of January 1864, was filed three years after the suit was commenced, in which Soorjo Coomar Roy and Jadub Coomar Roy, who were the presumptive reversionary heirs, declared that the suit had their full consent, and that plaintiff might carry on the said suit at his own expense. But we are at a loss to understand how the fact of their being made defendants, as they have been, or giving their consent that the plaintiff should carry on this suit, can entitle the plaintiff to a declaratory decree. It is not because a man who has a right consents to a man who has no right bringing a suit that the man who has no right can maintain it; nor can the making the man who has the right a defendant alter the case. It is still the stranger, with the consent of the reversionary heir, asking for a decree that the adoption was invalid, making the real heir a defendant to enable him to show, if he can, why the stranger should not have a declaratory decree to that effect.

It appears to us that, even with the consent of the presumptive reversionary heirs, the plaintiff, a stranger, had no right to have a declaratory decree with reference to the validity or invalidity of the adoption.

But a deed of compromise of 1839 was put in evidence in which the plaintiff, as manager of certain estates which were conveyed to him by that deed of compromise, had an interest in showing that Radhanath had not been legally adopted; and although the plaintiff had not set up that deed of compromise in his plaint as one of the grounds on which he sought to have it declared that the adoption was invalid, an issue was raised in the suit whether the plaintiff had a right to question the adoption.

The Judge held that it was clear on the arguments that the plaintiff was the next heir if the adoption of Radhanath should be disallowed; and he proceeded to try the issues, *first*, whether Brojoraj Kishoree had the right to adopt; and, *secondly*, whether Radhanath was legally adopted. The Judge found that Brojoraj Kishoree had no right to adopt, and gave a declaratory decree that the adoption was invalid, and that Radhanath was not, under such adoption, the legal son and heir of Muthooranath. The Judge having found the first issue in favor of the plaintiff, it was unnecessary for him to express an opinion on the second issue.

When the case came before this Court on appeal from the decision of the Judge, there was a difference of opinion between the two Judges before whom the case was first heard as to whether the plaintiff had a right to question Radhanath's adoption. It was not whether the plaintiff, as heir of Golucknath or as heir of Muthooranath, had that right. The case was referred for a third voice, and was heard by me; and it appeared to me that the plaintiff had an interest, under the deed of compromise of 1839, to question the adoption. The decision is reported in VIII. Weekly Reporter, page 241.

If it had been determined in a suit between the plaintiff and Radhanath's guardian, that the plaintiff had no right to question the adoption, the plaintiff might probably have been bound by that decision if Radhanath had instituted a suit against him with reference to the deed of compromise; and it appeared to me that the plaintiff had the right to question the adoption with reference to that deed.

As a single Judge, I had no power to determine any other question than that as to which the difference of opinion prevailed. I had no power to try whether the adoption were valid or not, nor whether, under the circumstances of the case, the plaintiff was entitled to a declaratory decree.

The case has now come back to be tried upon the merits, whether the adoption was valid or not, and whether the plaintiff is entitled to have a declaratory decree.

It appears to us that the plaintiff would not be entitled to a declaratory decree, even if he should prove that the adoption was invalid. He has based his right in the suit as regards Muthooranath's estate, upon the ground that, upon the death of his widow, he would be the heir; and it appears to us that he has failed to show that he was the reversionary heir; and the consent of the real reversionary heirs does not entitle him as a stranger to have a declaratory decree, even if he could prove that the adoption was invalid.

* Reference cited lower down in the judgment.

The *ikrarnamah* would, according to English law, amount to Champerty; for the real heirs consent to the plaintiff's carrying on the suit at his own expense with an agreement as to the mode in which the property should be divided amongst them, should he succeed.

We do not mean to say that the Law of Champerty is a law applicable to the Mofussil; but we think that the Court would be exercising a very unsound discretion, and acting upon a very erroneous principle, if they should allow a stranger to interfere in family-affairs, and to have the adoption declared invalid, under an agreement between him and the real heirs that, if he could establish the invalidity of the adoption, he should be entitled to a share of the estate.

With regard to his claim to set aside the certificate, which was affirmed by the Sudder Court in 1858, the same reasons apply. As a stranger, he has no right to set aside that certificate; and it is, therefore, unnecessary for us to determine the question which was raised, that, as to that part of the suit, he was barred by limitation.

The certificate, however, and the suit regarding it are material features in this case. Radhanath was adopted in 1853, upwards of 8 years before the commencement of this suit. His mother, as his guardian, in the summary suit for that certificate, which was resisted both by Soorjo Coomar Roy and Jadub Coomar Roy and by the plaintiff in this suit, established to the satisfaction of the Judge and of the late Sudder Court on appeal that the adoption was valid. For three years before the commencement of this suit that certificate had been in force. Neither Radhanath nor his mother had attempted or claimed in any way to interfere with the rights of the plaintiff under the deed of compromise. They were merely acting under the validity of that adoption with regard to Muthooranath's estate, and with regard to that portion of the estate of Golucknath which had not been included in the deed of compromise, and the certificate was not applied for until after the death of Golucknath's widow.

It is clear that the certificate to Golucknath's estate could not entitle either Radhanath or his mother to interfere with any portion of the property of Golucknath which Golucknath in his lifetime had conveyed away by the deed of compromise. That deed applied only to ancestral property which had descended from Nund Coomar Bose, and not to any property acquired subsequently by Golucknath.

The plaintiff asks in this regular suit to have it declared that Radhanath's adoption is invalid. It appears to us that the *onus* rested upon him, as it does upon any one who asks for a decree declaring the illegitimacy of another person, to prove the illegitimacy. The person who asks a Court to declare that a thing is invalid is bound to prove that it is so. The Act which enables the Court to make a declaratory decree does not enable the Court to call upon a man to prove his title at the instance of one who asks to have a declaratory decree that he is not entitled. But this case seems to have been treated both by the issues raised and the mode in which the evidence was dealt with, as if the defendant had been called upon to prove that his adoption was valid, and not that the *onus* lay upon the plaintiff to prove that it was invalid.

The plaintiff has not proved the invalidity of the adoption. He has not proved that Brojoraj Kishoree had no right to adopt, or that Radhanath has not been legally adopted. Radhanath was living in the family, and was treated as the adopted son. He had had a decree in his favor before this suit was commenced, in a suit to which the plaintiff was a party, declaring that adoption to be valid, and that decree had been confirmed by the late Sudder Court three years before this suit was commenced. The mother of Radhanath appeared as a witness, and deposed that her husband had given her verbal authority to adopt; she and Golucknath, through whom the plaintiff at the time he commenced this suit claimed as heir, and through whom Soorjo Coomar Roy and Jadub Coomar Roy who consented to this suit claim as reversionary heirs, in the Bill which they filed to set aside the will of 1239, prayed that the widow of Muthooranath should adopt under the directions of the Court. That shows that Golucknath did believe that, independently of the will of 1239, the widow had that power. In their answer to the suit filed against them by Huree Mohun, they swore that a paper purporting to be a will of Muthooranath, and of which they annexed a translation, was wholly in the handwriting of Muthooranath. That would be evidence against Golucknath and those

claiming through him as his heirs that such a document really did exist.

Whether it was actually executed or so far completed as to become a will, it is not material now to consider, because, whether it was a will or not, it was a paper declared by Golucknath to be in the handwriting of Muthooranath, in which he declared that he had authorized his wife to adopt a son.

It is said, both as regards this paper and the alleged will of 1239, that there was a clause in it stating that three copies had been deposited in certain places, and that those copies were not forthcoming. That remark might have been material if the question had been whether Muthooranath had so far completed the paper as to constitute it his will. The fact of his not having made the deposit of the copies as stated might possibly have been used as an argument to show that he had not completed the will, but was merely preparing it. The copies could not be deposited whilst the will was in a state of preparation, and not complete as a testamentary disposition; but it is immaterial when we look at the paper merely as a writing under Muthooranath's hand, in which he declared, not that by that instrument he gave his wife power to adopt, but that he had already given her such a power. The paper would be evidence of a declaration of fact, though not complete as a testamentary disposition. As against Golucknath's heirs, the non-production of any of those copies is not material, for the paper was produced by Golucknath, and sworn to by him to be in the handwriting of Muthooranath.

We are not prepared to say that a power to adopt may not be proved by the widow alone without the corroboration of other witnesses. It is not material in this case to decide that point, for the widow is corroborated by the paper of 1237, whether it operated as a will or not; and it is unnecessary, therefore, to consider whether Muthooranath ever did see or sign the alleged will of 1239, or give instructions for it, or was aware of the paper alleged to be the will of 1239.

It appears to me that the plaintiff has failed to show that the widow had no authority to adopt, and that the defendants have proved that the widow had such authority.

It should be borne in mind that, as regards an adoption by a widow in Bengal, it is against her temporal interests, inasmuch as it deprives her of her inheritance.

With regard to the 2nd issue, whether Radhanath was legally adopted, it is important to remark that the father of the boy who was given in adoption was not called in the former suit to prove that he did sell the boy, and only one of the witnesses who were called in this suit was called on the former occasion. The father of the boy broke down in that part of his evidence in which he attempted to show that no ceremonies had been performed. The other witness said that he believed the boy had been sold for Rupees 700; whereas the father said it was for Rupees 550. We do not think that the plaintiff has made out that Radhanath was not legally adopted; and whatever the form of the issue, it appears to us that the *onus* lay upon him to prove satisfactorily to the Court that the proper forms and ceremonies had not been gone through, before he can ask the Court to declare that an adoption which had been upheld by the Sudder Court in a suit in which the plaintiff was a party was an invalid adoption.

Further, it appears that the plaintiff himself must have been under some impression that there was a valid adoption, because in the suit for the certificate he, who up to the time of the commencement of this suit in 1861 seems to have considered that he was the reversionary heir of Golucknath, set up as a ground of defence to the plaintiff's application for a certificate that he had purchased from Golucknath's widow, not that he had purchased the widow's interest (for that would be no answer to the certificate), but that he had purchased from the widow that which was a bar to the certificate, namely, the interest of the reversionary heir. If he believed that he was the reversionary heir, there was no necessity for his purchasing, unless he believed that there were grounds upon which the validity of the adoption might be set up.

We should have added that one of the plaintiff's own witnesses says that Radhanath was legally adopted.

Upon the whole, it appears to us that both the issues ought to be found for the defendant; that the widow had power to adopt; and that Radhanath was legally adopted. Further, if it were necessary, we should hold that the plaintiff, whether the adoption was valid or not, has no right to a declaratory decree.

The decree of the Lower Court will be reversed except so far as it orders the plaintiff to pay the costs of Juggodumba Dossee

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and Gobind Monee Dossee, and a decree will be given for the female defendants with costs of the defendant Brojoraj Kishoree in the Lower Court, and the costs of this appeal.

The 16th April 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Hindoo law—Ancestral property—Joint ownership of father and son—Legal necessity for sale.

Case No. 114 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated 21st December 1866.

Kantoo Lall and another (Plaintiffs), *Appellants,*

versus

Greedharee Lall and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Hem Chunder Banerjee* for Appellants.

Baboos Juggodanund Mookerjee, Unnoda Pershad Banerjee, Romesh Chunder Mitter, Nil Madhub Bose, Shib Dyal Banerjee, Oopendur Chunder Bose, Rajendur Coomar Bose, and *Dwarkanath Mookerjee* for Respondents.

Under the Mithila law, as expounded by the *Vivada Chintamoni*, and supplemented where deficient by the Mitakshara, a son has ownership in ancestral property even during his father's lifetime; and such ownership accrues on the son's birth, from which period the father and son are joint-owners.

The existence of a decree against the father is not sufficient evidence of the necessity for his selling his son's interest in ancestral property.

Jackson, J.—THE plaintiffs in this suit are Kantoo Lal and Mussamut Dilaree Kooer, mother of her minor son Mohabeer Pershad. They claim to recover certain estates, ancestral property, which the fathers of Kantoo Lall and Mohabeer Pershad have alienated. The fathers Bhikaree Lall and Bujrung Suhai are still alive, and are parties to the suit. The defendants are the purchasers from the fathers of the landed estates in question.

The plaintiffs allege that the sales by their fathers of the ancestral estates were caused by the reckless extravagant way in which their fathers lived, and that the money raised upon these sales, and that the loans, to pay off which some of the sales were had recourse to, were expended on immoral purposes, and that such sales are invalid as against them (the plaintiffs), unless special grounds of necessity can be made out to support them.

The defendants, on the other hand, state that the sales were justified by the necessities of the family, and that many of them were held in execution of decree.

The Principal Sudder Ameen has dismissed the plaintiffs' suit, except as to 7 beegahs of one estate.

It is admitted that the law which will govern this case is the Mithila law.

The first question which is raised before us relates to the *status* of the son as regards ancestral landed estate inherited by his father from his grandfather under the Mithila law, and it was contended by the plaintiffs' vakeel that, as regards such estate, the son is from his birth co-owner with the father, and the father, except on pressing necessity, and for certain special reasons only, cannot alienate such estate. It is admitted that the Court must look to the Vivada Chintamoni to ascertain the Mithila law current on this point, and passages in that commentary have been referred to in the course of the argument. It is clear that that commentary does not lay down the law on the point in the same precise terms as either the Mitakshara or the Dyabhaga. We are not shown that it is anywhere distinctly declared in that commentary, as it is in the Mitakshara, that the son's right to ancestral property accrues upon his birth, or that he is from his birth co-owner with his father in such property, or that he can call upon his father at any time to divide such property with him. The son's rights in ancestral property are, therefore, not distinctly placed in such high terms by the Mithila law as

by the Mitakshara. But there are passages in the Chapter on partition of property during the lifetime of the father, which certainly tend to the conclusion that the right of the father to deal with ancestral property in the lifetime of his son is limited. It is laid down that "self-acquired "property shall be divided equally or un-"equally, or not divided at all, according "to the father's pleasure. The partition "of such property depends entirely on his "own will, for the sons have no owner-"ship therein." It is argued from this that there is certain property in which the sons have ownership, and that that property must be ancestral property. This passage would show that, whenever the right of the son may accrue, there is certain property in which the son has, even during his father's lifetime, an ownership; and looking to the analogy of the Hindoo law as laid down in the Mitakshara, and to the admitted fact that, on points where the Vivada Chintamoni is silent, the Mitakshara is to be taken as a guide, we think that that property is ancestral property which has devolved to the father and the son from the grandfather.

But the question still remains what description of ownership a son possesses in such property. If he is unable to compel his father to divide such property with him during his father's lifetime, his ownership, though inherent in him from his birth, may not actually come into force until his father's death. There is no direct clause in the Vivada Chintamoni which allows a son to force his father to a partition of ancestral property in his father's lifetime. The clause above alluded to declares the father's power to divide his property among his sons during his lifetime, and points out that, as regards certain property, the father is his own master, and can act as he pleases. As regards ancestral landed property, he does not possess the same right, because the son has an ownership in such property.

For the purposes of this suit, however, it is necessary also to determine at what time the ownership of the son commences—whether at his birth or after a partition has been made either with the consent of the father or against his consent. The Vivada Chintamoni not laying down any rule upon the point, we must decide this point also on the Mitakshara; and there it is laid down that the ownership accrues on the son's birth, and that the son and father are joint-owners in such property from the son's birth; and it has been held by several Benches of this Court, after some difference of opinion, that the son can compel his father to divide such property whenever he pleases. Applying these principles to this case, the sons may, we think, be considered in this case to be suing to obtain their share of their grandfathers' property. The fathers are parties to the suit as defendants, though, as they have alienated the estates, they do not oppose the sons. However repugnant at first sight it may appear to principles of justice and equity that the sons should be allowed to recover landed estates which the fathers have sold, still, if the right of the father to sell any portion of such estate can be questioned under the law, and the right of the son to a portion of such estate is clear under that law, the sons must recover. There are certain circumstances in this case which go to show that the purchasers from the father were aware that their title to the estates they purchased was not a valid title, the purchasers having allowed some of the estates to fall into arrears of Government revenue, and having re-purchased them under a new title, hoping thereby to cover the defects of the title gained by the first purchase. If the defendants were then acquainted with the defect in their title, and purchased with such knowledge, there can be little doubt that the consideration for such purchases was proportioned to the risk they ran as to their title being afterwards declared invalid.

There seems to be no sufficient evidence that the money for which the estates were sold was, as alleged by the plaintiffs, expended in immoral purposes. There is no distinct evidence as to what was the income of the plaintiffs' fathers. One of them is said to have been a Serishtadar in the Purneah Civil Court. It is not even stated in the evidence whether the whole of the landed estate has been dissipated, but it has been in the argument before us mentioned that that has been the effect of the sales, so much so that, even the family-house has been disposed of, and there has not been any direct contradiction of the fact by the pleaders of the defendant. Several of the sales which have taken place have been in execution of decrees, the decrees only showing that the fathers had incurred debts. The purchaser-defendants allege that the existence of these decrees is sufficient to support their case, that there was a necessity for the sale, and that they cannot be required to go

behind the decrees and the facts apparent on the face of the litigation, and to point out the exact mode in which the sums borrowed by the fathers were spent. In favor of this contention, we are referred to a decision of the Sudder Court, and to a precedent, Weekly Reporter, Volume VI., page 149, Mussamut Bhoorna Kooer and others. It seems by the last decision that the Judges did not consider the existence of the decrees alone to be a sufficient justification for the sale. They went on to look to the rest of the evidence regarding the sales, and came to the conclusion that the father and the purchasers had both acted *bond fide*, and that the money for which the sales were ultimately incurred was not spent in dissipation and extravagance. But there was in that case evidence that large sums of money were required for special purposes for the benefit of the family. There is no evidence to that effect in this case. The purchasers in that case were, therefore, able to justify their purchases, not only on the ground of the decrees, but also upon other evidence. As to the decrees in this case, they certainly afford no sufficient evidence as to the necessity of the sales by the fathers of their sons' interests in the property. The purchaser at a sale in execution of decree purchases only the rights and interests of the person whose property is put up for sale. If his interests are limited except under certain contingencies, the purchaser must be prepared to prove those contingencies, if he is desirous to make out that under the sale anything more than the interests of the debtors passed to him. In the present case, there is no evidence to show that the fathers required to raise money for any pressing necessity for the benefit of the family. All that is proved is, that the money was obtained from time to time far beyond the income of the parties, and to that extent that the whole ancestral estate, as well as ancestral house, was ultimately alienated.

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The 16th April 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Jurisdiction—Review after special appeal—Correction of clerical error—Alteration of award of costs.

Cases Nos. 9 and 10 of 1868.

Miscellaneous Regular Appeals from an order passed by the Principal Sudder Ameen of Nuddea, dated the 10th August 1867.

Oomanund Roy, *Appellant,*

versus

Maharajah Suttish Chunder Roy, *Respondent.*

Baboo Tarucknath Sein for Appellant.

Baboo Bhugobutty Churn Ghose for Respondent.

A Lower Appellate Court has a right to grant a review of its own judgment for the purpose of correcting a clerical error, even after a special appeal from its decision has been heard and determined by the High Court.

A Lower Appellate Court has no jurisdiction to review its own judgment so as to modify its substance, as for example to alter an award of costs, after a special appeal from its decision has been heard and determined by the High Court.

Phear, J.—THESE two cases, 9 and 10, came originally into the Lower Appellate Court as appeals brought by two different parties to the same suit. The decisions given in these two cases were, as we understand, specially appealed against to the High Court. The special appeals were each of them admitted, heard, and final decisions

were passed in them. After this, the Maharajah, defendant in the original suit and a party in both the appeals, made application to the Lower Appellate Court for a review of each of its two judgments. In the case now numbered 10, he applied for a review on the ground that the judgment of the Appellate Court awarded costs to the plaintiff (appellant), whereas, in fact, the plaintiff was respondent, and it was the Maharajah (defendant) who was the appellant. It seems that, on this application for review, the Lower Appellate Court was convinced that this was, in reality, a mere clerical error, and that the award of costs intended to have been made was to the defendant (appellant). It, therefore, granted the review, and rectified its original judgment in that particular.

It is now objected on regular appeal that the Lower Appellate Court had no jurisdiction to entertain and grant that review, and the argument has been mainly based upon a late ruling of this Court, which is reported in Wyman's Reports, Volume V., page 195.* It appears to us, however, that this case does not come within the scope of operation of that decision, but is strictly one of those which was referred to by the Court in the course of its judgment, when it said: "This decision does not in any way touch "the right which I presume to be incident to "every Court to correct its formal records in "such a way, if needed, as will make them "represent truly the decision which was "intended to be judicially expressed when "the decision was delivered. In this way "blunders of the pen may be set right."

We think, therefore, that the Lower Appellate Court was right, when it arrived at the conclusion that a clerical error of this kind had really been made, to rectify it in the way in which it has done. Consequently, the appeal No. 10 ought to be dismissed with costs.

No. 9 stands somewhat upon a different footing. The Maharajah's application for review was there placed upon the ground that no mention of his costs had been made in the original decision of the Appellate Court, that this was an error, and ought to be corrected. As far as we can understand the decision of the Principal Sudder Ameen, as it has been translated to us by the vakeel for the Maharajah, the absence of any mention of the Maharajah's costs occurs in the original judgment itself, and not merely in the decretal order which was drawn up in pursuance thereof. There was nothing whatever to show that the Court intended, at the time of giving the judgment, to award costs to the Maharajah, and certainly not that the Court intended to award such costs to be paid by the Maharajah's co-respondent. Indeed, had it been so, it seems to us that it might well have been made matter for special appeal to the High Court. Consequently, we are of opinion that the ground of review in this case is very different from that in No. 10, that it really goes to the substance of the judgment, and does not merely seek a rectification of the decree so as to make it accord with the judgment. It falls within the reason of the judgment which we have already referred to, reported in Wyman's Reports; and we think that we ought to follow that decision, and hold this to be a review which the Lower Appellate Court had no jurisdiction to entertain, after the special appeal had been admitted, heard, and determined in the High Court. For this reason, we think that this appeal should be decreed, and the review-order of the Lower Appellate Court reversed with costs in both Courts.

* *See* IX. W. R., p. 301.

The 17th April 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Jurisdiction—Appellate Court.

Case No. 1863 of 1867.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 4th December 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 17th March 1866.

Kritartho Moyee Debia (Plaintiff), *Appellant,*

versus

Khetternath Sircar and others (Defendants), *Respondents.*

Baboo Nil Madhub Sein for Appellant.

No one for Respondents.

Where a Civil Court's judgment, which makes defendants separately liable, proceeds on ground common to all the defendants, it may be reversed by the Appellate Court on the appeal of some of the defendants.

Jackson, J.—THE sole ground of special appeal in this case was that the Lower Appellate Court was not competent, on the appeal of some of the defendants, to reverse a judgment of the Moonsiff which made the defendants separately liable. This, however, is in direct contravention of Section 337. The decision of the Court proceeded on a ground common to all the defendants, namely, that the plaintiff had a title which enabled her to recover, and the Lower Appellate Court, having reversed the decision on that point, was clearly competent to do so in favor of all the defendants.

We dismiss this appeal, but without costs, no one having appeared for the respondents.

The 17th April 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Mesne-profits—Expenditure, by trespasser, of capital.

Case No. 18 of 1868.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 1st November 1867, reversing an order passed by the Sudder Ameen of that District, dated the 4th February 1867.

Sreenath Bose (Decree-holder), *Appellant,*

versus

Nobin Chunder Bose (Judgment-debtor), *Respondent.*

Baboos Mohendro Lall Shome and *Pearee Mohun Mookerjee* for Appellant.

Baboos Unnoda Pershad Banerjee and *Tarucknath Dutt* for Respondent.

Where a party is decreed entitled to mesne-profits, the trespasser cannot be allowed to urge that the owner would not have realized as much from the land as he (the trespasser) did; but if he had obtained extraordinary profits by the expenditure of capital on the land, allowance should be made for such expenditure.

Phear, J.—THE only question before us in this case is, whether or not the Judge of the Lower Appellate Court has estimated mesne-profits by a proper standard. It appears that the first Court decided that the amount to be decreed for mesne-profits was the actual amount realized by the wrong-doer while in possession. The Judge reversed that decision, holding that the plaintiff was not entitled to profits which the defendant obtained from the land if they were obtained by the use of labor, energy, and influence employed by the defendant, which the plaintiff would not have employed. He accordingly remanded the case to the Sudder Ameen, in order that he might ascertain the amount of the profits as rent which would have been realized from the land if leased out at the same rent as the neighbouring land.

It seems to me that this question is really concluded by the decisions which have been passed by a Full Bench and by a Division Bench of this Court. Mesne-profits are of the nature of damages given in order to reimburse the owner of the land for the loss which he has sustained in consequence of his having been wrongfully kept out of possession. Now, this loss must generally be measured by the actual profits arising from the usufruct of the land during that time. Certainly, it appears to me that the wrong-doer cannot be heard to say that these profits do not represent the owner's loss. It does not lie in his mouth to say that the owner would not have realized as much from the land as he, the trespasser, did. No doubt, it may be that the loss to the owner would be greater than the actual produce during dispossession; as, for instance, in the case where the wrong-doer, while in possession, chose to let land remain waste and unfruitful which was capable of yielding profit. And we think that these alternatives are pointed at in the judgment of the Full Bench delivered by the Chief Justice, and reported in the Full Bench Cases, the Special Number of Mr. Sutherland's Weekly Reporter, page 40. The Chief Justice says: "We are clearly of opinion

"that, when a party is declared entitled to "a decree for mesne-profits, he is entitled "to recover as those profits such sums as "may have been collected and appropriated "by others in wrongful possession, or such "sums as he (the party ousted wrong-"fully) would have collected had he been in "possession, and which he was prevented "from collecting by having been kept "wrongfully out of possession." This last is the alternative to be taken in the event of the first-mentioned profits being less than the second, and we think the same view was adopted by the learned Judges who decided the case reported in Volume VIII. of the Weekly Reporter, page 103. In the case before us it seems to be admitted that the wrong-doer has obtained extraordinary profits out of the lands, but also that he has obtained them by the expenditure of certain capital.

Under these circumstances, the remand-order of the Judge must be reversed, and the case must go back to the Lower Appellate Court, in order that that Court may ascertain what was the amount of net profit actually received by the defendant, after making due allowance for such expenditure as may have been incurred in order to obtain those profits. The special appellant must have the costs of the special appeal.

The 17th April 1868.

Present:

The Hon'ble G. Loch and J. B. Phear, *Judges.*

Intervention—Section 269, Act VIII., 1859—Limitation.

Cases Nos. 2270, 2271, and 2272 of 1867.

Special Appeals from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 16th July 1867, reversing a decision passed by the Moonsiff of that District, dated the 7th June 1866.

Deen Dyal Burmo Doss and others (Defendants), *Appellants,*

versus

Poran Dass and others (Plaintiffs), *Respondents.*

Baboos Gopal Lall Mitter and *Gopeenath Mookerjee* for Appellants.

Baboo Sreenath Banerjee for Respondents.

An attachment having been made in execution of a decree for rent, an intervenor claimed the land as mortgaged to himself, but his application was rejected, and he was directed by the Collector to bring his objection, if he had any, under Section 269, Act VIII. of 1859.

HELD that he was not bound to do so, and his omission did not bar his right to bring a suit to establish the validity of the mortgages under which he claimed, provided it was brought within the period permitted by Act XIV., 1859.

Loch, J.—KHURIA BIBEE had a decree for rent against Hedayutoollah, and in execution attached and sold a tenure alleged to belong to him other than that upon which the arrears accrued. The auction-purchaser is now represented by the special appellants. When the attachment was made, plaintiff claimed the lands in dispute in these cases as having heen mortgaged to him partly by Ameenoollah, the brother of Hedayutoollah, and by Buduroonissa, the wife of Ameenoollah, and also by Hedayutoollah. His application was rejected, and he was directed to bring his objection, if he had any, under Section 269 of Act VIII. of 1859. The sale took place, and the auction-purchaser took possession, but plaintiff made no application under the Section indicated, and now seeks in the present suits to establish the validity of the mortgages acquired from the parties mentioned above.

The first Court held that the mortgages taken from Ameenoollah and Buduroonissa were valid, but the Moonsiff rejected those taken from the judgment-debtor Hedayutoollah as being collusive.

The Lower Appellate Court considered that the mortgages given by Hedayutoollah were as good as those given by Ameenoollah and Buduroonissa; that the mortgagors Ameenoollah and Buduroonissa were in possession, which the defendant had denied; and he held that the auction-purchaser had purchased subject to the plaintiff's mortgage.

In special appeal it is pleaded that the suit is barred by limitation, inasmuch as it was not brought within one year from the date of the Collector's order rejecting the plaintiff's petition of intervention; that the *onus* has been wrongly thrown on the defendant; that the petition, on which the

Principal Sudder Ameen relies in support of his view that the property in question was in the possession of both the brothers, relates to certain ancestral property, and till it be shown that the property in this suit is ancestral, the statements made in that petition cannot be applied to it; that the Principal Sudder Ameen is also wrong in the conclusion he has come to from the terms of the bill of sale; the bill sets forth that the right and interest of the debtor are sold, and the Principal Sudder Ameen concludes that, because those terms are used, there must be some partner, and that partner Ameenoollah; that the Principal Sudder Ameen, though he has held the mortgages given by Hedayutoollah to be valid, has pronounced no opinion on those given by Ameenoollah and his wife, though the finding of the first Court regarding them was objected to on appeal; that with regard to dagh 910, which defendant acknowledges is not in his possession, the Principal Sudder Ameen has pronounced no opinion; and that he cannot be held liable for costs in regard of this land.

We do not think that this suit is barred by limitation. The Collector passed no order upon the plaintiff's petition when he intervened before the sale took place, but told him to proceed under Section 269 of Act VIII. of 1859 after the sale had taken place, should his possession be disturbed by the auction-purchaser. Plaintiff made no application under that Section. He was not bound to do so, and his omission to do so does not bar his right to bring the present suit within the period permitted by Act XIV. of 1859 for the institution of suits of this nature. Had he filed an objection under the said Section, and it had been adjudicated upon, he would have been bound to have brought a suit to set the order aside within a year from the date of such order, but in the absence of any such adjudication, the time for bringing the suit is not limited to one year.

The 17th April 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Hindoo wife's right to maintenance.

Case No. 1874 of 1867.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 30th April 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 12th May 1866.

Nitye Laha (Defendant), *Appellant,*

versus

Soondaree Dossee (Plaintiff), *Respondent.*

Baboo Tarucknath Dutt for Appellant.

No one for Respondent.

Where a Hindoo wife had left her husband's house and carried on an independent calling, and the husband did not object to the calling or give her notice to return —HELD that, as she was desirous of returning, and the husband declined to maintain her, she was entitled to maintenance.

Jackson, J.—THE husband in this case has admitted that he has refused to receive his wife or to maintain her. In the Sudder Ameen's Court, he justified this refusal by alleging that she had led a profligate life, and had returned to his house in a state of pregnancy by some other man. This allegation the Lower Appellate Court finds to be untrue.

The ground now set up is that the wife had incurred the loss of her right to maintenance by reason of having left her husband's house and carried on an independent calling, namely, that she labored on the Railway. It does not appear that the husband objected to this calling, or had given her any notice to relinquish it and to return to his house. No authority is shown to us that a Hindoo wife, by a single act of disobedience, forfeits her right to maintenance for ever. And as the plaintiff is desirous of returning, and her husband declines to maintain her, we think that the Lower Court was justified in holding that she was entitled to maintenance at the extremely moderate rate which it has decreed.

In coming to this decision, we, of course, as we are bound to do, accept the finding of fact by the Court below that no gross misconduct is shown on the part of the plaintiff. If we were at liberty to go into evidence, and if our finding were otherwise, of course our judgment would be different.

The appeal is dismissed.

The 17th April 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Enhancement of rent—Inconsistent grounds—Clauses 2 and 3, Section 17, Act X., 1859.

Case No. 1894 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 30th May 1867, reversing a decision passed by the Deputy Collector of that District, dated the 29th September 1866.

Gopeenath Mookerjee and another (Plaintiffs), *Appellants,*

versus

Ram Huree Mundul and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Kishen Succa Mookerjee* for Appellants.

Baboo Poorno Chunder Shome for Respondents.

A claim to enhancement of rent on the basis of increased produce, and one on that of increased value of produce, are not inconsistent and incompatible; and, if they were one, they would, not by being advanced together, cancel each other, and thus neutralize plaintiff's claim to the benefit of Clause 2, Section 17, Act X. of 1859.

Where a tenant is found to be holding a greater quantity of land than that for which rent has been paid by him, and the excess land lies within the land originally leased to him, the landlord is entitled to enhanced rent under Clause 3, Section 17, Act X., 1859.

Jackson, J.—THE decision of the Lower Appellate Court in this case is defective. The suit was one for enhancement. The landlord, it seems, relied upon all three Clauses of Section 17 of Act X. of 1859. The claim in respect of two of those Clauses is disposed of by the Judge with extreme brevity. As to the first Clause, he observes that the plaintiff "has offered no evidence to prove "the various points under Clause 1, which "it is essentially necessary he should do in "order to establish his claim, and therefore "the enhancement sought under that Clause "is disallowed."

We are not sure whether the Judge in saying this meant to say that there was an entire absence of proof on any of the various points, or that he meant that the proof supplied was not sufficient to cover all the various points. If he meant the latter, then his opinion is not open to revision. If he meant to say that there was no evidence at all, then he is wrong, because there *was* evidence, and it was necessary for him to ascertain whether that was sufficient to cover the various points. On this Clause we direct the Judge to re-consider his decision, and to state whether, in his opinion, the evidence which is on record is sufficient to cover the various points or not.

The plaintiff's demand under the second Clause is met by the Judge in a way that appears to us very remarkable. He says: "The enhancement is sought upon Clauses "1, 2, and 3 of Section 17. As claims to "enhancement on the basis of increased "produce and increased value of produce "are inconsistent and incompatible, hence "the Court considers that the plaintiff has "waived his claim under Clause 2."

We are not aware that such claims are incompatible. It may be that, if a tenant's holding were an island cut off from other lands, and without the means of exporting its produce, the two circumstances of increased productiveness and increased prices could not arise together. But we have had no reason shown to us whatever, why land situated like that in dispute could not produce larger crops, and why the tenant could not obtain a larger price for the same. But even

if it were otherwise, we see no reason why the plaintiff should not have the benefit of one or other of the conditions of the Clause instead of their being supposed to cancel each other.

On this point also the Judge must re-consider his decision, and determine whether the value of the produce or the productive powers of the land, or both, have increased otherwise than by the agency of the tenant.

On the third point, namely, whether the quantity of the land held by the ryot is in excess of that for which he pays rent, we think the Judge's decision clearly wrong. He declares that, because there are no specified boundaries of the defendant's holding, the lands in excess of 155 beegahs, for which a yearly rental of Rupees 222-2-12½ was paid, were lands in respect of which "no relationship of landlord and tenant" existed between the plaintiff and defendant; and he adds, "in respect thereto the defendant is therefore a trespasser."

In this proposition we cannot concur. The point for the Judge to determine was whether these lands lay within or without the lands originally leased to the defendant; if within, and the lands upon measurement were found to be more than 155 beegahs, which they were at first assumed to be, then under the 3rd Clause the tenant would be found to be holding "a quantity of land "which has been proved by measurement to "be greater than the quantity for which rent "has been previously paid by him;" and therefore the landlord would be clearly entitled to enhance.

With these directions the case is remanded to the Lower Appellate Court that it may look into the facts which it has not enquired into, and apply the law to them as laid down in this judgment.

The 18th April 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction—Sections 52 and 53, Act XX., 1866—Secondary evidence.

Reference to the High Court by the Judge of the Court of Small Causes at Jessore, dated the 5th March 1868.

Sreeram Roy Chowdhry, *Obligee*,

versus

Koleemooddee Mollah, *Obligor*.

In an application to a Small Cause Court, under Section 53, Act XX. of 1866, to enforce the agreement recorded by the registering officer under Section 52 on the bond—HELD that the applicant would be entitled to a decree only on production of the original obligation and of the record signed, but not on a copy of the same.

Case.—THIS is an application to this Court, under Section 53 of Act XX. of 1866, to enforce the agreement recorded by the registering officer under Section 52 of the said Act on the bond or obligation, a true copy whereof has been filed with the application.

It appears from the statement set forth in the application that the original instalment-bond is lost, and the pleader consequently asks this Court to give his client a decree for the amount mentioned in the application, or else to issue a notice to the obligor to attend and show cause why a decree as prayed for should not pass against him on the strength of the copy of the bond.

It appears to me that, under Section 53, the applicant is entitled to a decree only on production of the original obligation and of the record signed, as mentioned in Section 52; and that he is not entitled to a decree on production of a true copy of the same, as in the latter event he would have to offer secondary evidence in consequence of the loss of the original obligation, and it must be shown to the satisfaction of the Court that diligent search has been made in those

quarters in which the primary evidence was likely to be procured, and the obligor may be at liberty in a Court of equity to call upon the applicant for a suitable bond-indemnity. It is not competent to me to enter into either of these matters under the Section cited. The proper course, therefore, appears to me to be to refer the applicant to a regular suit, and that I ought to refuse to summon the obligor under the ruling in Kristo Kishore Ghose *versus* Brojonath Mozoomdar, Sutherland's Weekly Reporter, Volume VI., page 11, Small Cause Court References. I, however, find that the new amended Civil Procedure Code, now before the Council (Section 472), provides for the service of a notice on the person against whom the enforcement is applied for.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the Judge of the Court of Small Causes is correct in his view of the law. The petitioner cannot proceed under Act XX. of 1866 without producing the bond.

The 18th April 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Act XXI. of 1863—Reference to the High Court on points arising in execution—Act X., 1867—Recorder's Court.

Reference to the High Court by the Recorder of Rangoon, dated the 7th December 1867, in the matter of Mr. R. Sutherland.

Under Act XXI. of 1863 (Sections 22 to 26), a case cannot be stated for the opinion of the High Court with reference to a point of law arising out of proceedings in execution of a decree. Act X. of 1867 does not apply to the Recorder's Court at Rangoon.

Case.—Messrs. Gladstone Wyllie and Co. were the first execution-creditors of one Ahmed Ali Mahomed, and they applied to this Court on the 23rd August 1867, under the 239th Section of the Code of Civil Procedure, for the attachment, by prohibitory order, of certain property in the hands of Mr. Robert Sutherland belonging to the execution-debtor Ahmed Ali Mahomed.

The amount of Messrs. Gladstone Wyllie and Co.'s decree was Rupees 95,626-9-10, and the date of the decree was the 19th day of December 1866; their attachment was made on the property of the defendant on November 12th, 1866, before judgment, and became, therefore, on the decree being passed, an attachment in execution. (Raj Chunder Roy *versus* Issur Chunder Roy, 1 Bourke 139.)

Mr. Robert Sutherland had claimed to be entitled to that property under a deed of assignment executed in his favor by Ahmed Ali Mahomed on the 13th November 1866 (after Messrs. Gladstone Wyllie and Co. had attached the goods before judgment), transferring all his property to Mr. Robert Sutherland. The property consisted of piece-goods, &c., and was handed over to Mr. Sutherland at the same time.

This deed of assignment I considered fraudulent and void as against creditors, and I set it aside in a suit brought by Messrs. Bulloch Brothers and Co. against Mr. Sutherland.

My decision setting aside this deed of assignment was dated the 6th day of September 1867. The prohibitory order obtained by Messrs. Gladstone Wyllie and Co. in the present case was served upon Mr. Sutherland on August 24th. On September 9th, another application for a prohibitory order, covering the interest on Messrs. Gladstone Wyllie and Co.'s decree, was made by them. The second prohibitory order was made on September 10th, and served on Mr. Sutherland on September 11th.

On September 20th, Messrs. Gladstone Wyllie and Co. applied by petition for an order, under Section 242 of the Code of Civil Procedure, for payment, by Mr. Sutherland, of money, the proceeds of goods of Ahmed Ali Mahomed alleged to have been sold by him, and also for Mr. Sutherland to hand over to the Court any goods, &c., in his hands belonging to the debtor, to satisfy the balance. An order under Section 242 was made on the same day, and was served on Mr. Sutherland on September 21st, 1867.

Mr. Sutherland declined to comply with the order; and on September 30th, 1867, Messrs. Gladstone Wyllie and Co. applied by petition, asking that Mr. Sutherland should be called upon to show cause why the order

should not be carried out. Notice issued on this petition. Mr. Sutherland put in a counter-petition; and on October 2nd, the case was heard at great length, advocates being engaged on each side, and I came to the conclusion, on Mr. Sutherland's own showing, that he had received, on account of Ahmed Ali Mahomed's estate, a sum of Rupees 22,843-1-4.

It appeared to me that the order of the 20th of September was valid, that Mr. Sutherland was bound to obey it, but that it should be modified by calling on Mr. Sutherland to pay over to Messrs. Gladstone Wyllie & Co. the sum of Rupees 22,843-1-4, which sum, on his own admission, he had in his possession on account of Ahmed Ali Mahomed, but which was not enough to satisfy Messrs. Gladstone Wyllie and Co.'s claim.

The order, as modified, was drawn up on October 9th, and served on Mr. Sutherland on the 10th.

Mr. Sutherland still declined to pay, and on the same day, October 10th, the Counsel for Messrs. Gladstone Wyllie and Co. applied for the attachment of Mr. Sutherland's property and the arrest of his person.

It appeared to me that there was no provision in the Code of Civil Procedure for execution of an order of this sort against a third party not a party to the suit; nor is there any provision in Act XXIII. of 1861, or in the Code of Criminal Procedure, for enforcing such an order by proceedings in the nature of contempt of Court.

If it may be said that Section 296 of the Code of Civil Procedure enables the Court to enforce an order of the nature of this order against Mr. Sutherland, a third party, that Section does not seem to me to give this Court such a power, and it was not argued by either of the advocates in the course of hearing of October 10th that it did; but if it had been so argued, I should still have had doubts whether the Section in question confers upon the Court the required power.

The law provides for the enforcement of orders in execution against a party to the suit, and such orders are, under Section 11 of Act XXIII. of 1661, appealable: while orders against third parties are not. The law also provides specially for the making of such an order as the present against a third party, but does not provide specifically for its enforcement. It seems to me that the Legislature has abstained purposely from providing for the enforcement of an order against a third party, and the decision of the Court of Common Pleas in the case of Garran Guibilie, 31 Law Journal, C. P., page 131, appears to me to show that, where the Legislature has purposely abstained from providing for a special set of circumstances, while it has made specific provisions for another set of circumstances of a similar nature, a subsequent general Section does not supplement; the deficiency and the 222nd Section of the Common Law Procedure Act, upon which that decision was passed, is quite as general in its terms as the 296th Section of the Code of Civil Procedure.

On reference to Sections 16 to 21 of Act XXIII. of 1861, and to the parts of the Penal Code and Code of Criminal Procedure to which they refer, it appears to me that there is not in those Sections any provision for enforcing the order by proceedings in the nature of proceedings in contempt of Court, none of them applying to a case of this nature.

Supposing that I am right in considering that the Code of Civil Procedure does not provide in any way for the enforcement of an order against a third party to pay money under Section 242 of Act VIII. of 1859, I should wish to refer to your Lordships the question whether or not I have the power, as a Judge of a Court of Record, which I conceive this Court, according to the definition given in Blackstone's Commentaries (Kerr, page 26, Vol. 3), to be, to enforce the order by proceedings against the party refusing to obey it, in the nature of proceedings for contempt of Court, under the general powers incident to a Court of Record. In the cases of Doe *versus* Bywater, 7 C. B. 794, and Ex-parte Laurence, 2 Dowl. 231, it was laid down that an attachment for contempt lies against a party disobeying an order of a Judge, and the personal demand required (see Swinpen *versus* Swinpen, 25 Law Journal, C. P., 302) was made upon Mr. Sutherland.

Mr. Sutherland came into Court on October 11th, which was in the vacation, and he was attended by his Counsel, Mr. Macleod. He still declined to pay the money he had been ordered to pay to Messrs. Gladstone Wyllie and Co., contending, as he had contended all along, that they ought to bring a regular suit against him. I considered that this objection was not well founded; and after hearing all that Mr. Sutherland

and his Counsel had to say, I ordered him, as he still refused, to be committed to prison for contempt of Court, on which he paid the money, and consequently no order for his commitment was drawn up.

I desire to refer to their Lordships the following points:—

1st.—Whether a reference can be made to the High Court at Calcutta under Sections 22 to 26 of Act XXI. of 1863 in a case where a doubtful point arises in the course of proceedings in execution of a decree?

2nd.—Whether, supposing such a reference to be properly made, I am right in supposing that there is no power conferred by the Code for enforcing an order against a third party made under Section 242 of Act VIII. of 1859?

3rd.—Whether, supposing that no such power is conferred, there is power inherent in this Court as a Court of Record to enforce its orders by attachment for contempt of Court?

The judgment of the High Court was delivered as follows:—

Peacock, C. J.—The words of Act XXI. of 1863, relative to the statement of a case for the opinion of this Court, are very similar to those used in the Small Cause Court Act, XI. of 1865.

The construction put upon that Act was that a case could not be stated for the opinion of the High Court with reference to a point of law arising out of proceedings in execution of a decree; and we are of opinion that a similar construction must be put upon Act XXI. of 1863.

By Section 23 it is enacted that the Recorder may pass a decree contingent upon the opinion of the High Court upon the point referred, but that no execution shall be issued in any case in which a reference shall be made until the receipt of the order of that Court.

Sections 24 and 25 provide for the mode of dealing with cases referred; and the latter part of Section 25 provides that, when the High Court has heard and considered the case, it shall transmit a copy of its judgment to the Recorder, who shall, on the receipt thereof, proceed to dispose of the case conformably to the decision of the High Court. The Act evidently, as it appears to us, contemplates points of law which arise in a suit prior to decree.

Under these circumstances, we abstain from answering the second and third questions, as no legal effect can be given to them.

The Small Cause Court Act has been amended by Act X. of 1867, but that Act does not apply to the Recorder's Court.

The 20th April 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Dispossession under Section 318, Code of Criminal Procedure—Limitation—Clause 7, Section 1, Act XIV., 1859.

Case No. 1122 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 22nd February 1867, modifying a decision passed by the Moonsiff of that District, dated the 20th December 1865.

Undhoob Narain and others (Plaintiffs), *Appellants,*

versus

Chuttur Dharee Singh and others (Defendants), *Respondents.*

No one for Appellants.

Baboo Kalee Kishen Sein for Respondents.

Where a plaintiff was found to have been dispossessed from land by force of a Magistrate's order under Section 318 of the Code of Criminal Procedure, it was held that his right of suit for possession was not barred, under Clause 7, Section 1, Act XIV., 1859, by the lapse of more than three years from the date of the Magistrate's order.

Phear, J.—The Lower Appellate Court has held that the plaintiff was dispossessed from the land of which he seeks to obtain possession on the 4th September 1862, by force of the Magistrate's order made under Section 318 of the Criminal Procedure Act; and then, inasmuch as the suit is not brought until the 7th September 1865, that is, after an interval of more than three years from the date of the Magistrate's order, therefore the Lower Appellate Court has held the plaintiff's cause of action to be

barred under the limitation of Clause 7, Section 1, Act XIV. of 1859.

We are of opinion that this is a mistake in law. The Magistrate's orders made under the Criminal Procedure Act are not specially mentioned, as indeed they could not be, in Section 1, Clause 7, of the Limitation Act, and the Limitation Law must always be construed strictly. We think there is nothing in Act XIV. of 1859 to deprive the plaintiff in this case, upon the finding of the Principal Sudder Ameen, of his right of suit. Whether that finding of fact is right or not, we do not now say. The case must be remanded to be tried on its merits. Each party must pay his own costs in this appeal, inasmuch as the appellants do not appear.

The 20th April 1868.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Attachment—Notification—Section 5, Act XI. of 1859.

Case No. 2076 of 1867.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 28th May 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 24th January 1867.

Nurkoo Ram and another (Defendants), *Appellants,*

versus

Ramjoorawun Singh and others (Plaintiffs), *Respondents.*

Baboos Onookool Chunder Mookerjee, Gopal Lall Mitter, and *Nil Madhub Sein* for Appellants.

Baboos Unnoda Pershad Banerjee and *Kishen Succa Mookerjee* for Respondents.

A notification issued under Section 5, Act XI. of 1859, is simply a public call on the debtor to pay his debt by a fixed date; it does not operate as an attachment by the Civil Court.

Loch, J.—THE question before us is as to the effect of a notification issued under Section 5, Act XI. of 1859. Does it operate as an attachment by the Civil Court?

The plaintiff in this case held decrees for rent, and in execution applied to the Collector for the sale of certain revenue-paying property belonging to the debtor. Before the sale took place, the parties agreed to a postponement in order that the claim might be compromised, and the execution-case was struck off the file on 18th July 1865. On the 19th August following, the debtor sold the property to the special appellants, and part of the purchase-money was paid to plaintiff in liquidation of another decree he held against the debtor. As no compromise was effected, the decree-holder applied again for the sale of the property, and was opposed by the purchasers from the debtor, and the Collector allowed the claim, and refused to sell. Plaintiff then brought the present suit to set aside the order of the Collector, and to have the property declared liable for his decree; and both the Lower Courts have given a decree in his favor, the Judge in appeal holding in effect that a notification under Section 5, Act XI. of 1859, operated as an attachment.

There is no process of attachment in execution of decrees for rent, as is prescribed by Act VIII. of 1859, in execution of decrees of the Civil Court. The procedure in execution is of a more summary character. There is apparently no seizure in the case of immoveable property, but merely an advertisement of sale. Now, where the property to be sold is other than the tenure upon which the arrear accrued, and consists of land paying revenue to Government, the law (Section 110, Act X. of 1859) requires that it should be sold under the rules in force for the sale of estates for the recovery of demands recoverable by the same process as arrears of land-revenue. The law applicable to cases of this kind is Act XI. of 1859. Section 5 of that law prescribes that a sale for demands, not being land-revenue, but recoverable by the same process as arrears of land-revenue, shall be made after the issue of a notification specifying the nature and amount of the demand, and the latest date on which payment thereof will be received

has been affixed for a period of not less than fifteen clear days preceding the date fixed for payment in the office of the Collector or other officer duly authorized to hold sales under the Act, &c.

Now, this law does not provide that there is to be an attachment previous to the issue of notification; and as regards estates sold in satisfaction of arrears of Government revenue or other demands due to Government, it would be superfluous to make such attachment, for any private alienation of the estate would not prevent its sale for the sum due to Government. But would this be the case where the property is sought to be sold in execution of a decree for rent?

The law (Section 110 of Act X. of 1859) prescribes the mode in which sales of this kind are to be conducted, and the first step to be taken is the issue of a notification under Section 5, Act XI. of 1859. That notification is for the information of the debtor and of the public, that it may be known that an arrear or demand is due from the debtor, which will be received if paid on or before a fixed date. There is nothing of the nature of an attachment in this notification. The law does not require that the name of any estate belonging to defendant which may be liable to sale for the debt should be entered in the notification. It is simply a public call on the debtor to pay his debt by a fixed date. By Section 6 of Act XI. of 1859, the Collector, after the latest day of payment, has to issue a notification, to be affixed in his own office and in the Court of the Judge of the district, specifying the estates or shares of estates to be sold, and the date on which the sale shall commence. This notification corresponds to the proclamation of sale issued in execution of decrees under Section 249, Act VIII. of 1859; and, were a private transfer of the property to be made after the issue of such notification, it would probably prove no obstacle to the sale of the property by the judgment-creditor, but till such notification is issued, there appears nothing in the law to prevent the debtor alienating his property. The notification under Section 5 is, as observed above, merely a public demand upon the debtor to pay his debt by a fixed date. There is nothing under such circumstances to prevent his selling any property he has for the purpose of realizing the money due. If the money were paid in by the fixed date, the decree-holder could not question the validity of the sale by the debtor to a third party; and if, instead of paying the debt, the debtor spent the money for other purposes, the innocent purchaser for good consideration is not to suffer. There is this difference as to its effect between attachment in execution and the notification under Section 5, Act XI. of 1859, that, when once the former has taken place, the property is under the custody of the law, and the owner can do nothing with it without the permission of the Court; while, in the case of a notification, the property remains in the hands of the debtor, and he is at liberty to deal with it as he sees best, because it has not come under the custody of the law; that, whereas a *bonâ-fide* sale under the latter circumstances would be valid, it would not be so where attachment has been made, as any and every alienation after attachment is forbidden by law. The Legislature, in its anxiety to render the procedure in cases under Act X. of 1859 rapid, has omitted in some instances to provide protection for the parties, and it appears to me that the present is one of the cases for which no provision has been made in the law. The rule by which property may be sold in execution of a decree is prescribed, but no provision is made to prevent the debtor from dealing with that property as he pleases before the proclamation of sale is issued. The Legislature indicated the mode in which the sale is to be conducted, but failed to provide the necessary protection to the decree-holder before such sale could take place. Under this view of the case, I think the judgment of the Lower Court should be reversed with costs.

Jackson, J.—I also think that the special appeal should be decreed with costs, and the judgment of the Lower Court reversed. Whether the notification for sale would operate to prevent the debtor alienating the property or not, there was no notification in force at the time the sale in question in the suit took place. And even the creditor was so fully aware that the property was in the hands of the debtor to alienate and sell, that, when the debtor did sell the property, he, far from raising any objections to the sale, received from the debtor a portion of the purchase-money in liquidation of another claim which he held against the debtor. He acquiesced in the sale and derived benefit from it, and he cannot now turn round on the purchaser and ask to have the sale set aside as invalid. The sale is, in my opinion, a valid sale; but, even if there was any doubt in my mind on this point, the conduct of the creditor would have made it valid.

The 20th April 1868.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Joint Hindoo family—Relation of adult members to the Karta—Position of Karta during minority of members.

Case No. 131 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 8th April 1867.

Chuckun Lall Singh (Plaintiff), *Appellant,*

versus

Poran Chunder Singh (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboos Mohendro Lall Shome* and *Nilmadhub Sein* for Appellant.

Baboos Onookool Chunder Mookerjee and *Unnoda Pershad Banerjee* for Respondent.

Members of a Hindoo family, with vested interests in their joint property, choosing to continue in a state of commensality and joint fruition, do not possess individually any several proprietary right other than an alienable right to call for partition. The *Karta*, in general, is the mere mouthpiece of the family, and not an agent with delegated authority in a fiduciary and accountable relation to the rest of the family.

As long as a member of such a family is a minor, the *Karta* is in the position of a trustee for him of the joint property to the extent of his share in it, and is liable to account for it to him when the trusteeship ceases.

Phear, J.—The plaintiff and defendant are half-brothers, the latter gentleman being of very advanced age, while the former is about 45 years old. The father of the plaintiff and defendant died as far back as 1235, leaving them his heirs; and from that time till 1271 they lived together in commensality and in the enjoyment of their property as a joint Hindoo family. The plaintiff was a minor at the time of the father's death, but attained his majority in Bhadro 1247. In Srabun 1271, the plaintiff and defendant separated.

In this suit the plaintiff alleges that the defendant managed the family-property during the whole period while they, the two brothers, were living in commensality ; that with the ready money left by their father and the surplus remaining out of the annual profits, after defraying therefrom the expenses of the *Debshebas*, the charges of the family and of daily religious ceremonies, real properties have been purchased ; that he (the plaintiff) has requested the defendant to let him have the moiety of the accumulation of the surplus left after such purchases on adjusting of the accounts thereof, as well as half of the existing articles and furniture, and of the money drawn from Court by the defendant subsequent to separation ; but he has refused to do so. The plaintiff, therefore, sues to obtain from the defendant half the ready money and articles left by the father after adjustment of the accounts in respect of the income of real properties, and all sorts of expenditures *during the managership of the defendant from 1235 to 1270*, as well as half the money drawn by the defendant from Court subsequent to the separation.

The substance of the plaintiff's claim is, that he seeks to make his brother account to him for, and in respect of, all property for a period of 36 years, during the whole of which he and his brother had been living in commensality and enjoying the property jointly in the Hindoo fashion ; and he places his right to an account simply on the ground that his brother was all that time *Karta* of the family. The claim does, however, divide itself conveniently into three parts, namely, *1st*, the claim for account in respect of the period of minority ; *2nd*, the claim for a moiety of certain cash received from another branch of the family by arrangement on a butwarah being effected with it in 1239 ; and, *3rd*, the claim for account in respect of the time from 1247 to 1271.

During this last period, the plaintiff was admittedly an adult member of the joint-family, living in commensality with his brother, and enjoying the joint property to an equal extent with his brother, except so far as the fact that his brother was

Karta made any difference in this respect. Can he, under these circumstances alone, require his brother to furnish him the account he seeks? I think not. If he can, it must be because his brother stood during the period in the position of an agent relative to him, *viz.*, managed his property for him under some obligation of a fiduciary nature. But I think that this is not the correct representation, generally speaking, of the *Karta's* position relative to the adult members of the joint-family. It appears to me that the joint-family is, as regards the enjoyment of the joint-property, a single entity. As long as the members, who have, what may be termed, vested interests in the property, choose to continue in a state of commensality and in joint-fruition and enjoyment of the profits of the property, they cannot be said to possess individually any several proprietary right other than the right to call for partition —a right which they may alien. For proprietary purposes, they exist as a whole, somewhat in the character of a corporation. They manage the property together, and the *Karta* is but the mouthpiece of the body, chosen and capable of being changed by themselves. The family may in this respect be likened to a committee with the *Karta* as chairman. No doubt, in practice, the members of the family often do leave pretty nearly every thing in the hands of the *Karta* and under his control, but this is in most cases the result of the respect which seniority in age and generation is apt everywhere to engender, and most especially in the case of a Hindoo joint family. When it takes place, it is a willing abdication of personal care and supervision. It is not a distinct agency or delegation of a separate authority: each member may still at all times interfere if he chooses. And he may always insist upon division if he is dissatisfied with the management. Even where the me mbersof the family apparently leave the most unrestricted power in the hands of the *Karta*, it is, I believe, usual to hold a family conclave at least once in the year to confirm and approve of what the *Karta* has done, and to discuss jointly what should be done hereafter as to the family-affairs. I think, therefore, that, unless something is shown to the contrary, every adult member of an undivided joint family, living in commensality with the *Karta*, must be taken as between himself and the *Karta* to be a participator in, and authorizer of, all that is from time to time done in the management of the joint-property to this extent, namely, that he cannot, without further cause, call the *Karta* to account for it. Of course, it may, as a matter of fact, be the case in a given family that the *Karta* is the agent of, or stands in a fiduciary and accountable relation to, one or more of the members. It would be easy to imagine a state of things under which he had become the trustee of the property relative to his adult co-parceners, or in which, by reason of his fraud or other behaviour, they or one of them had acquired an equity to call upon him for an account. All that I desire to say is, that, in my judgment, he does not wear this character of accountability merely because he occupies the position of *Karta*. And in the case before us, there is not only an absence of evidence tending to show that the defendant was, relative to the plaintiff, anything other than an ordinary *Karta* of a joint-family living in commensality, but there is, on the other hand, ample to satisfy me that the plaintiff, now a man of mature age, has of late years, at any rate, taken an active part conjointly with his brother, the defendant, in the management of the joint property.

I am, therefore, of opinion that the plaintiff has not established any ground for making the defendant account to him in respect of dealings with, and the proceeds of, the joint-property for the period which elapsed between the date when the plaintiff attained his majority in 1247, to the date of separation of the two brothers in 1271.

As to the moiety of the cash received by the defendant which the plaintiff claims, I cannot say that the Lower Court is wrong in concluding from the evidence on the record that it has been paid for the plaintiff's use under circumstances which entitle the defendant to set off that payment against the plaintiff's claim. The defendant says that he applied it to the discharge of the plaintiff's share of liability for Government revenue since the separation, and there is nothing to show that this statement is not correct.

There remains the claim for account of the defendant's management of the property from the death of the father to the expiration of the plaintiff's minority in 1247. During this period the plaintiff was disqualified from taking any part in the management of the property, and the defendant was, I think, under the circumstances of the case, in the position of a trustee for him of

the joint-property to the extent to which he was entitled to share in it. When, therefore, the plaintiff attained his majority, and the trusteeship ceased, the defendant was clearly liable to account to him. But I think the plaintiff was bound, if he desired this account, to seek it within a reasonable time, and I am clearly of opinion that it is too late for him to ask for it now. Immediately upon becoming a major, he entered into personal enjoyment of the property jointly with his brother; he has all along had ample opportunities for ascertaining its condition and of learning how it had been treated during his minority. For 24 or 25 years he had all the books and papers of the estate within his reach, and yet from 1247 to 1271 he never once intimated that he held the past accounts still open between himself and his brother. After having so long, with the fullest means of knowledge, slept over his rights, he cannot now be allowed to assert them against his brother. He cannot now, without new reason, call upon his brother to account for the condition of the subject of trust, as it was delivered to his own hands, so to speak, twenty-five years before suit. It is said, however, that the trust which commenced with the minority has continued till the present time, and that the plaintiff has never, in the matter of the joint property, been other than the *cestui-que* trust of his elder brother. I have already said that, although, as a matter of fact, this might well enough have been the case, still the evidence on the record convinces me that the plaintiff did, on attaining his majority, enter into full enjoyment of the joint-property, as an adult member of the joint-family with entire knowledge of his rights. There is no suggestion of any special arrangement between him and his brother for the continuing of the former fiduciary relation, and I am of opinion that the plaintiff did at once, on the expiration of his minority, assume the *status*, and exercise the power of co-parcener in the joint-property, living in commensality with the defendant.

On the whole, it appears to me, considering the facts of the case, that this suit ought to be dismissed with costs.

Bayley, J.—I concur in thinking that the suit should be dismissed. In this case the whole evidence shows that plaintiff was merely one of a joint Hindoo family, and that the *Karta* was not agent or trustee, but the selected head of the *joint* family for the purposes of joint-management, the usual means available, in such circumstances, of consultation, supervision, and investigation, being open to the plaintiff; and after plaintiff's majority there was no reason why he should not have before demanded an account. Nor is it at all shown that he himself did not take part in the joint-management on his own joint-account.

The 20th April 1868.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Proceeding to keep alive a decree—Section 20, Act XIV., 1859—Admission by pleader.

Miscellaneous Appeals from an order passed by the Officiating Judge of Midnapore, dated the 8th April 1867.

Case No. 369 of 1867.

Kower Narain Roy (Decree-holder), *Appellant,*

versus

Sreenath Mitter and others (Judgment-debtors), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboo Ashootosh Dhur for Respondents.

And the cross-appeal No. 442 of 1867.

In order to enforce or to keep in force a decree, it is not necessary that the proceeding alluded to in Section 20, Act XIV., 1859, shall have been taken by the particular party seeking to execute: it is sufficient if any one interested has taken any proceeding.

A party is bound by the admission of his duly constituted vakeel, where the admission is one of a fact which, but for such admission, the opposite party would have had an opportunity of proving.

Jackson, J.—THESE two cases arise out of the execution of one decree. The first appeal is by the execution-creditor, who has an interest in the decree to the extent of 8 annas. The Judge has refused to allow him to execute for that share upon the ground that no steps had been taken by him on his own part within three years next before the present application to execute the decree against the judgment-debtor.

It is admitted that proceedings had been taken within three years by the party who held the other 8-annas share in the decree. Section 20 of Act XIV. of 1859 provides: "No process of execution shall issue from "any Court not established by Royal "Charter to enforce any judgment, decree, "or order of such Court, unless some pro-"ceedings shall have been taken to enforce

"such judgment, decree, or order, or to keep "the same in force within three years next "preceding the application for such exe-"cution."

The Act does not require that the proceeding shall have been taken by the particular party who seeks to execute. It is sufficient if any one interested has taken any proceedings. That has occurred in the present case, and the Judge was in error in not allowing the petitioner to execute, and his decision is, therefore, set aside with costs and interest.

The other appeal is on the part of the judgment-debtor, who complains that the Judge has allowed execution against him by the other creditor on the strength of an admission made by his vakeel that notice was served upon him on the 14th of September 1864. He contends—but it is right to say that that contention is very faintly advanced here by Baboo Ashootosh Dhur, who appears for him—that he is not bound by the admission of his pleader. It appears to us that, the admission being one of a fact which, but for such admission, the opposite party would have had an opportunity of proving, the party is bound by the admission of his duly constituted vakeel.

The Judge was right in allowing the execution, and this appeal, therefore, must be dismissed with costs and interest.

The 22nd April 1868.

Present :

The Hon'ble L. S. Jackson and C. Hobhouse, *Judges.*

Execution—Plea of limitation by one not a party—Sections 229 and 230, Act VIII., 1859.

Case No. 13 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 20th November 1867, affirming an order passed by the Sudder Moonsiff of that District, dated the 23rd July 1867.

Mohesh Chunder Banerjee (Objector), *Appellant,*

versus

Chundra Monee Debia and others (Decree-holders), *Respondents.*

Baboo Sham Lall Mitter for Appellant.

Baboo Tarucknath Dutt for Respondents.

Where a decree-holder sought to execute his decree against an under-tenure which had been sold for arrears of rent, and the purchaser objected on the plea of limitation—HELD that the purchaser, being no party to the suit, was not entitled to contend that execution was barred. He could only be heard under Section 229 or Section 230, Act VIII., 1859; and, if under the former, a very wide discretion could be exercised by the Court.

Jackson, J.—CHUNDRA MONEE DEBIA and others hold a decree made in 1863 for possession of a transferable under-tenure. Before execution of the decree, the landlord brought about the sale of the tenure for arrears of rent.

The decree-holders in 1867 applied to the Court to execute their decree, and the purchaser objected, setting up in the first place limitation. This objection was overruled by the Court of first instance, which held the decree-holder not to be barred (a previous application to execute having been made in 1864), and went on to investigate the purchaser's claim under Section 229.

He appealed to the Zillah Judge, insisting on his ground of limitation. The Judge, however, threw out his appeal, being of opinion that, as the petitioner was no party to the suit, he was not entitled to contend that the execution was barred.

The petitioner appeals specially against this ruling, but we think the Judge was right, and that the petitioner, who purchased the *under-tenure*, did not thereby acquire such an interest in the suit as to entitle him to maintain that the decree had become, by lapse of time, incapable generally of execution.

We are competent, in execution of a decree, to determine questions arising between parties to the suit and relating to the execution, but not questions arising between a party to the suit on the one hand, and a person who was or is no party to it on the other, except the particular claims connected with giving possession of property, which are specified in the Code.

The petitioner was not, and is not, a party; as the Judge observes, execution is not directly sought against him, and he can only, we think, be heard as provided by Section 229 or 230 (as the case may be) of Act VIII. of 1859.

But we may observe that, if the case comes properly within the terms of Section 229, a very wide discretion seems to be allowed to the Court by the concluding words

of that Section which enable the Court to investigate the claim as if a *suit* for the property had been instituted by the decree-holder against the claimant, and to pass such order for *staying execution* of the decree, or *executing* the same as it may deem proper.

The special appeal must be dismissed with costs.

The 22nd April 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Partition—Section 6, Regulation VIII., 1819.

Case No. 263 of 1867.

Regular Appeal from a decision passed by the Judge of Rajshahye, dated the 18th June 1867.

Gouree Sunkur Roy (Plaintiff), *Appellant,*

versus

Anund Mohun Moitro and others (Defendants), *Respondents.*

Baboos Mohinee Mohun Roy and *Sreenath Doss* for Appellant.

Baboo Greeja Sunkur Mozoomdar for Respondents.

There is no statutory bar against a ryot's right to partition as between himself and his co-parcener where he does not ask for such a distribution of the putnee-rent as would bind the zemindar, or limit the latter's right over the whole tenure as a joint one.

Mitter, J.—We are of opinion that this case is governed by the principle laid down in the decision passed by a Division Bench of this Court, and reported in page 192, Sutherland's Weekly Reporter, Volume VI., Civil Rulings. The Judge is quite mistaken in supposing that this case has not been properly reported. It is, like all other cases reported in the Weekly Reporter, neither more nor less from first to last than the words used by the learned Judges in their written judgment. The plaintiff is clearly entitled to a partition as between himself and his co-parcener. There is no statutory bar against this right, and the zemindar's interests cannot be possibly affected by the partition thus prayed for. No "apportionment of the jumma or reserved rent," prohibited by Section 6, Regulation VIII. of 1819, is sought for; or, in other words, the plaintiff has not asked for such a distribution of the putnee-rent as would bind the zemindar, or limit his right over the whole tenure as a joint one. We do not see any reason in law or equity why the plaintiff's right to have a partition as between himself and his co-parceners should not be enforced. We decree this appeal with costs.

The 22nd April 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Substitution of a third party for original plaintiff.

Case No. 1570 of 1867.

Special Appeal from a decision passed by the Judge of Sarun, dated the 24th April 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 23rd June 1866.

Saheb Roy (Plaintiff), *Appellant,*

versus

Choonee Singh and others (Defendants), *Respondents.*

Baboo Tarucknath Sein for Appellant.

Baboos Otool Chunder Mookerjee, Gopeenath Mookerjee, Nilmonee Sein, and *Doorga Doss Dutt* for Respondents.

A party who had sued, on the part of himself and of his minor brother, to recover possession of ancestral property alleged to have been alienated, sold his rights and interests in the suit to a third party, whose name was accordingly substituted in the place of plaintiff.

Held that the substitution of such party for the plaintiff in respect of part of the latter's share in the

subject-matter of the suit did not make that party a party to the suit, and gave him no *status* which would enable him to appeal.

Phear, J.—THE original plaintiff in this suit was one Dhunookdharee, who sued on the part of himself and his minor brother to recover possession of certain ancestral property which he alleged had been improperly alienated by his father.

Pending the trial of the suit in the first Court, the plaintiff sold his rights and interests in the suit to Saheb Roy, and, upon petition presented by him to the Court of first instance, that Court substituted Saheb Roy's name in the place of the original plaintiff.

The record thus altered came by appeal into the Lower Appellate Court, which Court, for reasons given by it, dismissed the appeal on the grounds that it was preferred by Saheb Roy alone, and that he had not made out any title to appeal.

It is not necessary for us now, on special appeal from that decision of the Judge, to say whether the reasons given by him are or are not sufficient to support his determination, for we are of opinion, upon the ruling of the Full Bench in the case reported in Volume IV. of the Weekly Reporter, page 309, that the substitution of Saheb Roy for the plaintiff in respect of a part of his share in the subject-matter of suit was invalid, and had not the effect of making him a party to the suit. This being so, he had, of course, no *status* which would enable him to appeal, and the decision of the Lower Appellate Court was right in substance. Therefore we dismiss the special appeal with costs.

The 22nd April 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mortgaged premises—Mortgagee's duty.

Case No. 1861 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 25th April 1867, modifying a decision passed by the Sudder Ameen of that District, dated the 9th August 1866.

Jogendronath Mullick and others (some of the Defendants), *Appellants,*

versus

Raj Narain Palooye (Plaintiff), *Respondent.*

Baboo Obhoy Churn Bose for Appellants.

Baboo Ashootosh Chatterjee for Respondent.

A mortgagee in possession of mortgaged premises is bound to keep them in necessary repair, and is at liberty to charge for the same with interest.

Kemp, J.—WE think that the finding of the Principal Sudder Ameen is wrong. The special appellant is the mortgagee, and he is in possession of the mortgaged premises consisting of a thatched house. It is said the original debt with interest has been paid from the usufruct of the mortgaged premises and this fact is apparently undisputed. But the mortgagee claims to be allowed for repairs and re-construction of the house.

The first Court allowed this. The Principal Sudder Ameen finds that, without the authority of the mortgagor, the mortgagee could make no repairs so as to charge the mortgagor. He further assumes that, as the deed of mortgage was not produced, it must be presumed that there was no stipulation that the mortgagee was to be entitled to any deduction on account of sums advanced by him for repairs.

Under the law as administered in this country, a mortgagee in possession is in the position of a trustee. The mortgagee must use the mortgaged premises as liable to become the property of the mortgagor, and must not do anything to diminish the security upon which the money was lent. In this case, the mortgaged property was a thatched house. To allow it to fall out of repair, and to become uninhabitable, would have been diminishing the value of the security on which the money was advanced, and preventing the mortgagor from paying off the debt from the usufruct. It is the bounden duty of the mortgagee in possession to keep the premises in necessary repair, and he will be allowed to charge for the same with interest. (Cooke's Law of Mortgage, page 344; Macpherson on Mortgages, page 85.)

We uphold the decision of the first Court, and reverse the decision of the Principal Sudder Ameen with costs and interest.

The special appeal is decreed with costs and interest.

The 22nd April 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Application for review—Section 378, Act VIII., 1859.

Case No. 146 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 14th December 1866, affirming a decision passed by the Moonsiff of Mahomedpore, dated the 24th July 1865.

Jewun Bibee (Plaintiff), *Appellant,*

versus

Buddun Mundul and others (Defendants), *Respondents.*

Moulvie Murhamut Hossein for Appellant.

Baboos Mohendro Lall Shome and *Romanath Bose* for Respondents.

A Moonsiff's order rejecting an application for review is not appealable.

Bayley, J.—In this case there is a patent want of jurisdiction. The Judge, on the 8th September 1863, admitted a summary appeal from the defendant against an order of the Moonsiff rejecting the application of that party for review.

That act was one wholly against law and without jurisdiction, the Moonsiff's order being final under Section 378, Act VIII. of 1859. The acts and procedure based on that illegal order given without jurisdiction are equally illegal and without jurisdiction. We accordingly decree this special appeal with costs. The Moonsiff's decision of 2nd April 1863 will stand, and the decision of 22nd May 1862 and all subsequent proceedings are hereby set aside.

The 23rd April 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Attendance of witnesses—Court bound to assist.

Case No. 1881 of 1867.

Special Appeal from a decision passed by the Officiating Additional Judge of Hooghly, dated the 8th April 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 16th April 1866.

Pearee Mohun Mookerjee (Plaintiff), *Appellant,*

versus

Madhub Chunder Ghosal and others (Defendants), *Respondents.*

Baboos Mohendro Lall Shome and *Molee Lall Mookerjee* for Appellant.

Baboo Umbica Churn Banerjee for Respondents.

Where an appellant delayed to give in the names of his witnesses, but was yet within reasonable time to secure their attendance on the day of hearing, if summonses had been sent through different peons by the Railway.—Held that the Lower Appellate Court was bound to have directed the issue of the summonses, and to have given every assistance to the party asking for them, all additional expenses being paid by such party.

Jackson, J.—We think that both the Principal Sudder Ameen and the Judge have been in error. The Principal Sudder Ameen had no discretion to refuse to issue the summonses required by the appellant upon his witnesses. (*Vide* precedent of this Court, page 111, Volume V., Weekly Reporter, Civil Rulings.) It is true that the appellant delayed to give in his list of witnesses until the 2nd April, when the date fixed for hearing the evidence was the 9th April, but the Principal Sudder Ameen is not right

in stating that these summonses could not have been served, so that the witnesses could not have attended on the 9th April. It is said the witnesses lived at Serampore, Pundooa, Huripal, and Kutwa, and that these places are at a distance from the Principal Sudder Ameen's Court at Hooghly. They could, however, be reached with the assistance of the Railway in a day from Hooghly. Different peons might have been sent to the different places, and they might have gone by rail, all additional expenses, of course, being paid by the party summoning the witnesses. The Principal Sudder Ameen should have directed the summonses to issue, and given every assistance to the party asking for them to prevent delay in their being served. It might be that the witnesses might not have been able to attend, and then the Court might have exercised its discretion whether it would take measures to enforce or not. We think there was reasonable time for the witnesses to attend, and the summonses would have been issued. The case will be remanded to the first Court to fix another day for the hearing. The orders passed are reversed.

The 23rd April 1868.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Mitakshara—Childless widow's interest in husband's estate—Champerty and maintenance.

Cases Nos. 205, 206, 209, and 231 of 1867.

Regular Appeals from an order passed by the Principal Sudder Ameen of Patna, dated the 28th May 1867.

Panchcowree Mahtoon and others (Defendants), *Appellants,*

versus

Kalee Churn and others (Plaintiffs), *Respondents.*

Mr. Piffard and *Baboos Unnoda Pershad Banerjee* and *Bhowanee Churn Dutt* for Appellants.

Mr. R. T. Allan and *Baboo Ashoolosh Chatterjee* for Respondents.

A childless widow, under the Mitakshara Law, takes only a limited interest in her husband's estate, similar to that taken by a childless widow according to the law of the Bengal School.

Held by Glover, J. (Macpherson, J., dissenting), that there is no law against Champerty or Maintenance in Bengal.

Glover, J.—THIS was a suit by one Kalee Churn as next heir of his grandfather Junglee Sahoo to recover possession of certain real properties, by cancelling deeds of sale executed by his maternal grandmother Phool Dyee, the widow of Junglee, to the vendors of the various defendants, on the ground that, according to Hindoo Law as prevailing in the provinces governed by the Mitakshara, she had no power to alienate, not being under legal necessity so to do.

Kalee Churn, the first plaintiff, sues along with four others, who are stated in the plaint to have purchased a large share in the property sued for in consideration of their providing the funds for carrying on the suit. These latter parties, as appears from the terms of a deed of partnership-agreement (*sherakutnamah*) filed with the record, were to have, in case of success, a 12-annas share in the property recovered, Kalee Churn contenting himself with a 4-annas share, which he was to have free of all costs incurred during the litigation of his claims.

Junglee Sahoo died in 1838 (Pous 1245 B. S.), leaving a widow Phooldijee, and two daughters, Bholakun and Mukkun. Each of the daughters had a son, but Debee Pershad, one of them, is dead, and Kalee Churn, the plaintiff, is now the only survivor. His grandmother Phool Dyee died on the 15th of January 1860, from which date he claims to succeed by right of heirship to his grandfather's property.

The particular alienations which he seeks to set aside are dated respectively—

1. 9th April 1848.—Foreclosure-decree of 8 annas of Ghousepore to Rambux.

2. 20th April 1848.—Kobala by Mussamut Phool Dyee to Azeem Ally—2*a.* 6*d.* 17*c.* 10*c.* of Mouzah Mahomedpore.

3. 3rd March 1851.—Kobala by Mussamut Phool Dyee to Mussamut Shetahoo—4-annas share of Chuck Kunral.

4. 13th December 1854.—Kobala by Mussamut Phool Dyee to Mussamut Mohono—8-annas share of Mouzah Ghoorunpoora.

5. 4th November 1855.—Kobala from Azim Ally to Chorab Singh—*Vide* No. 2.

6. 12th April 1856.—Kobala of Shetahoo to Reeroo—*Vide* Nos. 3 and 4.

7. 1st July 1858.—Kobala from Mussamut Shetahoo—4-annas share of Ghoorunpoora.

And he also seeks to have cancelled the orders of the Civil Courts, dated November 19th, 1856, and 9th March 1857.

The defendants pleaded generally—

1st.—That the suit savored of Champerty, and should be dismissed at once on that ground;

2nd.—That the suit is barred by limitation:

And particularly that the properties sought to be recovered had been purchased by them *bonâ fide* from the vendees of Phool Dyee, who was justified in making the alienations.

Thus, Omrao Mahtoo and others claimed under the deeds of sale Nos. 3 and 4. No. 3, dated the 3rd March 1851, was a deed of sale of an 8-annas share of Mouzah Chuck Kunral executed by Phool Dyee to Mussamut Shetahoo. No. 4, dated 13th December 1854, was for an 8-annas share of Mouzah Ghoorunpoora, and was given by Phool Dyee to Mussamut Mohono.

The defendants purchased a 4-annas share of these Mouzahs from Mussamut Shetahoo (who had in the meantime bought from Mussamut Mohono) on the 1st of July 1858 (deed No. 7 of the plaintiff's list); and they now plead that the original sales were made by Phool Dyee under great and pressing necessities, with the knowledge and consent of the reversioner Kalee Churn, and cannot, therefore, now be set aside.

Chooah Sing and Gopaul Sing claimed, under No 2, a deed of sale dated the 28th April 1848, by which a fractional share of Mouzah Mahomedpore, Sumpa Mauwa, was sold by Phool Dyee to Syud Azeem Ali, and by him, on the 4th of November 1855 (deed No. 5 of the plaintiff's list), to the defendants.

These defendants also averred that the plaintiff Kalee Churn was aware of the sale to Azeem Ali, and did not object to it.

The defendant Fuzul Kurreem, who is in possession of an 8-annas share of Mouzah Ghousepore, the property covered by the deed of sale No. 1, dated the 9th of April 1848, pleaded that he had been put in possession by a decree of Court passed in his favor in a pre-emption suit, which decree the plaintiff did not sue to reverse. He also pleaded, as did the other defendants, that the sale by Phool Dyee to Rambux was a valid sale, made with the knowledge and consent of the plaintiff Kalee Churn under pressure of great and immediate necessities.

It will assist the determination of this defendant's part in the case to explain the way in which he became interested.

It appears that one Deo Chand Sahoo sued Mussamut Phool Dyee on a bond, and got a decree on the 14th of August 1845. Execution was taken out, and on the 7th of July 1846 an 8-annas share of Mouzah Ghousepore was sold in satisfaction of the decree. The amount decreed was Rupees 257-1-12, but the property sold for Rupees 2,325, and was bought by Rambux Sahoo. Before, however, the purchase-money was paid into the Collector's hands, other creditors of Phool Dyee had become clamorous, and at the lady's request Rambux paid over to her for their benefit the balance of the purchase-money, receiving in return a receipt from various creditors acknowledging the amount paid. This receipt was accepted by the Civil Court, and forwarded by it to the Collector as a discharge to Rambux from all further liability on account of his purchase. The Collector, however, refused to receive it as such, and called upon the auction-purchaser to make good the balance of his bid, and, on his declining to do this, cancelled the sale.

I may mention here that there is no denial on the part of the plaintiff of the fact that the Rupees 2,325 paid by Rambux were made over to various creditors, including Deo Chand, and were not retained by Mussamut Phool Dyee.

Rambux on this brought a suit against Phool Dyee in the Principal Sudder Ameen's Court (27th April 1847) to recover his advance, and forced Phool Dyee to a compromise, by which she gave him a mortgage of the property originally sold at the suit of Deo Chand, with power of foreclosure,

if the money were not re-paid within a year. Mussamut Phool Dyee defaulted, and Rambux petitioned for foreclosure on the 3rd of August 1849. The foreclosure was made absolute at the expiry of the year of grace in 1851, and on the 6th of May 1854 he obtained a decree for possession. Before, however, he was settled in possession, he was sued by Kazee Fuzul Kurreem, who claimed a preferential right under the law of pre-emption, and a decree was passed in his favor on the 19th of November 1856, since which time he has been in possession.

The remaining defendant, Panchcowree Mahtoo, claimed under deeds Nos. 3 and 4, and his defence was similar to that of Omrao Mahtoo.

The Principal Sudder Ameen held that the Law of Champerty did not apply to this country; that the suit was not barred by the Statute of Limitations; and that Kalee Churn was, as only surviving grandson of Junglee, entitled to sue. On the merits he found that Phool Dyee was not justified by Hindoo Law in making the alienations complained of, and that Kalee Churn had never consented to her doing so. He, therefore decreed in the plaintiff's favor, and ordered the various deeds of sale and orders of the Civil Courts to be cancelled.

Against this decision all the defendants appeal.

The plea of limitation was taken generally by all the appellants, but was not pressed, a long current of decisions of this Court having laid it down that the cause of action to Kalee Churn in cases like the present arose on the death of his grandmother, from which date he was undoubtedly in time.

For the defendants it was argued that, according to the Mitakshara Law, the estate taken by Phool Dyee was not a restricted estate such as that of a widow under the Hindoo Law current in Bengal.. It was contended generally that a widow under the law of the Mitakshara takes an absolute interest in her deceased husband's estate, and may dispose of it as she pleases; and, further, that, at any rate, in the property not proved to have come to her husband as ancestral property, she takes an absolute interest. We, however, declined to hear any argument on these points, there being no sort of doubt that, according to a long series of decisions of the Courts of this country, which are in accordance with decisions of the Privy Council, a childless widow under the Mitakshara Law takes only a limited interest in her husband's estate similar to that taken by a widow under the law of the Bengal School.

It was also argued that the suit is bad for multifariousness. There is no doubt that it is so; and the plaint ought never to have been received or filed by the Lower Court. The remarks of the Court in the case of Rajah Ram Tewaree *versus* Luchmun Pershad (VIII. Weekly Reporter, page 15) on this question apply equally to the present case. Judges below ought to be more careful and to reject plaints when brought against several defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned. We cannot, however, dismiss the suit now at this stage of the proceedings on this ground, when the case has been tried fully on the merits, and we have before us the materials for finally disposing of the various issues between the parties.

On the question of champerty, Mr. Piffard for the appellant contended that there was no reason why the offence of champerty should be confined to English cases, and that the Courts here, being especially Courts of equity and good conscience, were bound to take notice of what the Equity Courts of England considered to be a serious offence against morality. He argued further that the original decision of the Sudder Court, upon which all subsequent rulings had turned, proceeded on a wrong principle, and was, therefore, of no value as an authority.

I concur with the learned Counsel in thinking that there is no good reason why the doctrine of champerty should be confined to English cases, and the present suit is one in which its application would be more than usually proper, for the record shows most distinctly that Kalee Churn has been egged on to litigate claims on which he had for many years kept silence, if he had not acquiesced in them, and that by parties having no interest in the issue, except as to the amount of plunder they might secure from the successful litigant in the event of their funds gaining the case for him. But as champerty is not a part of our Statute Law, and as successive decisions of our highest Court have pronounced it inapplicable to this country, I do not feel justified in re-opening the matter, or in referring it to a Full Bench. The decision quoted by

Mr. Piffard is to be found in the Sudder Dewanny Adawlut Reports for 1852, page 394, Kishen Lall Bhoomik *versus* Pearee Soondurry and others. This decision was passed by a Full Bench, consisting of five Judges, after reviewing the older cases on the subject; and it decided that champerty was not *per se* illegal, but that every such arrangement must stand or fall according to the the peculiar nature of its conditions. In this judgment the former decisions of the Sudder Court were considered and held to have been erroneous, and after full argument it was decided that, as between a plaintiff and a third party, an issue could properly be admitted regarding the source from which the plaintiff procured funds for defraying the expenses of his action, that is to say, a suit ought not to be at once dismissed without a hearing, merely because the plaintiffs in the cause had agreed to divide the matter sued for between them, if they prevailed at law, but that every such case should be looked at in its own merits, should a suit be brought to enforce or avoid its conditions; but that the Court should refuse to entertain the question as between the plaintiff and defendants, the former having the right to an adjudication of his controversy with the person keeping him out of his property, no matter how he procured the funds to litigate with.

The later decisions of this Court have not gone further than to express doubts as to the application of the doctrine of champerty to our Courts, but the result has practically been a regular following of the precedent of 1852. As to whether the Sudder Court in that decision misunderstood the former cases that had been brought to their notice, I do not think it necessary to offer an opinion. It is sufficient that all those cases were referred to and examined, and that the judgment of the Full Bench of the Court was that champerty was not of itself illegal.

Mr. Piffard further argued that the decision of 1852 went on the supposition that the Law of Champerty was a dead letter in England, and was largely influenced by this error. But I can see no reason to suppose that this was the case. One of the Judges (Sir R. Barlow) does say parenthetically that the Law of Champerty "was now a dead letter in our English Code," but the statement did not influence his decision which proceeded on other grounds, whilst the other four Judges treated the question entirely from an Indian point of view.

It seems to me, therefore, to have been authoritatively ruled that, as between a plaintiff and defendant in this country, no question of champerty can arise, and as I am not prepared to dissent from that ruling, although I confess to some doubts of its propriety, I must decide this issue against the appellants. * * * * * * *

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Macpherson, J.—I concur generally in this judgment.

But on the question of champerty and maintenance, which has been raised and discussed at length (and the law as to which cannot yet be said to have been definitively settled so far as this Court is concerned), I deem it unnecessary to express any opinion, as I agree with Mr. Justice Glover in thinking that the appellants have a good defence on the merits, and are on this ground entitled to succeed in their several appeals.

The 23rd April 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Objections first urged in special appeal.

Case No. 1606 of 1867.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 18th March 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 6th August 1866.

Benode Putnaik and others (Defendants), *Appellants,*

versus

Doyanidhee Bullior Singh (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Taruck-nath Sein* for Appellants.

Baboos Unnoda Pershad Banerjee and *Obhoy Churn Bose* for Respondent.

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A plaintiff obtained a decree to set aside an alienation of ancestral property effected by his father during his minority. Defendant objected in special appeal, *first*, that the suit was barred by lapse of time since Plaintiff attained his majority; and, *secondly*, that, under the Mitakshara Law, the father had a right to alienate a share of the property.

HELD that, as the *first* of these objections was entirely a matter of fact, and as the *second*, though essentially a matter of law, went to the substance of the plaintiff's claim, they should have been urged in the Lower Courts, and could not be admitted for the first time in special appeal.

Phear, J.—IN this suit the plaintiff sued to set aside an alienation of ancestral property which had been effected by his father during his minority more than 20 years before suit, on the ground that under the Mitakshara Law alienation was illegal and invalid against him. Both the Lower Courts have given the plaintiff a decree, on condition that he re-pay the defendant his purchase-money.

It is now objected by the defendant in special appeal that the plaintiff attained his age of 16 years in 1860, and that, inasmuch as the suit was not brought until September 1865, it is barred by the lapse of time. We think that this objection cannot be allowed to prevail. It was not made in the Court of first instance; on the contrary, the defendant there contended that the plaintiff was not born until 1848. Nor was it made before the Appellate Court, and without saying that questions of limitation cannot be taken up in special appeal when they have not been made earlier in the suit, assuming the facts essential thereto are admitted or proved in the suit, still in this case, as it was quite possible that the plaintiff might, if he had been put to the issue, have showed that his age of majority was not 16 but 18, namely, by showing, had the fact been so, of which we have no information, that his estates were under the Court of Wards, we think that the question of limitation is so entirely a matter of fact capable of being disputed, that we cannot allow the special appellant to take advantage of the particular state of facts as they happen to have been found, without his having raised the issue, which would have led to a full and complete investigation on this point.

The second objection to the decree of the Lower Appellate Court is, that by Mitakshara Law the father had at least a right to alienate his own share of the property which would have been, had a partition been effected, one-half, and that consequently the Lower Appellate Court was wrong in setting aside the alienation of the whole of the property, and giving a decree to the plaintiff for the whole. This objection also, we observe, is made in this Court for the first time, and as it is one which, although, no doubt, a matter of law in all essential respects, goes to the substance of the plaintiff's claim, we think that it ought to have been made in the Courts below, which had to decide the whole merits of the plaintiff's case; and that we cannot in special appeal say that the Appellate Court has committed such an error in law that we ought to set aside its decision because it has not considered a point which was never raised before it.

We may observe that no pecuniary loss can accrue to the defendant by reason of the omission of the Court to give effect to this objection, because the plaintiff cannot recover the property from the defendant, except upon the terms of reimbursing the defendant the amount of his purchase-money, and no mesne-profits are given.

For the reasons above given, we think that whatever might have been the intrinsic value of these objections, had they been made at the proper time, they have now come too late, and that, sitting as a Court of special appeal, we cannot enquire into them. We dismiss the appeal with costs.

The 24th April 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Evidence taken by Civil Ameen.

Case No. 1980 of 1867.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 28th May 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 30th December 1865.

Ran Churn Mahtoon and others (Defendants), *Appellants,*

versus

Surubjeet Mahtoon and others (Plaintiffs), *Respondents.*

Baboos Sreenath Doss and *Kishen Succa Mookerjee* for Appellants.

Baboos Unnoda Pershad Banerjee and *Onookool Chunder Mookerjee* for Respondents.

Where a Principal Sudder Ameen had deputed a Civil Ameen to inquire into the fact of possession instead of hearing the evidence on the point himself—HELD that, even if the Principal Sudder Ameen's order was improper, the deputation of the Ameen was legal, and the evidence taken by the Ameen was legal evidence, to be considered on its own merits.

Jackson, J.—THIS case must be remanded to the Additional Judge for re-trial.

The first question which he has to decide is the plea of limitation. It is for the plaintiffs in the first instance to satisfy the Judge that they have been in possession of the disputed lands within 12 years of the institution of the suit. The Judge's decision does not in any direct terms allude to the plea of limitation. But in finding that in the survey of 1843 the land was demarcated with the plaintiffs' estate, and that the proprietors of the defendant's estate then stated their intention to bring an action in the Civil Courts, and that the plaintiffs' jummabundee papers are not discredited for any particular reason, and that the defendants have not proved their possession, it would appear that the Judge intended on this evidence to decide that the plaintiffs had been in possession, and were not barred by limitation. But it is pointed out that, in his mode of dealing with this evidence, the Judge has altogether omitted to consider the arguments regarding the survey-demarcation of 1843 urged by the Principal Sudder Ameen, and similarly has omitted to consider the grounds on which the Principal Sudder Ameen rejected the jummabundee papers of the plaintiffs. Those papers are not direct evidence of any fact, though they may be, if found genuine by the Judge, used as corroborative evidence of the truth of the depositions of the witnesses examined by the plaintiffs on the point of possession. The Judge does not allude to those witnesses.

Again, the Judge states that he can place no reliance upon the evidence as to the possession of the defendants recorded before the Ameen, not because he, upon looking into that evidence, has ground for discrediting it, but because, in his opinion, it was improper to have deputed an Ameen at all for the purpose of making an enquiry into the fact of possession, and because he holds that such evidence should have been produced by the defendants in Court before the Principal Sudder Ameen. It is very possible that the Judge may be right in his opinion, and that the Principal Sudder Ameen should not have deputed an Ameen for this purpose; but the deputation of the Ameen was strictly legal, and the evidence taken by the Ameen was legal evidence, and that evidence must consequently be considered on its own merits, and not be rejected on the impropriety of the order of the Principal Sudder Ameen.

On these grounds the decision of the Judge, as it stands at present, contains errors in law, which may have materially affected the decision of the suit. We would point out to the Judge that he should, in the first place, decide the question of limitation, looking first to the plaintiffs' evidence on the point of possession, and then to the defendant's evidence on the same point; and that he should afterwards decide the question of title, here also looking first to the plaintiffs' evidence and afterwards to the defendant's. In the decision of the Judge he has considered in the first place the defendant's evidence on those points. We would not have remanded the case on this ground alone, if the evidence on both sides had been legally considered; but it is most important that, in recording decisions on these questions regarding land, the judgment should not bear even the appearance of the defendant's evidence having been considered before that adduced by the plaintiffs.

The 24th April 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Construction of pottah — Provisional jumma—Interest on arrears of rent.

Case No. 261 of 1867.

Regular Appeal from a decision passed by the Deputy Collector of Busseerhat in the 24-Pergunnahs, dated the 31st July 1867.

Bharuth Chunder Roy (one of the Defendants), *Appellant,*

versus

Bepin Beharee Chuckerbutty (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Appellant.

Mr. W. A. Montriou and *Baboo Ashootosh Dhur* for Respondent.

Plaintiff let to defendant a quantity of land of which he was not certain how much was in cultivation, and how much was jungle, at a total jumma to be eventually settled on the footing of 12 annas per beegah culturable, and 10 annas per beegah jungle, on the number of beegahs of each sort which existed at the end of the year next preceding the date of the pottah; the calculation of the rent to be permanently made by effecting a measurement within six months, until which time defendant should pay a provisional jumma at 12 annas a beegah on a given number of beegahs amounting to a specified sum. Plaintiff sues for arrears of rent, no measurement having taken place, though years have elapsed.

HELD that, until ascertainment by measurement of a settled jumma, the rent due under the terms of the pottah would be the provisional sum mentioned above; but if the delay in such ascertainment were due to default of plaintiff, defendant would be entitled to set up the state of things which he believed would be arrived at if measurement were effected.

Interest may be decreed with arrears of rent, but it should not upon instalments as from dates during the currency of the year, unless the parties had agreed that the rent should be paid by instalments at those dates.

Phear, J.—THIS is a suit to recover certain arrears of rent for land which the defendant admits that he held during the time that is sued for under a pottah from the plaintiff. That pottah is in the following terms: "The amount of land covered by the pottah "is 42,600 beegahs. Of this 10,424-0-5 "beegahs are, according to the jumma-"wassil-bakee papers up to 1,256, *hassil* "(culturable) lands, of which I grant you "lease at a rental of Rupees 7,818-0-2 at 12 "annas per beegah, and of the dense jungle "lands at the rate of 10 annas per annum "per beegah. The dense jungle (forest) "lands shall be held free of rent for a period "of 12 years from 1851 A. D., correspond-"ing with 1258 B. S., to 1862, corres-"ponding with 1269. You shall pay rent "for the same at the aforesaid rate of 10 "annas from 1270, corresponding with 1863. "Within six months of this date, I shall "measure the lands brought under cultiva-"tion up to 1257; and if any *hassil* lands "be found over and above those settled ac-"cording to the aforesaid terms, you shall "pay rent for such excess lands at the afore-"said rate of 12 annas: if less, a propor-"tionate abatement in the rent at which "settlement is made shall be allowed. Fur-"ther, you shall pay rent at the rate of 12 "annas per beegah for the amount of lands "which may be found on measurement of "the aforesaid 42,600 beegahs to have been "brought under cultivation up to 1257. "You shall hold the remaining lands free "of rent for the aforesaid period of 12 years. "after which the said lands shall be settled "with you perpetually from 1270 at the rate "of 10 annas."

The defendant says that he is not bound to pay rent to the extent which plaintiff claims. He says the claim of the plaintiff is based upon a calculation of 12 annas per beegah for 10,000 and odd beegahs of land; but he contends that, according to the terms of the pottah, he was not to pay that sum for a period, at any rate, of more than six months from the date of the pottah; and that, after the expiration of 6 months, if he was liable to pay rent at all before the measurement stipulated for in the pottah should be made, he certainly was not bound to pay upon an amount of beegahs greater than that which was culturable at the time that he entered upon possession, and he says that that amount was beegahs 3,600, instead of 10,424, and we understand that he tenders, or has paid—we do not know which—the amount of rent which corresponds to 3,600 beegahs at the rate of 12 annas per beegah, the amount which he admits to be due, but he contends that he is not liable to pay anything in excess of this sum.

We have considered the pottah, and we think that in effect the contract disclosed by it amounts to this: that the plaintiff let to the defendant 42,600 beegahs of land, of which he was not at the time certain how much was in cultivation, and how much covered with jungle. This took place in the commencement of the Bengalee year 1258. The rent for this land was to be a total jumma eventually to be settled on the footing of 12 annas per culturable beegah, and 10 annas per beegah of jungle-land, at the number of beegahs of culturable and jungle-lands, respectively, which existed at the end of the year 1257: that the calculation of this rent was to be permanently made by effecting a measurement within six months from the date of the pottah, but that, immediately and until this fixed jumma should be so ascertained, the defendant should pay a provisional jumma calculated at 12 annas per beegah on 10,000 beegahs and odd cottahs of culturable land amounting in figures, and so specified in the pottah, to Rupees 7,818-0-2. There was also a further proviso, with which we are not in this suit concerned, namely, that the jungle-land was to be held rent-free for 12 years.

The present suit is brought for arrears of rent at the rate of Rupees 7,818-0-2, the

provisional jumma mentioned above, and it is admitted by the defendant that as yet the measurement stipulated for in the pottah, and the consequent ascertainment of the permanent jumma, has never been effected, although as much as 15 or 16 years have elapsed, instead of six months only, since the execution of the pottah.

We think that the plaintiff is right in considering that, until ascertainment by measurement of a settled jumma, the rent due under the terms of the pottah is Rs. 7,818-0-2. It is probable that, if the delay in measuring and ascertaining a settled jumma according to the stipulations of the pottah is due to default of the plaintiff, the defendant would be entitled in equity to set up the state of things which he believes would be ascertained and arrived at, supposing that measurement were effected; and we are inclined to think that his defence that 3,600 beegahs was the extent of the culturable land at the end of the year 1257, when he took possession, would have been good so far as it went against the claim of the defendant, supposing, as we have just said, he showed that the default in bringing about the measurement was due to the plaintiff; and, further, that, as a matter of fact, 3,600 beegahs was really the full extent of the culturable lands at that time. Still there would remain even then the question whether he was entitled, at the time when the rent sued for accrued due, to hold the jungle-lands rent-free. But we need not go into this now, for, as far as we can see from the record, he has not proved the first breach of this defence, and he has certainly neither produced nor offered any evidence on the second. Whether or not he has any equity against the plaintiff in regard to the non-measurement of the lands, we cannot say; but it is certain that he has given no evidence in this case to show that only 3,600 beegahs of land were culturable at the end of 1257. Under these circumstances, we think that he has made out no defence whatever to the plaintiff's claim, and that substantially the plaintiff's suit must be decreed.

But a further objection is made to the calculation by which the Lower Court has arrived at the sum which it has awarded to the plaintiff. That Court has not duly given the arrears of rent actually due, but has given a considerable sum by way of interest on these arrears, and calculating interest it has made the interest to run from the dates of certain supposed *kists*. We think that, under the terms of the pottah, the Lower Court was right in awarding some interest upon the arrears which it decreed. But as there is no evidence upon the record that the rent was to be paid at any specific periods of the year by instalments, although, no doubt, there is an indirect allusion in the pottah to the existence of a *kistbundee*, we think that the Lower Court is wrong in making interest (as it seems to have done) run upon instalments of rent as from dates during the currency of the year at which *kists* are usually paid by tenants in this part of the country. We think that the Lower Court could only have done that rightly if it had evidence before it as between the parties to the suit that they had ageeed that the rent should be paid by instalments at those dates. The only evidence, as we understand, upon the record with regard to the payment of rent, and the date on which the payment of rent should be made, is that of the pottah itself, which speaks of it as an annual rent; and therefore, in the absence of further and more minute specification, we think that it must be taken that the rent was payable yearly at the end of the year, and, consequently, that the interest which the Lower Court has awarded upon the arrears decreed by it should run upon each annual arrear from the end of the year only. We shall direct that the decree of the Lower Court be altered in this respect, but in all other points the appeal is dismissed. We think that, as the result of this appeal will be very much in favor of the appellant, *viz.*, to the extent to which we have struck off the interest, to that extent the costs paid by him should be diminished. He will, therefore, pay the respondent the costs of this appeal only in proportion to the amount which the respondent has had the decree of the Court below affirmed.

The 25th April 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Heirs of an obligor under Section 52, Act XX. of 1866.

Reference to the High Court by the Judge in the Court of Small Causes at Jessore, dated the 12th March 1868.

Ram Narain Doss Biswas, *Obligee*,

versus

Sreemunth Poddar, heir of Jusomunth Poddar, Deceased, *Obligor*.

An agreement recorded on a bond or obligation under Section 52, Act XX. of 1866, binds the obligor only, and not his heirs, who cannot be summarily called upon to show cause why a decree should not be passed upon them.

Case.—THIS is an application to this Court, under Section 53 of Act XX. of 1866, to enforce the agreement recorded by the Registering Officer under Section 52 of the said Act, on the bond or obligation filed with the application against the heir of the obligor, who is dead, and the pleader for the applicant asks this Court to issue a notice to the heir of the obligor to attend and show cause why a decree, as prayed for, should not pass against him, as this was the practice adopted by my predecessor; but as it has already been held by the High Court in Kristo Kishore Ghose and Brojo Nath Mozoomdar, Sutherland's Weekly Reporter, Vol. VI., p. 11, Small Cause Court Rulings, that a defendant ought not to be summoned under Section 53, I have refused to issue the notice as prayed for, and have referred the applicant to a regular suit, as it appears to me that the agreement recorded on the bond only binds the obligor, and not his heirs, and a decree can only be passed against the obligor under Section 53.

No doubt, by law, the heirs are answerable for the debts of their ancestors as far as there are assets, but no further; and this question can only be decided in a regular suit after summoning the defendants.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the Judge of the Court of Small Causes is correct in this view. The heir cannot be called upon summarily under the Section referred to.

The 25th April 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction of Small Cause Courts—Suit to recover price of land—Breach of contract.

Reference to the High Court by the Judge of the Court of Small Causes at Dacca, dated the 17th March 1868.

Charoo Khan, *Plaintiff*,

versus

Doorga Monee, heiress and representative of Kishen Coomar Goopt, *Defendant*.

A suit to recover money paid as price of land in consequence of vendor's failure to complete the bargain by registration of the deed of sale is maintainable in a Court of Small Causes, being substantially a suit for breach of contract for sale of land.

Case.—PLAINTIFF brings this case to recover Rupees 183-8 paid as price of lands, owing to the failure of the vendor to complete the bargain, as agreed upon, by getting the deed of sale duly registered, reckoning his cause of action from the 15th September 1866, the date when registration was refused. Defendant denies the transaction, and pleads non-cognizability.

That the vendor did receive the above sum as value of the lands forming subject of

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the sale, has been satisfactorily proved. Now, the question is whether the case is at all actionable, and, if so, whether cognizable in a Small Cause Court? I am humbly of opinion that it is; for, if an action for money paid as the price of a piece of moveable property can lie on non-fulfilment of the contract, there appears to me, I beg to observe, no reason why the present one should not, and that in a Small Cause Court. The bargain of sale in cases of real property terminates in registration of the deed of sale. The vendor in this case coming to ignore all his doings, the Deputy Registrar, notwithstanding his faith in the *bona fides* of the transaction, refused registration under Section 82 of the Registration Act. Plaintiff had brought an action avowedly under Section 84, but in a wrong Court, that is to say, in the Moonsiff's Court, instead of the District Court, and the case was accordingly thrown away. The prescribed time for taking measures to enforce registration having thus expired, plaintiff brings this action to recover the consideration-money taken from him by the vendor, on the ground of breach of contract. That he has a right to seek redress in this way is not, I think, opposed either to law or to principles of justice and equity; otherwise every vendor could resort to such unfair courses.

Permit me to add that the Hon'ble Court's Ruling of 19th September last, in the case of Bheemul Mahtoon *versus* Olumossa and others, also brings a case of the kind within the breach of contract class. It is therefore quite optional with the plaintiff to bring either a regular action to establish his right to the property, as in the case alluded to above, or one like the present case, for refund of the consideration paid—a course, as the Hon'ble Court may observe, much easier and more natural, it being simply asking what the vendor received. However, the question, connected as it is with the new Registration Law, being one of general importance, I did not think it prudent to bring it to a determination without referring to their Lordships.

Revenue, &c., Reporter, Vol. IV., No. 12, pages 252 to 254.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the suit is maintainable in a Court of Small Causes. It is substantially a suit for breach of contract for sale of land.

The 27th April 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Contract of partnership — Rents — Appeal by one defendant — Section 337, Code of Civil Procedure.

Case No. 2114 of 1867.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 8th June 1867, reversing a decision passed by the Assistant Collector of Raneegunge, dated the 29th September 1866.

Sreemunjuree Dossee (Plaintiff), *Appellant,*

versus

Poorusuttun Doss and others (Defendants), *Respondents.*

Baboos Juggodanund Mookerjee and *Umurnath Bose* for Appellant.

Baboos Kishen Kishore Ghose, Ashootosh Chatterjee, and *Greeja Sunkur Mozoomdar* for Respondents.

The parties had entered into a contract of partnership to work certain supposed mines: plaintiff to receive a *bonus* and also six-monthly payments as "rent" for the land, both parties to share the profits and bear the losses; it being stipulated that, in case coal should not be discovered, the *bonus* and any sum paid as rent would be refunded:

HELD that this was a partnership-arrangement, and the payment of the money which went by the name of rent was not as by a tenant to a landlord, but as consideration-money for land forming a portion of the capital.

When one of several defendants appeals at any time against the judgment of a Court of first instance, the Appellate Court is competent, under the circumstances set forth in Section 337, Code of Civil Procedure, to reverse the judgment appealed against, in favor of all the defendants.

Jackson, J.—WE think that the decision of the Judge in this case is substantially correct, and that the suit brought by the plaintiff for recovery of her rent was not one cognizable by the Collector's Court as one between landlord and tenant.

It appears that the plaintiff and the defendants entered into a contract of partnership to work certain mines, or supposed mines, lying underneath the soil of about 1,000 beegahs contained in a certain durputnee belonging to the plaintiff. It was agreed between the parties that the plaintiff was to receive a sum of money as a *bonus* down, and also 500 rupees yearly, in two six-monthly instalments as rent for the land. She was also to receive a 4-annas share of the profits, the remaining 12 annas going to the defendants. The parties were to share the profits in the above-mentioned proportions, and also to bear the losses. And it was further stipulated that, in case coal should not be discovered beneath the soil, the plaintiff was to refund to the defendants both the amount of the *bonus* and also any sums which might have been received on account of rent.

This, we think, was, to all intents and purposes, a partnership-arrangement; and although the terms are somewhat unusual in their nature, we think the fair and reasonable construction of them is that the rent payable was to form part of the working expenses of the concern, after which the profits were to be divided in the proportion of one-fourth to the plaintiff, and three-fourths to the defendants. The payment of rent, consequently, or the money which went by the name of rent, was not a payment to be made as by a tenant to a landlord, but was in the nature of a fixed sum to be received by the plaintiff in consideration of the land which she brought into the concern, and which, in fact, represented her portion of the capital.

We think, therefore, that the Judge was right in holding that the Collector had no jurisdiction, and in reversing his decision.

The second ground taken in appeal was, that the Judge was not entitled to reverse the judgment of the Court below in respect of one of the defendants who had not appealed, and in regard to whom it is contended the judgment had become final.

It seems that the defendants who did appeal had come in after judgment had passed against them *ex parte*, and satisfied the Collector that they had had no notice of the proceedings. Therefore, there was a rehearing, and judgment was again passed.

We think that this does not in any way affect the competency of the Court under Section 337 of the Code of Civil Procedure, and that, when any one of the defendants is enabled to appeal at any time against the judgment of the Court below, the Court may, under the circumstances set forth in that Section, reverse the judgment appealed against, in favor of all the defendants.

The order of the Judge must, therefore, be affirmed, and this appeal must be dismissed with costs.

The 27th April 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Interest not leviable from defaulting purchaser —Section 254, Code of Civil Procedure.

Case No. 88 of 1868.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Shahabad, dated the 10th December 1867.

Soorj Buksh Singh (Decree-holder), *Appellant,*

versus

Sreekishen Doss (Judgment-debtor), *Respondent.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Otool Chunder Mookerjee for Respondent.

When the proceeds of an eventual sale are less than the price bid by a defaulting purchaser, the difference leviable from him under Section 254, Code of Civil Procedure, must be levied without interest.

Jackson, J.—We think the order made in this case did not provide for any levy of interest.

But we think that we should go further and state that, in our opinion, the law under which the principal amount is levied in this

case does not allow the levy of interest. The last Clause of Section 254 of the Code of Civil Procedure runs as follows: "If "the proceeds of the sale which is eventually consummated be less than the price "bid by such defaulting purchaser, the "difference shall be leviable from him under "the rules for enforcing the payment of "money in satisfaction of a decree of "Court."

It was apparently the intention of the Legislature that the party entitled should proceed to levy this amount immediately. It was not intended that the amount of difference should remain as it were as an investment with interest at 12 per cent., and the law accordingly allows that that difference, and that only, shall be levied.

It may be urged that the defaulting purchaser may delay payment by means of vexatious appeals, and it seems that an appeal was allowed under the Section in this very case.

We should have been inclined to think but for the authority of the decision in the appeal in question, that no appeal lay in this case, the parties not being parties to the suit. But in this case, which is reported at page 126, VI. Weekly Reporter, it seems that the appeal was allowed. Whether it was or was not right to allow the appeal, the law seems to us to contemplate nothing beyond the levy of the actual difference, and interest cannot be allowed.

This appeal is, therefore, dismissed with costs.

The 27th April 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Hindoo widow—Mortgage of husband's property—Mortgagee's responsibility.

Case No. 2036 of 1867.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 20th March 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 12th May 1866.

Ram Pershad Singh and another (Plaintiffs), *Appellants,*

versus

Mussamut Nagbungshee Kooer and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Appellants.

Messrs. R. E. Twidale and *C. Gregory*, and *Baboos Unnoda Pershad Banerjee, Onookool Chunder Mookerjee, Romesh Chunder Mitter*, and *Otool Chunder Mookerjee* for Respondents.

Where a Hindoo widow raises money by mortgaging her husband's property, the mortgagee is not bound to look to the appropriation of the moneys so raised, his responsibility ceasing when he has satisfied himself that there was legal necessity for the loan.

Kemp, J.—THIS appeal has been argued at great length, and more in the shape of a regular than a special appeal. The plaintiff alleges that he is a reversioner to the estate of one Gunga Pershad, his suit setting up an adoption of him by the said Gunga Pershad having already failed.

The object of the present suit was to set aside certain alienations made by the widow of Gunga Pershad, Nagbungshee Kooer. It appears that the lady, for the marriage expenses of her daughter, raised a loan of 14,000 rupees on four bonds at a short date; that in satisfaction of these bonds, she mortgaged the properties in dispute to the father of the special respondent who, after obtaining foreclosure, sues for their possession, and has obtained a decree in both Courts.

It is contended in special appeal—

1st.—That the Judge was wrong in deciding that it was not necessary for the special respondent to prove the existence of the bonds.

2nd.—That the mortgagee being the brother of the mortgagor, and being the person who negotiated the loan, it was incumbent on the plaintiff to prove that the entire sum borrowed was spent on the marriage of the daughter of the mortgagor.

3rd.—That the Judge has not rightly understood the terms of the mooktearnamah and the contention of the special appellant with reference to the purport of that document.

4th.—That the special appellant did charge the mortgagor with waste.

5th.—That a certain petition to the Magistrate, reporting the destruction of the special respondent's house by fire, was not evidence, and ought not to be admitted as such.

6th.—That the petition of the mortgagor, dated the 1st September 1859, contains no admission of the mortgage, and was inadmissible as evidence.

We think that the Judge has substantially found that the loan was contracted for a legal necessity, *viz.*, for the marriage of the daughter of the mortgagor. The mortgage has been held to be proved by both Courts. The Mahajuns from whom the money was originally borrowed have been examined, and deposed to the loan for the purposes stated above. There is also some evidence that the house of the mortgagor was burnt down by the rebels in the mutiny. The Mahajuns depose to the return of the bonds on the execution of the mortgage by which the bonds were satisfied, and the presumption is that these bonds were destroyed, as stated by the special respondent. The petition to the Magistrate, though not strictly evidence, corroborates to a certain extent the above facts. It was presented when there was no prospect of this suit. The mortgagee was not bound to look to the appropriation of the moneys which were raised by the mortgage. He satisfied himself that there was a legal necessity for the loan, and there his responsibility ceased. He had no control over the money, or how it was to be spent, or whether the whole sum advanced was spent in the marriage or not.

The mooktearnamah is only one piece of evidence, and has been considered by the Judges. It recites that money was required for the marriage, and the mere omission of the four bonds in this instrument would not over-ride all other evidence to the effect that the money was borrowed for the purposes of the marriage and appropriated to those purposes.

The petition of the mortgagor and any statement made by her in that petition would not be evidence, and the Judge was perhaps wrong in laying the great stress which he does on that petition, but there is other evidence upon which the Judge has come to a finding. We dismiss the appeal with costs and interest.

The 27th April 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Mahomedan Law—Adopted son—Applications under Act XXVII. of 1860.

Case No. 37 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 23rd December 1867.

Khajah Oheed Khan, *Appellant,*

versus

The Collector of Shahabad, on behalf of Government, *Respondent.*

Messrs. R. T. Allan and *C. Gregory* for Appellant.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondent.

An adopted son cannot inherit among Mahomedans. When applications are made for certificates under Act XXVII. of 1860, a Judge should determine who is entitled, and should grant the certificate accordingly. He has no power to make an order in respect of the property of the deceased.

Jackson, J.—THE appellant, we think it is clear, has no case. He claims as an adopted son under an *ekrarnamah*, dated the 9th of November 1854.

Mr. Gregory, the pleader for the appellant, admits that he can cite no authority either from Mahomedan Law or from decided cases, showing that an adopted son may inherit among Mahomedans. There is, indeed, a sort of *dictum* by one Judge of the late Sudder Court in the case of Mirza Aga Ali Hossein Khan *versus* Shoohamut Ali, decided in the year 1861, in which it is stated that the adopted son was entitled to a certificate. That *dictum* cannot, however, be accepted as binding authority upon the subject, and in fact, no certificate was given, but the case was remanded to the Judge for further evidence.

Mr. Gregory then stated that his client was in possession, and that the whole property of the lady had been conveyed to him under the *ekrarnamah*. If that be so, then it follows that there was no occasion for the certificate under Act XXVII. of 1860, as the property belonged to him, and not to the deceased woman.

Mr. Gregory has not thought it advisable to read to us any evidence regarding the question of possession, and which evidence, probably, if read, would not have influenced our judgment, because the right of his client to obtain a certificate to collect the debts due to the estate of the deceased woman must depend on the right to inherit from her, and not upon a right arising out of possession taken under document executed by her fourteen years ago.

It is further complained, although this ground is not taken in the petition of appeal, that the Judge in disposing of this case has gone beyond his authority, for he refused the petitions of the two applicants for certificates, and ordered that the property should be taken over by the Collector on the part of Government. This was clearly beyond his power. He was to determine who was entitled to the certificate, and grant the certificate; he ought not to have made any order in respect of the property of the deceased.

This portion of his order must, therefore, be set aside. As the appeal, however, was not on this point, the appellant is not entitled to any costs, but he must pay the costs to Government in the case; and as regards the certificate, the order of the Judge is confirmed with costs.

The 27th April 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Special Appeal—Issues.

Case No. 1638 of 1867.

Special Appeal from a decision passed by the Judge of Sarun, dated the 22nd April 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 25th June 1866.

Puriag Dutt (Plaintiff), *Appellant,*

versus

Brojo Koonwar and others (Defendants), *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

Baboos Hem Chunder Banerjee, Unnoda Pershad Banerjee, and *Mohinee Mohun Roy* for Respondents.

A father having executed a deed conveying certain ancestral property to two persons (*D* and *B*), who alienated it to several others, his son sued to have the conveyances by *D* and *B* to the others set aside, on the ground that the deed given by the father was *benamee*, and that *D* and *B* never had possession. The suit was dismissed by both the Lower Courts.

HELD that, as plaintiff went to trial in the Courts below upon one issue only, *viz.*, whether *D* and *B* were ever really in occupation, he was not entitled in special appeal to complain that evidence had not been taken as to the passing of consideration-money.

HELD that, as the question whether the alienation of the property by the father without the son's consent was valid under the Mitakshara Law was not raised in the Lower Courts, such invalidity could not be admitted as a ground of objection in special appeal, for it necessarily involved as issue of fact.

HELD that, as no issue was raised in the Lower Courts which could have been the foundation for a declaration of right, the non-decision of a claim to such a declaration could not be made a ground of special appeal.

Phear, J. (Hobhouse, J., concurring).—ON the 4th October 1845, the father of the plaintiff in this suit executed a deed conveying certain property to two persons, Dhunuk Dharee and Brojo Koomar. After this deed, Dhunuk Dharee and Brojo Koomar alienated this property to several other persons separately by separate conveyances. The plaintiff now sues Dhunuk Dharee and Brojo Koomar and all those different alienees of Dhunuk Dharee and Brojo Komar in one suit, asking to have the conveyances of Dhunuk Dharee and Brojo Koomar to the other defendants, respectively, set aside, on the ground that the conveyance of his father on the 4th of October 1845 was *benamee*, and that Dhunuk Dharee and Brojo Koomar never had possession of the property at all, but that, on the contrary, his father remained subsequently to that deed, as before, in the open possession and enjoyment of it himself. The plaintiff also seeks in the same suit to have it declared that certain other property now in the possession of his father is ancestral property, and that his father is not entitled to sell it as against him, the son, without his consent. Both the Lower Courts have dismissed the plaintiff's suit, and he now appeals specially to us upon several separate grounds.

The *first* ground is that the Court below has not tried the question whether the consideration-money passed under the bill of sale in dispute or not. Now, we observe that the plaintiff went to trial of this action in the first Court upon one issue only as regards the merits, namely, whether Dhunuk

Dharee and Brojo Koomar were ever really in occupation of the property conveyed under the *Bynamah* of the 4th October 1845, or were they only nominal parties, the father himself continuing to hold possession subsequent to the execution thereof; and with a very little consideration, I think it is clear upon the wording of this plaint that this was the only real issue between the parties to the suit. The plaintiff did not seek to set aside the deed of the 4th October 1845. The position taken up by him as against the defendants, the grantees of Dhunuk Dharee and Brojo Koomar, was that no possession had ever passed to their vendors, but that, in fact, they had bought directly from the father in possession of the property. That being so, the whole merits of the plaintiff's case turned upon whether the father was so in possession or not. At any rate, he was content to go to trial upon that one issue which has been found against him in both Courts, and I do not think that he is, under these circumstances, entitled to complain that another matter of evidence which might have borne upon the larger question of whether the deed of 1845 was *benamee* or not, namely, evidence as to the passing of consideration-money, was not taken into consideration by the Lower Appellate Court.

The *second* ground of special appeal is, that the Judge's decision upon the point of possession is erroneous, inasmuch as the documents relied upon by him are not evidence of actual possession, and he has not noticed and weighed the testimony of the witnesses on the part of the plaintiff deposing to the facts as alleged by the plaintiff. I think that the documents which are referred to by the Judge as evidence going to show possession on the part of Dhunuk Dharee and Brojo Koomar are in law evidence of that fact, although, at the same time, I should be disposed to say that they were of a weak character, that is, not very convincing in their nature; but he has weighed them against documents put forward by the plaintiff for the same parties, and come to a conlusion which, I think, is perfectly justified in law that the plaintiff's documents are of no force at all. It is true that he has neglected to refer to the testimony of the witnesses whom the plaintiff says he called to depose to this fact, and who did so depose. But I see that the Lower Court commented upon the testimony of these witnesses, and remarked that it did not appear to that Court to be of much probative value. The plaintiff did not, in his written grounds of appeal to the Lower Appellate Court, make specific objection to this appreciation of his oral testimony exhibited by the first Court, and he has not satisfied me in any other way that he pressed this evidence upon the attention of the Lower Appellate Court. I, therefore, feel myself bound to attribute the silence of the Judge with regard to this oral testimony, rather to its not having been brought under his notice by the plaintiff than to his having altogether neglected to consider it.

The *third* ground of special appeal relied upon before us is, that the determination of the question whether the deed of 4th October 1845 was *benamee* or not, which formed the sole basis of the judgment of the Lower Appellate Court, does not dispose of the plaintiff's claim to a certain Mouzah Bungra. The plaintiff, no doubt, does in his plaint claim Mouzah Bungra, on the ground that it was sold in execution of a decree against his father made after the date of the deed of 4th October 1845, and that the execution-proceedings in which it was sold were collusive on the part of his father and Dhunuk Dharee and Brojo Koomar; but it is hardly necessary to remark that, if the deed of 4th October 1845 was not *benamee*, but a valid instrument of alienation, there is an end altogether of any supposition that his father and Dhunuk Dharee and Brojo Koomar were acting collusively in this matter to defraud the plaintiff or to the damage and diminution of his ancestral estate, for in that case the property had *bonâ fide* passed out of the hands of his father by that deed of October 1845. It seems almost impossible to understand how any cause for collusion between the father and his alienees could have arisen, and none such certainly has been specified before us, when he had already, as against them, completely divested himself of all interest in the mouzah. So that, as regards this portion of the property sued for, as well as the rest, the *bona fides* of the transfer under the deed of October 1845 affords an answer to the plaintiff's claim in the shape which he has chosen to give to it.

The *fourth* ground of special appeal is, that, even if the deed of October 1845 was not *benamee*, but a deed for good consideration, still it effected an alienation of ancestral property, and that such an alienation by the father during the life of a son without the son's consent would be invalid under the Mitakshara law. To answer this ob-

jection it is enough to say that it was not made a matter of issue in the first Court; nor was it made matter of complaint to the Appellate Court that an issue of fact on this point had not been raised and tried. Now, it is clear that an issue of fact is absolutely necessary between parties for the proper disposal of a question of this kind, because whether the alienation was valid or not, has to depend entirely upon the circumstances under which it was made, the consideration which was given for it, and, I may add, upon another disputable fact, which is not, as I understand, admitted by the defendants in this case, namely, the time of the plaintiff's birth. Therefore, as an issue of this sort has never been asked for, I think that this ground of objection to the decision of the Lower Appellate Court cannot now be entertained.

One more objection was argued before us, namely, that the Lower Appellate Court has given no decision as to the plaintiff's claim to the declaration of right which he asked for relative to the property in the possession of his father. As to this, it is enough to say that no issue which could have been the foundation for such a declaration was raised in the first Court; nor was any objection made to the Lower Appellate Court that such an issue had not been framed. And the omission of the Court to frame this issue is to me perfectly intelligible, for it does not appear to me that there is anything whatever in the facts of the case to lead to the supposition that the plaintiff was entitled to such a declaration. It needs not now to be remarked that the plaintiff cannot come into Court to obtain a declaration of right against all the world, but can only ask it against some one who has challenged that right either by actually invading it or threatening to make it; and from what I have heard in the argument of the case on one side and on the other, I have not gathered that there is a particle of evidence to suggest that any of the defendants ever threatened the plaintiff's rights in the property in regard to which he asks for the declaration. Had there, therefore, been an issue upon this point, which I have already mentioned was not necessary before a declaration could be made, it seems to me that the plaintiff must have utterly failed upon it. The special appeal must, in my opinion, be dismissed with costs; and, in saying this, I desire to add that I think this suit is an instance of the accumulation of different causes of action in one plaint which ought to be discouraged in the highest possible degree by this Court. It is, in truth, one of those cases in which I must repeat what I have often unfortunately had occasion to say before, that it was a neglect of duty on the part of the Court of first instance to admit a plaint containing all these distinct causes of action against different defendants, upon the files of the Court for tr a

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The 29th April 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble W. S. Seton-Karr, L. S. Jackson, J. B. Phear, and A. G. Macpherson, *Judges*.

Limitation—Reversionary heir—Female heir.

Case No. 460 of 1867.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 21st December 1866, reversing a decision passed by the Moonsiff of Madareepore, dated the 2nd February 1865.

Nobin Chunder Chuckerbutty (Plaintiff), *Appellant*,

versus

Issur Chunder Chuckerbutty and others (Defendants), *Respondents*.

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Appellant.

Baboos Hem Chunder Banerjee and *Shushee Bhoosun Bose* for Respondents.

When a childless Hindoo widow is the heiress and legal representative of her husband, the reversionary heirs are bound by decrees relating to her husband's estate, which are obtained against her without fraud or collusion; and they are also bound by limitation by which she, without fraud or collusion, is bound.

The words "cause of action" in Act XIV. of 1859 refer, not to a new cause of action accruing to the reversionary heir personally, but to the cause of action which accrued to the heir or representative, for the time being, of the deceased.

When alienations of her husband's estate are improperly made by the widow, they are good as against her for her life; and the reversionary heir's cause of action does not accrue until her death. But when property belonging to the husband's estates is held adversely to the widow and never reaches her hands, the cause of action accrues to her, and a suit, whether by her or by the reversionary heir, must be brought within the usual period, counting from the commencement of the adverse possession.

This case was referred to a Full Bench on the 25th September 1867, under the following orders, recorded by Bayley and Miller, JJ.:—

Miller, J.—THE first point raised before us in this special appeal is, that the Lower Appellate Court has committed an error in law in holding that the claim of the special appellants to the property in suit is barred by the Statute of Limitations, when their cause of action did not accrue until after the death of Dhone Mala, which took place in 1266 B. S. We think that this objection is a valid one. We are of opinion that limitation cannot run against a reversionary heir under the Hindoo Law until after the death of the female heir who succeeded to the estate of the deceased proprietor. There can be no doubt that the special appellants could not have maintained an action for the possession of the lands in dispute during the lifetime of Dhone Mala. Their right to such possession only accrued after Dhone Mala's death, and it would be contrary to the very principle upon which the Statute of Limitations is founded, to hold this right barred for a supposed neglect on their part to sue within a period during which they were not in a position to sue at all.

In defining the *status* of a Hindoo widow, their Lordships in the Privy Council remarked in the case at page 527 of Sutherland's Privy Council Judgments: "The same principle which has prevailed in this country as to tenants-in-tail representing the inheritance would seem to apply to the case of a Hindoo widow." But it does not follow from this (as has been contended before us by the pleader for the respondent) that the reversionary heir is bound by the *laches* of the widow. On the other hand, we find it laid down in page 446 of Angell on Limitation that adverse possession for any length of time cannot affect the title of a claimant who had no right of entry during that time, and in support of this position a case is quoted by the author in the same page, in which it was distinctly held that limitation does not run against a remainder-man until after the demise of the last tenant-in-tail without issue. It has been held by the Privy Council in the case already referred to that a decree obtained against a widow in connection with the estate of her husband will bind the heirs of the husband claiming in succession to her; but it has been held at the same time that the latter can always impugn the correctness of the decree upon *special* grounds. We think that the negligence of the widow is one of the special grounds contemplated by their Lordships.

Several cases of this Court have been quoted by the pleaders on both sides in support of their respective views. The appellant relied upon the following cases:—

Weekly Reporter, Vol. 1, p. 347; Vol. 2. pp. 271, 276; Vol. 6, p. 338; Vol. 7, p. 453; 2 Hay, p. 648; Marshall, p. 33.

The respondent, on the other hand, relied upon a judgment of this Court (not printed) in special appeal No. 551 of 1867, decided on the 26th July 1867, and quoted from Macpherson on Mortgages, page 19, in which it is laid down as a settled proposition of law that adverse possession that would bar the widow would bar the reversioner also.

As, therefore, there is a conflict of authority on the point, we refer the case to a Full Bench for final adjudication.

The judgments of the Full Bench were delivered as follows:—

Peacock, C.J. (Seton-Karr, J., concurring).—Ramdoollub Chuckerbutty died leaving two sons, two daughters, and a widow. The two sons died without issue in the lifetime of the widow, and upon their death their respective estates descended to the widow as heir. The two daughters each had a son or sons, who, upon the death of the widow, succeeded to the estate of their uncle. After the death of the sons, a stranger entered, and the widow never took possession. The widow died in 1266. The question is whether the sons of the daughters had a fresh cause of action upon the death of the widow.

The question of law which is raised for our opinion is whether, if a person dies

leaving a female as his heir-at-law, the reversionary heirs have a fresh cause of action in regard to the estate of the ancestor at the time of the death of the female heir, or whether they are barred by limitation if the female heir would have been barred. The question is a very important one, and depends upon the proper construction of the Statute of Limitation, having regard to the nature of the respective estates under the Hindoo Law of a female heir and of the reversionary heirs.

There are several conflicting decisions upon the point in this Court, and it is upon the ground of those decisions that we have to determine the question.

The arguments adduced by the Judges in support of their several views are of considerable weight, and they have been substantially incorporated in the argument of the vakeels before us.

A case was cited from Fulton's Reports, page 329, for the purpose of showing the opinion of the late Supreme Court upon the subject; but it is not very clear what are the grounds upon which that case turned. The female heir in that case had entered into possession. Sir John Grant, who delivered the judgment, did not state whether his opinion was founded upon the point of limitation simply, or upon the ground that a grant by the female heir might be presumed, and, if so, that it would not be binding beyond her own life. He says: "I think that, if we were to presume a grant, it would not be binding beyond the widow's life."

It is unnecessary for us to determine in this case when the cause of action of the reversionary heirs would accrue if the female heir were to sell the estate without lawful cause. In that case, the purchaser entering into possession would not be a wrong-doer during the life of the female heir. No cause of action would accrue to the female heir against him for entering under her grant, although it would not be binding as against the reversionary heirs, and possibly might not be so against creditors of the ancestor.

In this case, a cause of action did accrue to the female heir, and the question is, whether the reversionary heirs upon her death acquired a new and independent cause of action within the meaning of the Statute of Limitation, or merely succeeded to the same cause of action which was vested in the female heir in her lifetime.

Whatever may have been the date of the decision in the case cited from Fulton's Reports, it must have been before the decision of the late Supreme Court in Goluckmonee Dabee *versus* Degumber Dey, decided on the 15th of November 1852, which is set out in Mr. Justice Macpherson's book on Mortgages, 2nd edition, page 20. Sir Lawrence Peel in that case says: "It has been invariably considered for many years that the widow" (speaking of the widow succeeding as heir) "fully represents the estate, and it is also the settled law that adverse possession which bars her bars the heir also after her, which would not be the case if she were a mere tenant for life, as known to the English Law."

It was also held by the Privy Council in the Shiva Gunga case,* 9th Moore's Indian Appeals, page 539, that, in the absence of fraud or collusion, a decision against a widow, with regard to her deceased husband's estate, would be binding upon the reversionary heirs.

In the 8th Moore's Indian Appeals, page 550, it was said that comparing a Hindoo widow to a tenant for life was calculated to mislead. In the Shiva Gunga case, the widow was compared to a tenant-in-tail; but the heirs in that case were not likened to remainder-men, and must, therefore, have been in the position of tenants-in-tail. Such heirs would be bound, if the tenant-in-tail was barred, though the remainder-man might not be.

If, then, in the Shiva Gunga case, the widow was like a tenant-in-tail, and the reversionary heirs were like the issue-in-tail, and the same likeness exists in the present case, the reversionary heirs would be barred by limitation which ran against the female heir. If the female heir in the present case had sued the wrong-doer, and, without fraud or collusion, had failed to make out her case to turn him out of possession, the reversionary heirs would have been bound by the decision. I am assuming that they are not claiming through the female heir.

For instance, if the female heir had sued the wrong-doer, and he had set up a purchase from the ancestor, and had succeeded in that defence at the suit of the female heir, the reversionary heirs would be barred by the decision in the absence of fraud or collusion.

* *See* 2 W. R., P. C. Rulings, p. 31.

The Law of Limitation is passed for the benefit of defendants, partly upon the ground that, after length of time, they may have lost the evidence in support of their right; and it would be anomalous to hold that a female heir was barred by limitation, lest the defendant should have lost his evidence to prove his right against her, and to hold that the reversionary heirs, who would have been barred by a decision against the widow, if she had brought her suit in time, are not barred by limitation against her.

Possibly, if we could trace the Hindoo Law to its origin, we should find that a widow did not succeed to her husband's estate as his heir. It was doubtful at one time whether she did so. It was supposed that she took, because she was part of the husband. In the *Dyabhaga*, Clause 11, Section 1, Verse 2, it is said: "In regard to the wealth of a deceased person who leaves no male issue, authors disagree in consequence of finding contradictory passages of law." Thus Vrihaspati says: "In Scripture and in the Code of law, as well as in popular practice, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased, half the body survives. How, then, should another take his property while half his person is alive? Let the wife of a deceased man who left no issue take a share, notwithstanding kinsmen, a father, a mother, or uterine brother be present."

This would account for the rule which says that the reversionary heirs of the husband are those who would have been his heirs if he had lived up to the time of the death of his wife.

It is difficult to reconcile the above principle with the fact of sons and grandsons taking during the life of the widow. I have never been able to find the principle accurately defined by which sons take in preference to a widow. The *Dyabhaga* rests the right of the sons upon the doctrine that succession is grounded solely upon the benefits conferred (*Dyabhaga*, Clause 11, Section 1, paras. 32, 33, and 31); but probably the right of the sons in preference to that of the widow depends upon the doctrine, that a son or other descendant is consubstantial with the father or other ancestor. Menu says: "The husband, after conception by his wife, becomes himself an embryo, and is born a second time here below." (See also Colebrooke's Hindoo Law, Volume (?), page 459; *Viavastha Durpana*, 1st Edition, Volume 1, page 33, note.)

However this may be, it is settled that the wife does take as heir to her husband in default of issue, and that, upon her death, those persons succeed as reversionary heirs who would have been the heirs of the husband if he had died at that time. It is a very anomalous position that a person should take as heir, and that his right to take as heir should be determined according to a state of facts not existing at the time of the death of the ancestor, but caused by events which may have occurred many years after his death.

These considerations lead me to the conclusion that a reversionary heir, who is bound by a decision against a widow respecting the subject-matter of inheritance, is also barred by limitation, if, without fraud or collusion, the widow is barred by limitation.

It has been contended that, as the widow cannot absolutely convey away her husband's estate without sufficient cause so as to be binding upon the reversionary heirs, they ought not to be barred by limitation against the widow; otherwise she will be able, if she lived a sufficient time, to do indirectly, by allowing adverse possession to be held against her, that which she could not do directly, by a sale without sufficient cause.

But reversionary heirs presumptive have a right, although they may never succeed to the estate, to prevent the widow from committing waste; and I have no doubt that, if a proper case were made out, reversionary heirs would have a sufficient interest, as well as creditors of the ancestor, by suit against the widow and the adverse holder, to have the estate reduced into possession, so as to prevent their rights from becoming barred by limitation.

In the case of moveable property, such as Government paper, a Hindoo, although he is not bound to do so, may obtain probate or letters of administration. Adverse possession or wrongful detention of Government paper, or the like, would give a cause of action to the heirs, or, in the case of probate or letters of administration, to the executor or administrator. If an executor or administrator should fail to sue, to recover the Government paper within the time limited by law, he would be barred by limitation, but I have no doubt that a suit could be maintained against him and the wrong-doer by legatees or creditors of the deceased owner, or by the heirs, who are in the same position

as the next of kin would be in England, to compel the recovery of the Government paper, and the application of it in due course of law.

The cause of action of the executor or administrator would arise from the time of the wrongful detention of the paper from him. But suppose he should die after the paper had been detained against him for five years, and the next person in succession should take out letters of administration with the will annexed, or if there were no will, simple letters of administration of the property not administered by the deceased executor or administrator, the cause of action of the administrator *de bonis non* would not accrue at the time of the death of the former executor or administrator, but he would merely succeed to the cause of action which was vested in the former executor, and limitation would date as against him from the same period as it would have dated if the former executor or administrator had lived.

It has been held in England that an executor of an executor or an administrator *de bonis non* has a right to sue if he commences his suit within one year after the death of the preceding executor or administrator, notwithstanding that period may exceed the period of limitation which the former executor or administrator had.

It is unnecessary to say whether a similar law would apply here. I mention it merely because I think it is an argument to show that, in the case of representatives, where one is substituted for another in consequence of death or other cause, the substituted representative has only the same cause of action as the representative for whom he is substituted.

Now, according to the Hindoo Law, it appears to me that the widow, although she has a beneficial interest in the property, is still only to some extent a representative, and holds the property, not merely for her own benefit, but for the benefit of the deceased.

It is said that the reversionary heirs could not sue during the lifetime of the widow, and that, therefore, they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow as a representative, and see that the reversionary heirs are bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion, we are of opinion that they are also bound by limitation, by which she, without fraud or collusion, is barred. When, therefore, we construe the words "cause of action" in the Statute of Limitation, we must consider them as referring, not to a new cause of action accruing to the reversionary heirs personally and individually, but to the cause of action which accrued to the heir or representative, for the time being, of the deceased.

This is not the only instance in which a person may be barred by time which has elapsed before he has a right to sue. If an ancestor is dispossessed, the cause of action of his heir accrues, not at the time when the ancestor dies, and when he could sue, but at the time when the ancestor was dispossessed, and ought himself to have sued; and there is no more reason why a reversionary heir should have a fresh cause of action from the death of the widow because he could not sue during her lifetime, than that an immediate heir should have a fresh cause of action commencing at the date of the ancestor's death because he could not sue during the lifetime of the ancestor.

A reversionary heir cannot sue during the lifetime of the widow, because during her life the estate of the deceased is represented by her as the heir-at-law. I have spoken of a widow in many parts of this judgment, but the remarks which I have made apply equally to other female heirs, such as mothers, daughters, and the like.

It appears to me that this case ought to go back to the Division Bench which referred it, with the expression of our opinion that the period of limitation against a reversionary heir is not to be reckoned from the time at which he succeeded, *viz.*, from the date of the death of the female heir, but from the date at which it would have been reckoned if the female heir had lived and brought the suit.

Jackson, J.—I entirely concur in the opinion of the Chief Justice that the plaintiff was barred in the present case. We sit here unquestionably to administer the Hindoo Law in those cases to which that law applies, and on all points not decided we are clearly bound to refer to the original sources of that law, and to interpret them to the best of our ability; but where any point having already arisen has been decided by the authority of the highest Court which takes cognizance

of questions of Hindoo Law, we are, I think, as clearly bound implicitly to guide ourselves by the decisions of that tribunal. It has been distinctly held by the Privy Council in the Shiva Gunga case that a decision fairly arrived at without fraud or collusion in the presence of a Hindoo widow in possession of the estate will bind reversionary heirs. That being so decided, it appears to me impossible to escape the conclusion that an adverse possession which barred the widow will also bar the heirs, and in that opinion we are fully and strongly supported by the decisions of the late Supreme Court in the case to which His Lordship the Chief Justice has referred.

It was an argument of the pleader for the plaintiff in this case that a widow who is incompetent, except in certain cases, to alienate the estate left by her husband, ought not to be allowed indirectly to do that which she cannot do directly. It appears to me incorrect to say that, in such a case as this, the widow has done anything in the nature of an alienation indirectly or directly. If, indeed, it could be shown that she had colluded with the persons holding adverse possession, so that, in fact, a case of fraud could be made out, then, no doubt, she might be held to have done indirectly that which the Hindoo Law forbids her doing directly. But in such a case as this, undoubtedly, a reversioner aggrieved by such frauds would be entitled to bring his action.

I state very shortly the principal reasons upon which my own conclusions are founded, because, although I am very far from dissenting from any observations contained in the elaborate judgment which we have just heard, I am not at this moment prepared unreservedly to assent to the whole of them.

Phear, J.—I too desire to avoid pledging myself to all the illustrations which have fallen from the Chief Justice; but with this exception, I concur entirely in the reasoning which he has given in support of his conclusions, and I concur also in the remarks which have been made by Mr. Justice Jackson.

I will add that it seems to me that, when a reversionary heir succeeds to the property of his ancestor on the death of an intervening female heir, he takes substantially the same proprietary right as she enjoyed, and no more, though, doubtless, she was fettered in a way that he is not, with regard to the dealings with the property, *viz.*, her alienations are often liable to be avoided by him when he succeeds to the right of succession. If, then, that proprietary right was invaded while in her hands, the cause of action accruing from the act of invasion can be none other when it comes to be pursued by the reversionary heir than it was when the female heir herself was the person to do so. Both the right which is infringed, and the act complained of as the infringement, are the same, whether it is he or she who sues. It follows that, if the reversionary heir brings a suit founded upon that act of invasion of the proprietary right, the time prescribed in the Statute of Limitation runs against him from the date of the act. Of course, it may be that the possession of a third party, which is no trespass on the proprietary right when in the hands of the female heir, may, if persisted in, become so when that proprietary right passes to the reversionary heir. In such a case, the infringement of the proprietary right first commences on death of the female heir, and with it the cause of action arises. This is so when the female heir conveys under such circumstances that her alienation can be questioned by the reversionary heir.

With these views, I entirely agree in the answer which the Chief Justice proposes to send to the Division Bench.

Macpherson, J.—I also concur in the proposed answer. But a very great difference exists between the case immediately before us, and the case in which a mother (or other Hindoo female having an estate similar to that of a childless widow) has herself alienated property belonging to the estate which she has taken as heiress, without sufficient reason for making such alienation. In the latter case, the alienation is good as against her, and so far as her own life-interest is concerned. Therefore, in fact, no cause of action necessarily arises at all with respect to her alienation so long as she lives. The cause of action does not arise until her death, when the reversioner's cause of action for the first time accrues. In the case before us, the property having never reached the hands of the mother at all, having been throughout held adversely to her, the cause of action accrued in the mother's lifetime; and, therefore, a suit to recover possession, by whomsoever it may be brought, is barred, unless instituted within twelve years from the commencement of the adverse possession.

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The 29th April 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Hindoo Law—Ancestral property—Alienation—Son's right to recover possession—Refund of purchase-money—Onus probandi.

Case No. 1198 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 25th March 1867, reversing a decision passed by the Moonsiff of that District, dated the 31st May 1866.

Modhoo Dyal Singh (Plaintiff), *Appellant*,

versus

Golbur Singh and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. C. Gregory for Respondents.

Under the Mitakshara Law, a son is entitled to recover from a purchaser from his father ancestral property improperly sold by the father, and in the absence of proof of circumstances which would give the purchaser an equitable right to compel a refund from the son, the latter would be entitled to recover without refunding any part of the purchase-money.

But if it is proved that the son got the benefit of his share of the purchase-money, the son must refund his share of the purchase-money before he can recover his share of the property sold. And where the purchase-money has been applied to pay off a valid incumbrance on the estate, the right of the son to recover will be subject to that of the purchaser to stand in the place of the incumbrancer.

The *onus* in such cases to prove the application of the purchase-money lies on the purchaser.

This case was referred to the Full Bench on the 3rd December 1867, under the following orders recorded by Kemp and Glover, JJ.:—

Glover, J.—THIS special appeal is preferred by the plaintiff against that part of the Principal Sudder Ameen's decision which orders him to repay the money advanced to his father Sheo Kishen (Rupees 2,900), before he can get possession of the family-property.

The Principal Sudder Ameen has decided that the plaintiff must refund, on the authority of a decision of this Court, dated September 30th, 1863, Muddun Gopal Thakoor *versus* Ram Buksh Panda and others (6 Weekly Reporter 71), in which it is laid down that, in the absence of evidence to the contrary, it must be presumed that the price received by a father selling a portion of an ancestral estate became part of the assets of the joint family, and that, if a son seeks the aid of a Court to set aside the purchase, he must do equity and offer to repay the purchase-money, unless he can show that no part of such purchase-money or the produce of it ever came into his hands.

We have been unable to find any other decision of this Court in which a similar doctrine had been laid down, and we are unable to assent to it.

A long current of decisions* has fixed it as settled law that by the Mitakshara a father cannot alienate ancestral property without the consent of his son, unless for certain necessary purposes. In all other cases, the son has an absolute veto on the sale, and must succeed in a suit to set it aside.

* Beginning with the Sudder Dewanny Adawlut Ruling in the case of Ameerut Misser, Sudder Dewanny Adawlut Reports, 1861, page 193, and ending with the Full Bench Ruling of the High Court in the case of Rajah Ram Tewarree and others, 8 Weekly Reporter 15.

In the present case, it has been found that there was no necessity and no acquiescence, and we do not see, therefore, why the purchaser should be entitled in equity to a refund from the son of his purchase-money. The son never knew of the sale, and never agreed to it. The sale may have been one of a most imprudent description, and one which no man of sense would have made.

In the present case, neither the son nor the father appears to have derived any benefit, for the land was sold in order to redeem a mortgage which had still three years to run.

But, even were it not so, it appears to us that, as the Mitakshara Law gives a son an equal right with the father in the matter of

alienation, it must give him that right absolutely; and that a son seeking to set aside imprudent or unnecessary sales made by a father is not bound to refund to the purchasers. If it were so, he would not succeed on his right as a son, but on his power as a man of substance. A poor man would be virtually deprived of the right which the Mitakshara Law undoubtedly gives him.

Cases of this sort appear to us to be those in which the maxim of "*caveat emptor*" should be strictly applied. Every purchaser in the Mithila districts knows perfectly well the nature of a father's rights in ancestral property; and if he chooses to purchase, without first securing the consent of the heir, or without assuring himself of the existence of a necessity, he has only himself to blame if the son recovers possession of what has been improperly taken from him. He appears to us to have no claim to equitable consideration.

As our opinion differs from that of the learned Judges who decided the case above referred to, we must, in accordance with the rules of practice laid down for our guidance, send up this case for the orders of a Full Bench.

The point on which we ask the Full Bench's decision is whether, under the Mitakshara Law, a son, who recovers his ancestral estate from a purchaser from the father on proof that there was no such necessity as would legalize the sale, and that he never acquiesced in the alienation, is bound in equity to refund the purchase-money before recovering possession of the alienated property.

The judgment of the Full Bench was delivered as follows:—

Peacock, C. J.—The question upon which the opinion of the Full Bench is asked is, whether under the Mitakshara Law a son, who recovers his ancestral estate from a purchaser from the father upon proof that there was no such necessity as would legalize the sale, and that he never acquiesced in the alienation, is bound in equity to refund the purchase-money before receiving possession of the alienated property.

There can be no doubt that, although the word "recovers" is used in this question, the meaning is whether, under the circumstances stated, a son is entitled to recover except upon condition of refunding the purchase-money. Assuming that to be the question, I think the answer should be that, in the absence of proof of circumstances which would give the purchaser an equitable right to compel a refund from the son, the latter would be entitled to recover without refunding the purchase-money or any part of it. We express no opinion as to whether he would be entitled to recover the whole or only his share of the estate.

Having answered the question propounded, I think we ought to add that, if it is proved to the satisfaction of the Court that the purchase-money was carried to the assets of the joint-estate, and that the son had the benefit of his share of it, he could not recover his share of the estate without refunding his share of the purchase-money. So, if it should be proved that the sale was effected for the purpose of paying off a valid incumbrance on the estate which was binding upon the son, and the purchase-money was applied in freeing the estate from the incumbrance, the purchaser would be entitled to stand in the place of the incumbrancer, notwithstanding the incumbrance might be such that the incumbrancer could not have compelled the immediate discharge of it; and the decree for the recovery by the son of the ancestral property, or of his share of it, as the case might be, would be good, but should be subject to the right of the purchaser to stand in the place of the incumbrancer.

It appears to me, however, that the *onus* lies upon the defendant to show that the purchase-money was so applied. I do not concur with the decision which has been referred to from 6 Weekly Reporter, page 73, in which it is said that "in the absence "of evidence to the contrary, it must be "assumed that the price received by the "father became a part of the assets of the "joint-family." If the father was not entitled to raise the money by sale of the estate, and the son is entitled to set aside that sale, the *onus* lies on the person who contends that the son is bound to refund the purchase-money before he can recover the estate, to show that the son had the benefit of his share of that purchase-money. If it should appear that he consented to take the benefit of the purchase-money with a knowledge of the facts, it would be evidence of his acquiescence in the sale.

I think the case must go back with this answer to the Division Bench which referred the question to us, in order that the case may be finally determined upon the merits by that Bench.

h

The 29th April 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble W. S. Seton-Karr, L. S. Jackson, J. B. Phear, and A. G. Macpherson, *Judges.*

Landlord and tenant—Ejectment—Clause 6, Section 23, and Section 25, Act X. of 1859—Section 15, Act XIV. of 1859.

Case No. 689 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 15th January 1867, reversing a decision passed by the Assistant Commissioner of that District, dated the 29th August 1866.

Jonardun Acharjee (Plaintiff), *Appellant,*

versus

Haradhun Acharjee and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Nil Madhub Sein for Respondents.

A person calling himself a ryot has not a right to recover possession under Clause 6, Section 23, Act X. of 1859, merely because the landlord turned him out of his own authority, and without applying for the Collector's assistance under Section 25 of Act X. of 1859.

In a suit under Clause 6, it is necessary to determine the question whether the plaintiff has been illegally ejected; this involves the question whether the tenancy was at an end or not when the ejectment took place; if it was at an end, the plaintiff must fail.

If a landlord ejects a ryot of his own authority, without the intervention of a Court of law or the Collector, the case will fall within Section 15 of Act XIV. of 1859; and if the ryot sue him in the Civil Court within six months, he will be entitled to recover possession without reference to the title of the landlord to eject him.

This case was referred to a Full Bench on the 25th September 1867, under the following orders, recorded by Bayley and Mitter, JJ.:—

Mitter, J.—This was a suit instituted by the special appellants under Clause 6, Section 23, Act X. of 1859. The defendant (special respondent) admitted the ejectment, but pleaded in justification that the special appellant had no right to occupy the land in suit, the period of his lease (which was for *seven* years) having expired at the commencement of the year in which the dispossession took place.

In special appeal it is contended before us that the act of dispossession being admitted by the landlord, the Lower Appellate Court ought to have passed a decree in favor of the special appellant without any enquiry into the question of title or right to occupy the land.

We think that this contention is sound. A suit under Clause 6, Section 23, Act X. of 1859, has been already declared by a Full Bench decision of this Court to be merely a possessory suit. No question of right or title can be gone into, and the result of the action depends entirely upon the proof or otherwise of the fact of *illegal ejectment* complained of.

It has been contended by the pleader for the respondent that every act of ejectment is not necessarily illegal because it has been effected without the intervention of a Court of law, and that a zemindar or other person entitled to the receipt of rent is fully competent to dispossess a ryot (not having a right of occupancy either by law or contract) of his own authority, without invoking the assistance of the Collector under Section 25 of the Act.

We have given our best attention to these arguments, and have come to the conclusion that they are not correct. We think that the whole policy of the Legislature has been to put an end to the exercise of any such arbitrary power. Section 15, Act XIV. of 1859, provides a full and complete remedy against every act of ejectment from land that is accomplished without the "consent of the party in possession," and "otherwise than by due course of law." We think also that Section 25, Act X. of 1859, was intended to put a stop to all similar acts of dispossession on the part of the landlord. We felt some doubt about the meaning of the words "If any zemindar or other person

"in receipt of the rent of land *requires* "*assistance* to eject," &c., used in that Section. But, on the whole, we think that such assistance of the Collector's authority is necessary in every case in which the tenant in possession of the land is unwilling to leave it. Otherwise, if it is once conceded that the necessity for such assistance is to be left entirely at the discretion of the landlord himself, very few zemindars will be found to ask for it from the hands of the constituted authorities, but will take the law into their own hands, and so revive the abuses which the law desires to remove; and the Section itself would be reduced to a dead-letter, at least in the majority of cases.

Three decisions of this Court have been quoted before us in the course of the argument. The first is reported in page 191 of the Weekly Reporter, Volume I. This case is in all fours with the present, but it was held there that, in a suit under Clause 6, Section 23 of Act X. of 1859, the tenant is bound to show some right to be restored to his tenure, and that a zemindar is *not* bound to proceed under Section 25 of the Act, unless he finds some legal impediments in his way. In page 361 of the same Volume, another Division Bench of this Court held in a similar case that the question of *right* must be gone into, but the landlord is bound to show that the tenure has lapsed. The third case is reported in page 119 of the same Volume. It was held in this case, and in our opinion correctly, that "in any "case the zemindar is bound to proceed to "the ejectment by due process of law, and "not *proprio motu*."

Thus, as there is a conflict between the last-mentioned case and the two preceding, we refer the question to a Full Bench for an authoritative adjudication.

The judgment of the Full Bench was delivered as follows:—

Peacock, C. J.—This is a suit brought under Clause 6, Section 23, Act X. of 1859, by a person calling himself a ryot, and the question which has been submitted to this Court is substantially whether the person who held as tenant (assuming the tenancy to have come to an end) has a right to recover possession merely because the zemindar did not apply for the assistance of the Collector under Section 25 of Act X. of 1859.

The Full Bench case to which reference is made (No. 3130 of 1864, 7 Weekly Reporter 186), merely held that a suit for a declaration of right might be brought in the ordinary Civil Court.

In suits under Clause 6, Section 23. Act X. of 1859, it is necessary to determine whether the plaintiff has been illegally ejected, which involves the question whether the tenancy was at an end or not. If, after the expiration of a tenancy, a zemindar wishes to obtain possession without resorting to a Court of law, he may apply under Section 25 for the assistance of the Collector, who will thereupon summarily enquire into the case, and if he finds that the tenancy is at an end, will render assistance in turning the tenant out. If, however, the zemindar acts of his own authority and without the intervention of a Court of law, or of the Collector, he comes within Section 15 of Act XIV. of 1859; and if the ryot sue him in the Civil Court within 6 months, he will be entitled to recover possession without reference to the title of the zemindar to eject him. If, however, he sue in the Collector's Court under Section 23, the question is open as to whether the tenancy was at an end or not; and, if at an end, he must fail in his suit.

It appears to me that this case must go back to the Division Bench to be determined on the merits.

The 29th April 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, A. G. Macpherson, and C. Hobhouse, *Judges.*

Rival decree-holders—Action—Section 270, Act VIII., 1859—Appeal.

Case No. 654 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 15th January 1867, modifying a decision passed by the Sudder Ameen of that District, dated the 26th January 1866.

Gogaram (Defendant), *Appellant,*

versus

Kartick Chunder Singh (Plaintiff). *Respondent.*

b

Baboos Kalee Kishen Sein and *Kadernath Chatterjee* for Appellant.

Mr. R. T. Allan and *Baboo Ashootosh Dhur* for Respondent.

An action will lie in the Civil Court by a decree-holder against the holder of another decree in order to obtain a refund of money which has been paid to the latter under an order passed in the execution department in contravention of the provisions of Section 270 of the Code of Civil Procedure. It is for the Court to decide whether, having regard to all the equities between the parties, the plaintiff is entitled to recover or not.

No appeal lies from an order directing the distribution of sale-proceeds under Section 270 of Act VIII., 1859.

This case was referred to the Full Bench on the 26th September 1867, under the following orders, recorded by Loch and Dwarkanath Mitter, JJ.:—

Mitter, J.—THIS was a suit instituted by the plaintiff (special respondent) to recover a certain sum of money that has been paid away to the defendant (special appellant) under an order of the Civil Court passed in the execution department. It appears that the plaintiff and the defendant are two rival decree-holders against one and the same judgment-debtor. Certain properties belonging to the judgment-debtor having been sold in execution, an application was made by the plaintiff to the Judge to have his decree satisfied first from out of the proceeds realized by the sale. The Judge refused this application on the opposition of the defendant; and a miscellaneous appeal being preferred to this Court, the order of the Judge was reversed, though it appears to us that the appeal was entertained without jurisdiction. In the meantime, however, the money having been paid away to the defendant under an order of the Judge, the plaintiff has been obliged to bring the present action to obtain a refund of the same, upon the ground that the process of attachment taken out by him being prior in point of date to that taken out by the defendant, he, and not the defendant, had a preferential title to the sale-proceeds.

It is now contended before us in special appeal that such a suit will not lie, and in support of this position two cases have been cited to us at the argument, the first of which is reported in page 181 of the special number of the Weekly Reporter; and the second in page 113, Volume VII. of the same Reports. We think, however, that this contention is not sound, and that the precedents relied upon are contrary to law. In support of this view, we have very little to add to the able and elaborate judgment recorded by Mr. Justice Levinge, whose opinion was overruled by a majority in the first case. There is no statutory bar to the hearing of such a suit, and in the absence of such a bar we think that the Civil Courts are bound to take cognizance of it as provided for in Section 1 of the Code of Civil Procedure. Nor do we think that there is any reason in justice or equity why the plaintiff should be deprived of the ordinary privilege of suing for that to which he was legally entitled, and which has been made over to a wrong party by an erroneous order of the Court passed in a summary manner. The absence of any provision for an appeal in the miscellaneous department seems to us to afford an additional reason for supposing that the Legislature did not intend to give any finality to the proceedings held in that department. As, however, the two cases above referred to are directly in favor of the contention raised before us by the special appellant, we are obliged to wait for a more authoritative ruling, before disposing of the case upon our own responsibility. We, accordingly, refer this case to a Full Bench for the determination of the following question:—

Whether an action will lie in the Civil Courts on behalf of one decree-holder against another for obtaining a refund of money that has been paid away to the latter under an order passed in the execution department in contravention of the provisions laid down in Section 270 of the Procedure Code.

The decision of the Full Bench was delivered as follows:—

Peacock, C. J.—The question which has been asked is, whether an action will lie in the Civil Courts on behalf of one decree-holder against the holder of another decree for obtaining a refund of money which has been paid to the latter under an order passed in the execution department contrary to the provisions of Section 270 of the Procedure Code.

We are of opinion that the question ought to be answered in the affirmative, but we must guard ourselves from being understood to determine that the plaintiff in such a suit would under all circumstances be entitled to

recover. There may be circumstances by which he may be equitably precluded from recovering; and it will be for the Court which decides the suit to determine whether, having regard to all the equities between the parties, the plaintiff is entitled to recover or not.

I concur in the view taken of this case by the decision of the Full Bench of the Agra Sudder Court, to which we have been referred by Mr. Allan, and which is reported at page 443 of the Reports of the Agra Court for September 1864.

Section 270, Act VIII. of 1859, does not expressly give a right of appeal, and by Section 364 it was enacted that no appeal shall lie from any order passed after decree, and relating to the execution thereof, except as is hereinbefore expressly provided. It is clear, therefore, that no appeal lay against such an order, although in one case the order was reversed by a Division Bench upon appeal. The Judges in that case, which is reported in 2 Weekly Reporter, Miscellaneous Rulings, page 48, held that the decree-holder at whose instance the property was sold was entitled to be paid first, and they set aside the order of the Judge declaring that payment should be made to the decree-holder who first attached the property. This is contrary to the ruling reported in the same Volume, page 21, where it was held that there was no appeal from an order directing the distribution of the sale-proceeds. But the fact of the order having been set aside does not, in my opinion, deprive the plaintiff of his right of action.

By Section 1, Act XXIII. of 1861, Section 283 of the Code of Civil Procedure was repealed; and by Section 11 of Act XXIII. of 1861, Section 283 was re-enacted with this addition, "that any questions arising between "the parties to the suit in which the de-"cree was passed, and relating to the execu-"tion of the decree, shall be determined by "order of the Court executing the decree, and "not by separate suit; and the order passed "by the Court shall be open to appeal." In cases between parties to the suit, therefore, the order was made subject to appeal, and a right to bring a separate suit to reverse the order was taken away.

In this case, the question did not arise between the parties to the suit, and consequently the order was not open to appeal. At the same time, there is no express provision by which the right to bring a separate suit has been taken away. When the right of appeal was taken away by Section 364, it appears to me that it was not the intention of the Legislature to take away the right of contesting the summary order by a regular suit, and that seems to be the view of the case taken by Section 11 of Act XXIII. of 1861, which is to be read as part of Act VIII. of 1859, for when by that Section an appeal was given in regard to the matters to which the Section referred, the right to contest the order by a separate suit was expressly taken away.

I am not sure that Section 270 of the Procedure Code applies to this case at all. The property was first attached under a decree of the Moonsiff's Court at the suit of the plaintiff, and was subsequently attached and sold at the suit of the defendant under a decree by the Judge's Court, and the proceeds were made over to the defendant. It seems to me that, whilst the property was under attachment by the Moonsiff's Court, it was not liable to be sold under the decree of the Judge's Court, although it might have been attached subject to the prior attachment of the plaintiff.

I wish to make one remark with regard to the judgment of Mr. Justice Trevor. He says: "That as the action is for money had and received by the defendant to the plaintiff's use, it is necessary that there should be privity between the plaintiff and the defendant" The suit was simply to recover from the defendant a sum of money which the plaintiff contended had been erroneously paid over to the defendant instead of being paid over to the plaintiff. The plaintiff said nothing of the money having been received by the defendant to the plaintiff's use, and there is nothing more likely to mislead or to confuse than by converting a suit brought in the Courts of justice in the Mofussil in this country to the forms adopted according to the English procedure.

If the order of the Judge had not been set aside, the suit would have been one to recover the money from the defendant which had been erroneously paid over to him under a summary order under the execution, or, to use the language which is commonly applied to suits of this nature, to recover the money from the defendant by setting aside the order of the Judge. In such a suit there is no privity between the complainant and the defendant.

This case will go back for final decision to the Division Bench which referred it for our opinion.

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The 29th April 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Admission of secondary evidence—Special appeal.

Case No. 1684 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameeen of Nuddea, dated the 6th July 1867, reversing a decision passed by the Moonsiff of Bongong, dated the 26th February 1866.

Chunder Kant Ghose and another (Defendants), *Appellants,*

versus

Showdaminee Debia and others (Plaintiffs), *Respondents.*

Baboos Bungshee Dhur Sein and *Kalee Mohun Doss* for Appellants.

Baboo Ashootosh Chatterjee for Respondents.

Whether secondary evidence is admissible in the place of primary is a question for the determination of the Court which tries the case on its merits; but such determination is open to special appeal, if it is come to without evidence at all, or without evidence legally sufficient.

Phear, J.—This suit is brought to recover possession of certain lands from the defendants, and it is barred by the Law of Limitation, unless one Mougul Chunder, the late husband of one of the plaintiffs, was in possession of the lands sued for, some time, however short, after the 16th November 1853. The Lower Appellate Court has held that the suit is not barred by the Law of Limitation, and it is now objected upon special appeal that there was no evidence before the Court to support the finding that Mougul Chunder was in possession of the property at any time after the 16th November 1853.

We have heard the advocates of both parties at some length, and have had the advantage of a very full discussion of the evidence given by the witnesses, so far as it bears upon the point of Mougul's possession. We think that the evidence of Harran, Tehsildar and Gomashta, as we think he is termed, of Mougul Chunder, if it is believed, which is, of course, not matter for us to consider here in special appeal, does afford some evidence that Mougul Chunder was in possession of the property up to the date of the decree made in a certain suit, that is, up to the 22nd February 1854, and consequently we think that on special appeal the judgment of the Lower Appellate Court is not open to impeachment upon the ground of objection which we have just mentioned.

Upon the merits of the case it became necessary at the trial for the plaintiff to prove a certain *hibbanamah* of 30th September 1859 as being the root of her deceased husband's title. She did not produce the *hibbanamah* itself, but tendered secondary evidence, oral and documentary, for the purpose of proving that instrument. The Lower Appellate Court has received that evidence, and come to a verdict in her favor upon it.

The second objection made on special appeal is, that, under the circumstances of the case, secondary evidence was not admissible, and that, therefore, the judgment of the Lower Appellate Court is bad in law in this respect. Now, whether secondary evidence is admissible in place of primary and better evidence is always a question for the judicial determination of the Court which has to try the case on its merits; but, of course, like most other judicial determinations of a subordinate Court, although it cannot be as a determination of fact impeached in a Court of special appeal on the merits of the decision, still it must be based upon legal evidence, and therefore it is competent for the party complaining of the admission of secondary evidence to object on special appeal that the decision which the Lower Court has come to as to the admissibility of secondary evidence was given either on no evidence at all or on evidence that was not legally sufficient to support it. (See 9 Weekly Reporter, page 248, Civil Rulings.) Therefore, this objection, if put in the shape that we have just now suggested, namely in this form, that the Lower Appellate Court came to the determination in this case that secondary evidence of the *hibbanamah* was admissible upon grounds which were legally insufficient, this objec-

tion is a very proper one to make in a Court of special appeal. Taking it as having been so made, we have referred to the evidence which has been brought to our notice, much of which, indeed, the Lower Appellate Court specifically discusses, and we find, as it seems to us, that it does constitute evidence which the Lower Appellate Court might properly look at in order to satisfy itself whether the plaintiff was or was not able, at the trial of this case, to produce the original document. The Lower Appellate Court has distinctly found upon this evidence that this *dauputtro* or *hibbanamah* has been destroyed. The Lower Appellate Court has, therefore, properly laid the foundation for allowing the plaintiff to produce secondary evidence, unless that finding is not justified in law by the evidence. We have already said that in our judgment there was legal evidence before the Lower Appellate Court bearing upon that issue, and therefore it seems to us that this second objection of the special appellants fails equally with the first, and that this special appeal ought to be dismissed. It is, therefore, dismissed with costs.

The 29th April 1868.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Jurisdiction—Suit to recover zemindaree dak charges on a contract.

Case No. 2190 of 1867.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 4th July 1867, reversing a decision passed by the Moonsiff of that District, dated the 5th April 1867.

Mr. H. S. Erskine (Plaintiff), *Appellant,*

versus

Trilochun Chatterjee and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Tarucknath Sein* for Appellant.

Baboo Nil Monee Sein for Respondents.

A suit by a zemindar against his putneedar for the recovery of money expended on account of zemindaree dâk charges, which the putneedar is bound by his contract to bear, is cognizable by a Court of Small Causes.

Jackson, J.—THIS is a suit by the zemindar against his putneedar, founded upon the contract between the parties, for the recovery of a sum of money which had been expended by the zemindar in the way of zemindaree dâk charges, which expenses, it was alleged, the putneedar was bound by his contract to bear.

The Moonsiff gave judgment for the plaintiff, but on appeal the Zillah Judge reversed that decision, whereon the plaintiff appeals specially to this Court.

For the defendant (special respondent) a preliminary objection is taken, that, under Section 27 of Act XXIII. of 1861, no special appeal lies in this case, and we have been referred to a precedent of this Court in Volume VIII. of the Weekly Reporter, page 517, in which it is expressly held that suits of this description are suits cognizable by Courts of Small Causes, and, consequently, the special appeal is taken away.

We see no reason to dissent from that ruling. The suit, as brought, was distinctly based on a contract, and therefore fell clearly within the terms of Section 6 of Act XI. of 1865.

Mr. Allan, for the special appellant, contended that the subject-matter of the suit was one of a "more extensive" nature than a mere suit upon a contract, inasmuch as it affected the rights and obligations of parties in connection with immoveable property, and he cited to us a case reported in 4 Weekly Reporter, page 247, in which, in the case of a suit also for zemindaree dâk charges, a special appeal was entertained and decided on the merits. On referring to that case, we find that it is clearly distinguishable from the present case and from the case in Volume VIII. of the Weekly Reporter. That was not a suit founded on a contract between the parties, but upon the obligation or liability which attached by usage to the putneedar to defray charges of this nature. Even on the special appeal I do not understand that an objection was taken to the hearing of the special appeal under Section 27 of Act XXIII. of 1861 ;

but that the objection was that the merits of the case ought not to be gone into, because the suit was one only cognizable by the Small Cause Court, and, therefore, that it had been tried without jurisdiction by the ordinary Civil Court, the district there being Zillah Hooghly, where there are Courts of Small Causes within whose jurisdiction the parties probably resided.

But the reason assigned by the Court for rejecting the special appeal would equally apply to the objection taken against the hearing of the special appeal, namely, the suit being a suit cognizable by a Court of Small Causes, and not by the Regular Civil Courts, and within the limit of 500 rupees; and consequently it was a suit in which no special appeal will lie.

I think, therefore, that the preliminary objection taken by the respondent must prevail, and that the special appeal must be dismissed with costs.

The 29th April 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Intervention under Act X. of 1859—Section 73, Code of Civil Procedure.

Case No. 2196 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 29th May 1867, affirming a decision passed by the Deputy Collector of that District, dated the 29th September 1866.

Leelachul Mundul (Intervenor), *Appellant,*

versus

Soondurec Bewa (Plaintiff), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Molee Lall Mookerjee for Respondent.

In a suit by a tenant to recover possession of a tenure from which he had been illegally ejected by the person entitled to receive rents for the same, it was held that a third party who intervened on the ground of being in possession of the land in question was not entitled to be heard, Act X. of 1859 containing no provision (except in the case provided for in Section 77), by which the Court of a Collector is enabled to bring in as parties to the suit persons other than plaintiff and defendant.

Jackson, J.—We think that in this case the intervenor was entitled to be heard either in special appeal or in the Courts below.

The suit was one by a tenant under Clause 6 of Section 23 of Act X. of 1859, to recover possession of a tenure from which the plaintiff alleged that he had been illegally ejected by the person entitled to receive the rents for the same.

The special appellant before us intervened in that suit, alleging that she was in possession of the land in question, which had been leased only for a term to the plaintiff.

Act X. of 1859 contains no provisions corresponding with Section 73 of the Code of Civil Procedure, which enables the Court to make persons who are interested in the subject-matter of the suit, and likely to be affected by the result, parties to the suit. There is one case in which the Collector's Court is empowered to bring in a party, and that is the case provided for under Section 77 of Act X. of 1859. That Section, as it appears to me, contemplates not exactly intervention, but enables the Collector, "when, in "any suit between a land-holder and a ryot "or under-tenant under this Act, the right "to receive the rent of the land or tenure "cultivated or held by the ryot or under-"tenant is disputed, and such right is claimed "by or on behalf of a third person, on the "ground that such third person, or a person "through whom he claims, has actually and in "good faith received and enjoyed such rent "before and up to the time of the commence-"ment of the suit," to make such third person a party to the suit; and this, it appears to me, might be done whether such third person had actually appeared and intervened or not. I am of opinion that there is no other case in which the Court of the Collector is authorized to bring in as parties to the suit persons other than the plaintiff and defendant.

A case has been cited to the opposite effect (Issur Chunder Bhuttacharjee *versus* Bhyrub Chunder Shaha, 3 Weekly Reporter, page 166, Act X. Rulings). There, indeed,

the learned Judges say (page 167): "It "is true that Act X. of 1859 does not, like "Act VIII. of 1859, in its procedure-clauses, "lay down any special rules under which "third parties can intervene in a suit to "which the plaintiff has not made them par-"ties; but the practice both of this Court on appeal, and of the Lower Courts, has always been to allow of such interventions "upon its being made to appear, *primâ facie*, "that the intervenors have rights and "interests which will be affected by the "Collector's decision in the suit, and the "absence of any special Clause in the Act "on the subject may be held to sanction "such a procedure, inasmuch as the law "does not forbid it, and the direct result of "the Collector's decision being a dealing "*in rem* with the subject of suit, and it not "being confined to an adjudication of ab-"stract rights between the mere parties to "the suit, it is reasonable to suppose that "the Legislature intended that all persons "concerned in the actual subject-matter "should have the opportunity of asserting "those rights previous to that decision "being given."

Now, I am not aware upon what foundation that assertion rests as to the practice of this Court, and no other reported case bears out the statement in question. We have an earlier case in the same Volume at page 16, in which the opposite view is taken; and there are two other cases reported in 8 Weekly Reporter, one at page 78, and the other at page 497, in which this view has been adopted. I cannot find that the ruling of the two learned Judges in the first case cited has been followed by any other bench of this Court. Therefore, it does not appear to me that there is a sufficient conflict of decisions to make it necessary to refer the matter to a Full Bench. But being of opinion that intervention is not warranted by Act X. of 1859, I hold that the special appellant is not entitled to be heard, and the special appeal must be dismissed with costs.

Mitter, J.—I concur.

The 29th April 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Appeal—Jurisdiction—Section 9, Act VI. (B. C.), 1862.

Case No. 2189 of 1867.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 19th June 1867, affirming a decision passed by the Collector of that District, dated the 19th December 1866.

Messrs. J. Erskine and Co. (Plaintiffs), *Appellants,*

versus

Gholam Khezur (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Tarucknath Sein* for Appellants.

Baboo Debendro Narain Bose for Respondent.

An appeal from the decision of a Deputy Collector, in a suit under Section 9, Act VI. (B. C.) of 1862, lies, not to the Collector, but to the Zillah Judge.

Jackson, J.—In this case the plaintiff, the defendant, the Collector, and the Zillah Judge, have all been in error.

The suit was one for the purpose of obtaining assistance to measure the plaintiff's land under Section 9 of Act VI. of 1862 (B. C.). The suit was heard before a Deputy Collector in the District of Burdwan. We are not informed where the Deputy Collector was stationed, or what his powers were; but it may be assumed for the purpose of this decision that he was an officer possessing jurisdiction in the matter.

By the last Clause of Section 10 of the same Act, it is provided: "The appeal shall "lie to the Zillah Judge or to the Sudder "Court, subject to the provisions and condi-"tions contained in Sections 160 and 161 "of Act X. of 1859."

But the plaintiff, who was unsuccessful in the suit, instead of appealing to the Zillah Judge, appealed to the Collector; and the Collector proceeded to hear the appeal, and reversed the decision of the Deputy Collector; whereupon the defendant in his turn preferred an appeal against the decision of the Collector to the Zillah Judge. This appeal was made at the Zillah Judge's Court at Beerbhoom. It is not explained why an appeal from the Collector of Burdwan should have been made to the Zillah Judge's Court of another district.

Be this as it may, the Judge of Beerbhoom, considering that his Court was the proper tribunal where an appeal from the decision of the Deputy Collector ought to have been made, reversed the order of the Collector as made without jurisdiction, and there he left the matter.

The plaintiff has now appealed specially to this Court, and we have to get rid of all the proceedings which have been taken without jurisdiction, and direct what is the proper course which ought to be taken. It is manifest that there has not been a lawful trial of any appeal as yet. The plaintiff was wrongly advised, and took his case to the wrong tribunal. He ought not, we think, under the circumstances, to be shut out altogether from obtaining a decision on his appeal; and we, therefore, set aside the judgment of the Zillah Judge and the Collector, and declare that the plaintiff is at liberty, if so advised, to appeal, within 20 days from the date of this judgment, to the Zillah Judge having jurisdiction in the matter.

As both parties have been in like fault, we make no order as to costs.

The 5th May 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Sale in execution—Purchaser's liability.

Case No. 2434 of 1867.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 5th July 1867, reversing a decision passed by the Moonsiff of that District, dated the 24th January 1864.

Dewan Roy and another (Plaintiffs), *Appellants,*

versus

Mr. Charles Riddell and another (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Anund Gopal Palit* for Appellants.

Mr. R. T. Allan for Respondents.

Where an estate is sold in execution of a decree, the purchaser is not bound by all the acts of the judgment-debtor, *e.g.*, he is not bound by a mere collusive transfer of the estate into another person's name.

Jackson, J.—We think that the Judge should have gone into the allegation of the plaintiff that the zur-i-peshgee lease for 1272 to 1274 was collusive, the more so as the Lower Court has found that it was a collusive transaction. The Judge is wrong in holding that the plaintiff is bound by all the acts of the judgment-debtor whose estate plaintiff bought in execution of decree. The plaintiff cannot rely on his own mortgage because he elected to take a money-decree; but the plaintiff can sue to obtain possession of the estate which he purchased in execution, if he can make out that the debtor made a mere collusive transfer of it into another person's name, and the defendant cannot prove that it was a *bond-fide* transaction. The plaintiff would not be bound by any such collusive acts of the judgment-debtor.

The orders passed by the Judge are reversed, and the case remanded to him for trial on the above points.

The 5th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Enhancement—Suit for a kubooleut—Onus probandi.

Case No. 1468 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 4th April 1867, affirming a decision passed by the Deputy Collector of that District, dated the 29th December 1866.

Shibchunder Bose and others (Plaintiffs), *Appellants,*

versus

Ramchand Chund (Defendant), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellants.

Baboo Womesh Chunder Banerjee for Respondent.

A landlord suing a ryot for a *kubooleut* is bound to make out the reasonableness of the rent which he demands, and *à fortiori* that the defendant is holding the particular land specified in his suit.

Jackson, J.—We think that this case falls fully within the principle of the recent decision of the Full Bench in the case of Golam Mahomed *versus* Asmut Ali Khan Chowdhry, in which it was held that a landholder suing a ryot for a *kubooleut* was bound to show that the ryot was liable to pay the particular rent specified in the *kubooleut* for which the suit was brought.

Here the case is that the plaintiff has failed to show that the ryot was occupying the lands specified in the plaint, and he now asks the Court to give him a decree for a *kubooleut* specifying the lands of which the defendant admits occupation, and with such rent as may be fair and reasonable for those lands. But if the plaintiff is bound to make out the reasonableness of the rent which he demands, he is *à fortiori* bound to make out that the ryot is holding the particular land. He sues for a specific thing, namely, a definite rent for a definite holding; and if he fails to show that the defendant is holding the lands specified, the suit must fail.

Speaking for myself, I defer most unwillingly to the ruling of the majority in Thakooranee Dossee's case,* namely, that a suit for a *kubooleut* at an enhanced rate may be brought without notice of enhancement. But if that be the law, I should certainly desire to guard against the undue extension of that principle, by refusing to give a decree except where the plaintiff had made out the very case set up in his plaint.

Special appeal dismissed with costs.

Mitter, J.—I entirely agree.

The 6th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Act X. of 1859—Ryots holding from Permanent Settlement at varying rates.

Case No. 2478 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 20th August 1867, reversing a decision passed by the Moonsiff of that District, dated the 20th September 1866.

Dinobundhoo Dey (Plaintiff), *Appellant,*

versus

Ram Dhone Roy (Defendant), *Respondent.*

Baboos Onookool Chunder Mookerjee and *Kishen Succa Mookerjee* for Appellant.

Baboos Sreenath Dass and *Hem Chunder Banerjee* for Respondent.

Act X. of 1859 provides for two classes of ryots only, *viz.*, those who have held and cultivated the land for a period of 12 years, and those who have held at fixed rates from the time of the Permanent Settlement; it makes no provision for ryots who have held since the time of the Permanent Settlement at varying rates.

Jackson, J.—It appears to us that the judgment of the Lower Appellate Court is erroneous.

The plaintiff sued for the ejectment of the defendant from certain lands held under a pottah within the plaintiff's mehal. The defendant pleaded that he was in occupation of the land under purchase from a party who, with his ancestors and predecessors, had occupied this land from a time anterior to the Permanent Settlement.

The Moonsiff found that the service-tenure under which the land has been previously held had been abrogated, and the land resumed by the Collector in 1837, and then the holder having accepted a pottah from the ijaradar under Government, which was to subsist during the period of the ijara, and that period having expired, the defendant had no right to continue in the land, and he decreed accordingly.

The Principal Sudder Ameen appears to have satisfied himself by reference to the papers of the Commissioner's and Collector's offices, that a *settlement* at half rates had been made with the defendant, and that the defendant consequently was entitled to hold the land at such rate, and he reversed the decision of the Moonsiff.

In special appeal, it is contended before us that that judgment is contrary to the law of the case; that the defendant had no rights, whether under the settlement or by right of occupancy, or otherwise, which would entitle him to retain the land.

We have heard two vakeels for the respondent; and, in disposing of the question which arises in this case, we may fairly adopt the arrangement of the subject which was proposed by Baboo Hem Chunder Banerjee. He says that the defendant's title may be made out in one of two ways: either

* *See* 3 W. R., Act X. Rulings, 29.

by a document conferring such right, or by the operation of law.

Now, it has not been contended that the defendant is in possession of any document which entitles him to retain the lands. He purchased the rights and interests of the party who received the pottah from the ijaradar, and that pottah gave the tenant no right to retain the lands at a fixed rate, or otherwise, after the expiry of the term of the pottah.

Then it is contended that the defendant had acquired his right to retain the land by operation of law.

For this purpose we are asked to read together Sections 3, 4, and 5 of Act X. of 1859.

Section 3 enacts that "ryots who, in "the Provinces of Bengal, Behar, Orissa, "and Benares, hold lands at fixed rates of "rent, which have not been changed from "the time of the Permanent Settlement, are "entitled to receive pottahs at those "rates."

Section 4 provides: "Whenever, in any "suit under this Act, it shall be proved "that the rent at which the land is held by "a ryot in the said Provinces has not been "changed for a period of 20 years before "the commencement of the suit, it shall be "presumed that the land has been held at "that rent from the time of the Permanent "Settlement, unless the contrary be shown, "or unless it be proved that such rent was "fixed at some later period."

Section 5 runs as follows: "Ryots hav-"ing rights of occupancy, but not holding at "fixed rates, as described in the two preced-"ing Sections, are entitled to receive pot-"tahs at fair and equitable rates." &c.

Together with these Sections we are asked to read Section 37 of Act XI. of 1859, and the contention of Baboo Hem Chunder is in substance this: Section VI. of Act X. defines a class of ryots, but not the only ryots who have rights of occupancy under that Act; those being merely ryots who have held and cultivated the land for a period of 12 years, and who, by special indulgence of the Legislature, are admitted to the same privileges as the class spoken of under Section V., they again being ryots who have held the land since the time of the Permanent Settlement, although not at fixed rates.

If we are right in understanding this to be his contention, it appears to us to be entirely groundless. It has been, as we believe, the construction invariably adopted in this Court—and we see no reason to depart from it—that in the early Sections of Act X., namely, from 3 to 6, the Legislature intended to provide for two classes of ryots, and no more, namely, ryots who have held and cultivated the land for a period of 12 years, and ryots who have held at fixed rates from the time of the Permanent Settlement as described in Section 3, and who, under that Section, are declared entitled to receive pottahs at those rates. And as difficulty would sometimes arise in the way of a ryot who sought to entitle himself to that privilege, Section 4 provided the means of bringing him within the meaning of the Section without going the whole length of proving that he had been holding since the time of the Permanent Settlement at fixed rates.

Then, as to ryots having rights of occupancy and entitled to receive pottahs at fair and equitable rates, Section 5 not having defined who are ryots having right of occupancy, Section 6 says: "Every ryot "who has cultivated or held land for a period "of 12 years has a right of occupancy in "the land so cultivated or held by him, "whether it be held under a pottah or not, "so long as he pays the rent payable on ac-"count of the same," &c.—that is to say, that a ryot who has held and cultivated land for 12 years is a ryot having a right of occupancy, and consequently entitled to a pottah at fair and equitable rates.

We see no trace of an intention on the part of the Legislature except to provide for one class of ryots with rights of occupancy, and there is certainly no distinction as to rights between those who have held for 12 years and those who have held since the time of the Permanent Settlement at changing rates.

The most favorable position which the defendant could claim would, therefore, be that of a ryot having a right of occupancy from having held and cultivated the land for 12 years. It seems to us quite clear that the previous tenure, that of service namely, was put an end to by the resumption; and from that time the defendant was a mere tenant holding under the terms of his pottah. Therefore, even if the question could arise as to the rights of the party holding from the time of the Permanent Settlement, the defendant is not entitled to any consideration on that ground, as the tenure, if any, which had existed since the time of the Permanent

Settlement, was put an end to by the resumption in 1837.

We must then see if the defendant is a ryot who can claim the right of occupancy. It is admitted that the defendant does not inherit from the previous occupant, but purchased from him, and has purchased within 12 years. He, therefore, has not held the tenure for 12 years; the previous holding is not one which he can count, and under the previous rulings of this Court he is not entitled to claim the right of occupancy.

We think, therefore, that the judgment of the Lower Court must be reversed, and this appeal must be decreed with costs.

The 6th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Suit for possession—Erroneous issue—Special appeal.

Case No. 1824 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 28th June 1867, reversing a decision passed by the Moonsiff of that District, dated the 24th January 1866.

Juggessur Nundee (one of the Defendants), *Appellant.*

versus

Chunder Gobind Singh and others (Plaintiffs), *Respondents.*

Baboo Otool Chunder Mookerjee, for Appellant.

Baboos Nil Monee Sein and *Obinash Chunder Banerjee* for Respondents.

In a suit to recover lands to which plaintiff is entitled if the Civil Court gives him a decree without trying the proper issue, defendant's remedy lies in special appeal, and not in a fresh suit regarding the issue left untried.

Jackson, J.—We think it quite clear that the decision of the Lower Appellate Court (the Principal Sudder Ameen) in this case is erroneous, and the decision of the Moonsiff right.

The suit related to a few beegahs of land, the contending parties being on one side the proprietor of talook No. 141; and on the other, the putneedar of *lakheraj jooje, khyratee mehal.*

It seems that the now defendant had previously brought a suit against the now plaintiff to recover possession of the identical land to which the present suit relates, and obtained from the Court a decree for a part of the lands on the strength of his title. As to a portion of the land, his suit was not decreed, and against that portion of the judgment he appealed. The Principal Sudder Ameen who heard the appeal gave him a decree for the remaining land, and observed that it was not necessary to determine the question between *mal* and *lakheraj*, but to determine who was the party in possession. Afterwards, on an application for review of that decision, the Principal Sudder Ameen is reported to have said that he had determined no question of right between the parties, but had only gone into the possession, and not title.

But that suit was not a possessory suit under Section 15 of Act XIV. of 1859, but was a suit to recover lands to which the plaintiff was entitled. If the Principal Sudder Ameen gave him a decree for such lands without trying the proper issue, it was for the defendant to appeal specially to the High Court. This he did not do, but he now brings a fresh suit for the determination of the issue which was left untried in the former suit. This cannot be allowed. The cause of action in both suits was entirely the same, namely, the wrongful possession by the defendant of the same land, and it was tried between the same parties.

The present suit, therefore, is clearly barred by Section 2 of Act VIII. of 1859.

The proper mode of correcting an erroneous or defective decision of an Appellate Court is by special appeal, and not by a fresh suit regarding the issue left untried.

The decree of the Lower Appellate Court is reversed, and that of the Moonsiff is restored with all costs.

The 6th May 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Joinder of causes of action—Plurality of plaintiffs—Sections 8 and 9, Act VIII., 1859.

Case No. 1716 of 1867.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 4th May 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 27th September 1866.

Romoona and another (Defendants), *Appellants,*

versus

Manicko Moyee Chowdhrain and others (Plaintiffs), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Unnoda Pershad Banerjee* for Appellants.

Baboos Sreenath Doss and *Ashootosh Chatterjee* for Respondents.

There is no suggestion in Act VIII. of 1859 that causes of action between different plaintiffs and different defendants respectively should be united and tried at one trial. On the contrary, the express provisions of Sections 8 and 9 forbid, by implication, the larger and more extensive union of causes of action.

The Code of Civil Procedure assumes that the plaintiff always is single, and gives no warrant for two or more plaintiffs to make their separate claims in one action.

Phear, J.—Manicko Moyee and Juggurnath held each of them a decree against one Poorno Chunder. Upon seeking execution of their decrees by attachment and sale of what they supposed to be the property of the judgment-debtor, these judgment-creditors met with opposition. Part of the property was claimed by one Romoona, the widow of one Goluck Chunder, deceased; and another part of the property was claimed by one Kisto Chunder, alleging that he had bought it from Goluck Chunder. On this state of facts, the two judgment-creditors, Manicko Moyee and Juggurnath, together bring this suit against Romoona and Kisto Chunder, claiming to have the whole of the property to which these two defendants separately asserted title declared to be the property of their judgment-debtor, and available to be taken in execution and sold under their (the plaintiffs') several decrees. The defendants protested that the causes of action of the two plaintiffs were separate and distinct, but their objection was overruled by the first Court, and a decision given in favor of the plaintiffs to the extent of a half-share of the property which is the subject of suit.

Against this decree there were two appeals: one brought by the plaintiffs jointly, and the other by the defendants jointly. In the latter the defendants again objected that the claims of the plaintiffs were separate, and could not form one cause of action. Again this objection was overruled, and upon the two appeals, namely, the appeals of the plaintiffs and of the defendants, the Lower Appellate Court gave a decision in favor of the plaintiffs for the whole of the property.

The defendants now come on special appeal before us, and urge for a third time that the causes of action upon which Manicko Moyee and Juggurnath sued were separate, and could not properly be united so as to form common claim. I think that this objection ought to prevail. The truth is that, under the plaint preferred by the plaintiffs Manicko Moyee and Juggurnath, four distinct actions were covered: two by Manicko Moyee against Romoona for one portion of the property, and against Kisto Chunder for the other portion of the property, and two by Juggurnath against Romoona and Kisto Chunder in like manner. In my opinion, the law of Civil Procedure in this country not only does not countenance, a joining, or rather lumping together of four distinct suits in this manner, but I think it forbids it. I have no doubt, judging by implication that the earlier Clauses of Act VIII. of 1859, the Act which constitutes our Procedure, were framed in contemplation merely of a single cause of action to be sued on by one plaintiff, it may be consisting of more persons than one,

against one defendant, who may be, in the like manner, complex. Then comes Section 8, which provides that several causes of action by and against the *same* parties, and cognizable in the same Court, may be joined in the same suit; but at the same time the Procedure Code provides by Section 9 that, if two or more causes be joined in the same suit, although that course has been taken by the plaintiff in accordance with Section 8, still, even then, the Courts may separate them if they think that they cannot conveniently be tried together. To my mind these two Clauses afford the only indication given in Act VIII. that several causes of action may be combined together in one suit. There is no suggestion, I think I may venture to say, from the beginning to the end of Act VIII., that causes of action between different plaintiffs and different defendants respectively should be united and tried at one trial. On the contrary, I think that the express provisions of Sections 8 and 9, and the care exhibited in them on the part of the Legislature to limit the combination of causes of action even in those cases with which those Sections deal, do by implication amount to saying that the larger and more extensive union of causes of action, with regard to which the Act is silent, are not only not contemplated, but forbidden by it.

I need hardly point out that whatever may be the case on the particular facts brought before us in this appeal, the causes of action of Manicko Moyee and Juggurnath are so different, so distinct in their nature, as that they might be dependent upon entirely different evidence for their respective substantiation. In like manner, the defence to the two might easily be imagined to be equally different. If this were so, it would be a monstrous injustice that the defendants should be obliged, in spite of their protest from the beginning, to have their distinct defences to the one claim and the other confused together and tried as one between them and these two several plaintiffs in one action, just as if the two plaintiffs had a common ground of suit against them. Even, as the case stands before us, Manicko Moyee would fail in her suit if she could not prove that she held the decree which she alleges she has; for it is the essence of her right to bring this suit that the property forming the subject of the suit should be made available for the purposes of satisfying her decree. If she cannot show that she has a decree to execute, she is certainly out of Court. And it is obvious that the particular decree upon which she relies for her title to sue must be specifically proved, as her right to the decree which she seeks may depend materially upon the date of, and other facts connected with, that which she wants to execute. So also with Juggurnath. And if Juggurnath proved his decree, while Manicko Moyee was unable to establish hers, the question would arise in the combined suit whether the suit should be dismissed, or whether it should be partially decreed. I confess that, saving all questions of abatement and matters in amendment of the record, I have never in my memory heard of a suit decreed in favor of one co-plaintiff, and dismissed as against the other co-plaintiff. And that negative fact of usage is, I think, influential to show how very impracticable, quite apart from any matter of law, it has been found that combined suits of this character should be united together and treated as if they were one. I think it would be hopeless to expect that a trial at law between parties should lead to a satisfactory conclusion, unless, at least, the pursuing party be kept single, although no doubt, it may well be, and often is the case, that those who defend stand each upon his own separate ground. I further think that our Procedure Code assumes, if it does not expressly say, that the plaintiff always is single, and that it nowhere gives any warrant for allowing two or more plaintiffs to make together their separate claims in one action.

In my judgment, therefore, apart from the merits of the case, the defendants were quite right when they urged, as a matter of law in the first Court, and again in the Court of appeal, that the two cases could not be heard together in this form against them. I think we are bound now in special appeal to give effect to their objection, even although it may not be possible for them to satisfy us that the decision which has been given in the suit is such as involves any substantial error or defect in regard to the merits of the case. If, however, it were necessary, in order to support the present determination on special appeal at which I have arrived, to find such error or defect, I should be prepared to presume that a decree between parties upon a record which did not separately represent the relations between the parties who ought, on the facts, to have been affected by it, would work injury. On the whole, I think that the bringing of these four suits in one, under the allegations of one plaint filed by two separate

plaintiffs jointly, was contrary to the law of procedure of this country, and cannot be upheld, as it has not been acquiesced in by the defendants themselves, but on the contrary has been persisted in against their urgent protestations in every Court. On these grounds I think that the appeal must be decreed, and that the judgments of both the Lower Courts must be reversed. The appellants will recover their costs in all Courts.

Hobhouse, J.—I have had some hesitation in coming to the same conclusion as my brother Phear in this case, but on further consideration I am of the same opinion as he is. It seems to me, according to the wording of the law under Section 8, Act VIII. of 1859, that, when the law declares that causes of action by and against the same parties, and cognizable by the same Court, may be joined in the same suit, we must hold that by that provision it was intended to provide that, when causes of action are not by and against the same parties, then such causes may not be joined in the same suit. When, therefore, such causes of action are joined in the same suit, it seems to me that they are joined contrary to law; and if they are joined contrary to law, then any decision which the Court may come to in such an action must be contrary to law, and, being so, must be set aside.

The 6th May 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Execution of decree—Second application—Duty of Court.

Case No. 86 of 1868.

Miscellaneous Regular Appeal from an order passed by the Principal Sudder Ameen of Cuttack, dated the 14th December 1867.

Byjnath Pundit (Decree-holder), *Appellant,*

versus

Kunhya Lall Pundit (Judgment-debtor), *Respondent.*

Baboos Hem Chunder Banerjee and *Obhoy Churn Bose* for Appellant.

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Respondent.

HELD by Phear, J., that, under the Code of Civil Procedure, a Court is not bound to grant, as a matter of course, a second application from a judgment-creditor for execution, but ought always to require him to show why the steps previously taken did not lead to a full discharge of the debt, and ought not to grant its process a second time unless satisfied that the failure was not attributable to the applicant's own fault.

Phear, J.—In this case, the decree was passed on the 16th August 1861. The first application for execution was made on the 18th of June 1864, two years and ten months after the decree was obtained. The notice of the application of execution was served upon the defendants on the 22nd of January 1865, and it is possible that the delay between June 1864 and January 1865 may have been the fault of the Court, and not attributable to laches or want of diligence on the part of the plaintiff; but after the service of notice on 22nd January 1865, the plaintiff took no further steps whatever, and his execution-case was struck off on the 4th March 1865. From that time until the 8th July 1867, another long interval of two years and four months, nothing was done by the judgment-creditor, but on that day the present application for execution was made. The Lower Court refused to grant that application, holding that the intermediate application of the 18th of June 1864, followed only by service of notice on 22nd January 1865, was not a *bonâ-fide* proceeding which would have the effect of keeping the decree alive under the provisions of Section 20, Act XIV. of 1859.

This is a regular appeal against that decision, and I must say that I see no reason at all for disturbing the finding of fact at which the Lower Court has arrived. The long intervals between the decree and the first application for execution on the one side, and between the striking off of that execution-case and the second application for execution on the other side, are both, to my mind, very material facts bearing upon the *bona fides* of that application itself. There are other facts referred to by the Lower Court, and on the whole it comes to the conclusion that the application of June 1864 was a pretence only, and not a *bonâ-fide*

proceeding within the terms of the Act. In that conclusion I concur. It follows that this present appeal will be dismissed.

But I wish to add one or two words expressive of my opinion with regard to another phase of the case, in which I believe my learned brother is not at present prepared to concur. It seems to me that, under the Procedure Act—Act VIII. of 1859—although the Court is bound to issue process of execution of one sort or the other, when first the execution-creditor makes application in due form for execution, and shows that every thing has occurred to entitle him to it in the mode prescribed by the Act, still I do not think that, when the Court has once granted an application of this kind, it is bound, upon the second application of the same judgment-creditor, to grant that second application as a matter of course. I think that it is specially incumbent upon all Courts charged with the execution of decrees to take care that their proceedings and processes are not abused, and there is probably no process or proceeding of Court in regard to which it is necessary to be more attentive in order to prevent abuse than the process of execution. I think that, except in the first instance, when, no doubt, the Court is obliged to grant the application of the judgment-creditor in the other cases, it ought always to require of him to show why the steps previously taken by him in execution had not led to a full discharge of the debt. And unless the judgment-creditor should satisfy the Court that the failure of these proceedings to bring about execution of the decree was not attributable to his own fault, the Court ought not, I think, to grant its process a second time.

With these views, I think that, in the present case, the Lower Court would have been perfectly right to have dismissed this application for execution, upon the single ground that the decree itself was one which was six years old, that proceedings in execution had been taken by the judgment-creditor some two years and a half before the present application, and that he in no way accounted for these proceedings not having been carried to a fruitful result, or shown why the decree was not yet satisfied.

Hobhouse, J.—I agree with my learned brother Phear in thinking that the proceeding of the 22nd January 1865 was not, for the reasons given by him and by the Court below, a *bond-fide* proceeding. I think, therefore, that the judgment of the Court below was right when it refused execution in this case. I think, therefore, that that judgment must be confirmed, and this appeal dismissed with costs. I am not prepared to give any opinion upon the subject discussed in the second part of my brother Phear's judgment. I do not think that that subject necessarily arises in this particular case.

The 7th May 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Non-registration of documents—Secondary evidence.

Case No. 1831 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 9th May 1867, modifying a decision passed by the Sudder Ameen of that District, dated the 29th March 1866.

Kumeezooddeen Holdar (Plaintiff), *Appellant,*

versus

Rujjub Ali Shaha and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Otool Chunder Mookerjee* for Appellant.

Baboos Hem Chunder Banerjee and *Kalee Mohun Doss* for Respondents.

It is not enough for a party desirous of adducing secondary evidence of the contents of a document which ought to have been registered, to show that he cannot produce it because it is not registered; he must show that its non-registration was not due to any fault or want of diligence on his part, or he must show that the party against whom he desires to use it was guilty of such fraud in the matter of non-registration that he cannot be allowed to object on that ground to the production of the secondary evidence.

Phear, J.—We do not feel it necessary to call upon the other side in this appeal. The case is very intimately connected with

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the last, which we have decided, and, in truth, is much in the nature of a cross-appeal in the same suit. The plaintiff complains that the Lower Appellate Court has refused to receive secondary evidence of a contract of sale which he alleges that the first defendant, together with defendants Nos. 3 and 4, executed to him on the 8th Falgoon 1271, and upon the basis of which he claims to recover from defendant No. 2 certain property originally belonging to defendant No. 1, and forming the subject of that alleged contract of sale.

The special grounds of appeal which have been written in this case seem to our mind hardly to give scope to the plaintiff for the argument which he has used before us; but, however this may be, as far as we can understand the position taken up in this Court by the special appellant, it is this, namely, that the Lower Appellate Court has committed an error in law in saying that the plaintiff has not sufficiently accounted for the non-production of the original document of the 8th Falgoon 1271, to entitle him to adduce secondary evidence of some sort to establish that contract. It is true that, when stated in this form, the difficulty of supporting it on the facts which have occurred is very great, and the advocate for the plaintiff has preferred rather to say that the Lower Appellate Court has not tried the question at all. We do not think, however, that this last allegation is correct, for it seems to us clear that the Lower Appellate Court had really before its mind the question which it ought to decide before it allowed secondary (that is to say, in this case, parol) evidence of the contract of the sale to be produced, and that it did require that the absence of the original should be properly and sufficiently accounted for. Now, the real reason why that original is not produced is this, namely, that it was not registered, and, therefore, inasmuch as it is a contract affecting land or interests in land, it cannot be used as evidence in any Civil Court for any purpose whatever. The Lower Appellate Court, having the Registration Act in view, refused to receive secondary evidence of the non-registered document; and it seems to have been greatly influenced in its determination by a precedent of this Court, which laid down that the non-producibility of a document, by reason of its not having been registered within the provisions of the Registration Act, was not of itself a sufficient foundation to entitle a person relying upon that document to produce secondary evidence of its contents; and the advocate for the special appellant, pressed by this authority, has in effect argued before us that the precedent of the 15th December 1866 (Mussamut Mun Mohinee Dossia and others, defendants, appellants, *versus* Mussamut Bisho Moyee Dossia and others, plaintiffs, respondents) is overruled by a decision of a Division Bench of this Court, reported in Volume IX. of the Weekly Reporter, page 351.

If these two decisions were really in contradiction the one of the other, we should probably in this case have found ourselves obliged to refer the question to a Full Bench. But it seems to us that it is not so. Without saying that we approve altogether of the decision of the Court as reported in Volume IX. of the Weekly Reporter, page 351, we think that in that case there were special features of fraud and misrepresentation relied upon by the Court as being sufficient to justify a Court of Equity in refusing to be bound by the strict letter of an Act of Legislature. The Court may have seen that the effect of insisting upon the terms of the enactment strictly would be to carry out a fraud perpetrated by a party to the suit with direct view to the protection which he would receive from the terms of the Act, and there is no doubt that a Court of Equity will not, if it can help it, permit a legislative enactment to be purposely made the instrument for effecting a fraud. There is, however, nothing of this kind in the case which is at present before us, and, therefore, were it for nothing else, we consider that we are not bound by the decision which seems to have been pronounced by the Division Court in that case.

On the other hand, the principle enunciated in the decision which was referred to by the Lower Appellate Court seems to us to be of general application. It is not enough for a party desirous of adducing secondary evidence of the contents of a document which is of such a character that it ought, under the Registration Law, to be registered, to show to the Court that he cannot produce it because it is not registered, and therefore, by the registration-laws themselves, is forbidden to be used in evidence. He must go further. He must show that the fact of its not being registered, and its consequent non-producibility, was not due to any fault of his or want of diligence on his part at any time; or, at any rate, he must show that the party against whom he desires to use them was guilty of such fraud in regard to the matter

of non-registration, that he cannot be allowed to object on that ground to the production of secondary evidence in the trial of the suit against him. As far as we can understand the facts of the case—and we have questioned the pleaders for the appellant upon this point—there is no evidence whatever to implicate defendant No. 2 (the principal defendant against whom the suit is brought) in any fraud, or indeed any overt act, towards preventing the deed from being registered. There is evidence, no doubt, to show that he was of the party which set out at the time that an abortive attempt was made to get defendants Nos. 1, 3, and 4 to present themselves at the registry-office; but there is nothing, as we understand the record before us, to show that he was guilty of any act of fraud against the plaintiff, leading these persons to refuse ultimately to be present at the registration-office. Again, there seems to us also to be an entire absence of any proof that the plaintiff himself, the person principally interested in the registration of the deed, had ever taken those measures which are provided by the Registration Acts themselves for the purpose of enforcing and bringing about registration. Under the circumstances, we think that the Lower Appellate Court could very well, indeed, have come to the conclusion that the special appellant had not cleared himself of negligence in the matter; at any rate, that it committed no error in law in refusing to be satisfied, on the materials before it, that it was not in any way due to the fault of the special appellant that the deed was not registered, and consequently not producible in evidence. And still less was the Court bound in law to hold that the plaintiff (appellant) had proved that this non-registration was due to any act of fraud towards him on the part of the defendant No. 2.

On the whole, we think that the objection of the special appellant, in the only form in which we can shape it so as to make it effective as an objection in special appeal to the decision of the Court below, has not been established. We therefore dismiss the special appeal with costs.

The 8th May 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Section 149, Act VIII. of 1869—Witnesses.

Case No. 145 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 29th March 1867.

Indro Chunder Baboo and others (Plaintiffs), *Appellants,*

versus

Mr. Hamilton Grant Dunlop, Manager of the Agra and Masterman's Bank, and others (Defendants), *Respondents.*

Mr. A. T. T. Peterson and *Baboo Kishen Kishore Ghose* for Appellants.

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Respondents.

The Civil Procedure Code neither expressly nor impliedly declares that witnesses must be summoned before the day fixed for the *first hearing* of the suit. So long as the hearing merely stands adjourned, and so long as the party who wishes to summon witnesses has not closed his case, the Court is *bound* to summon them, unless it appears that the application is made so late that the witnesses cannot be reasonably expected to attend in time to be examined before that party's case closes.

Macpherson, J.—In this case the first issue fixed for trial and tried by the Principal Sudder Ameen was whether the property, the subject of the suit, was or was not at-

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tached according to law, on the 10th of April 1866, in execution of a decree held by the plaintiffs against the defendants Prestwitch and Jennings.

Issues were fixed on the 29th of November 1866, when the Principal Sudder Ameen appointed the 28th of December for the trial of the case, and ordered that the parties should then produce their witnesses, and that the record of the execution-case, No. 68 of 1866, should be sent for from the Judge's Court.

Nothing seems to have been done on the 8th of December, save that on that day the Principal Sudder Ameen, complying with the prayer of a petition previously presented to him by the defendants, ordered a Commission to be issued for the examination, on behalf of the defendants, of certain witnesses residing in Calcutta.

In the month of January, the Commission was returned by the Small Cause Court unexecuted, and on the defendant's application, the Commission was again (on February 20th) sent to the Calcutta Small Cause Court for execution.

Before any return had been made to the Commission, the plaintiffs, on the 25th February 1867, presented a petition, stating that it was necessary for them to prove that the attachment in question had been duly made, and praying that (in order to prove this fact) the Nazir, Naib-Nazir, and a peon of the Judge's Court, might be summoned and examined as witnesses. Upon this petition, the Principal Sudder Ameen passed an order to the following effect: "As "new witnesses cannot be summoned, so "the record of the case of execution of "decree will be sent for and looked into, if "necessary."

Upon the 9th March 1867, the case came again before the Principal Sudder Ameen, who ordered as follows: "This day, this "case being brought up for hearing, it is "found that the papers relating to the de-"positions of witnesses have not as yet "arrived here from the Calcutta Small Cause "Court. It is, therefore, ordered that the "27th instant be fixed for the hearing of "the case."

On the 29th of March, the Principal Sudder Ameen decided the case, and held that it was not proved that the property was duly attached on the 10th of April, as alleged. The reason given by him for so deciding is, that, having called for and examined the record of the execution-proceedings, No. 68 of 1866, in the Judge's Court, he was of opinion that the record did not show that the attachment had been properly made. Because the record did not distinctly show that every thing that should have been done was done, the Principal Sudder Ameen considered apparently that the logical inference to be drawn was that nothing was done save what was shown in the face of the record. He says: "Now, "in calling for, from the Judge's Court of "this district, and referring to, the record "of the execution-case of the plaintiffs, "No. 68 of 1866, I find that the order "for attaching the property in suit was made "only on the 6th April last; and that, though "a portion of that property consists of land, "still the process of attachment was neither "served in the Collectorate of this district, "nor was any written order notifying the "attachment fixed up therein; neither does "it appear that any order was passed direct-"ing such order to be so fixed up. Secondly, "the attachment was not made according to "Section 235 by a written order prohi-"biting 'the defendant from alienating "the property in any way, and all per-"sons from receiving the same by pur-"chase, gift, or otherwise;' for if this had "been the case, then such order would have "been probably contained in the *hookum-"namah* to the address of the Nazir, or in "some other paper attached to the record "in question, and the Nazir would also "then have particularized in his return "the fact of his having made the attach-"ment in the above manner. No such thing, "however, appears to have been done; and "thus, when the properties in dispute were "not attached by an order prohibiting their "alienation; when, with regard to the "attachment of the landed portion thereof, "no written order was fixed up in the "Collector's Court; and when, therefore, "the attachment in question was not valid, "any subsequent sub-mortgage of the dis-"puted properties which might have been "made by the defendant, Mr. Prestwitch, "to the Agra and Masterman's Bank, as "a security for his debts, cannot be pro-"nounced to be null and void under the "provisions of Section 240 of Act VIII. "of 1859."

The plaintiffs appeal, contending that the Lower Court was wrong in refusing to summon and examine the Nazir, Naib-Nazir, and peon of the Judge's Court, as prayed by them on the 25th of February, and in

then deciding the issue against them, merely because the execution-proceedings did not show that all that ought to have been done was done.

We think that nothing could possibly be more unjust to the plaintiffs than the course adopted by the Principal Sudder Ameen, and that the plaintiffs have good reason to complain of the manner in which they have been treated.

The Principal Sudder Ameen was legally bound to summon the plaintiffs' witnesses, as prayed by them on the 25th February. We find from his own order of the 9th March that the case was on that day "brought up for hearing;" and again we find that he fixed the 27th March for the "hearing of the case." Why, then, could not these witnesses of the plaintiffs have been summoned on the 25th February to attend on either of these days?

Section 149 of Act VIII. of 1859 enacts that "the parties or their pleaders *may, at* "*any time* after the issue of the summons "to the defendant, if the summons be for "final disposal of the suit, or after the issues "have been recorded, if the summons to "the defendant be for the settlement of "issues only, *obtain, on application to the* "*Court,* summonses to witnesses or other "persons to attend either to give evidence "or to produce documents," &c. Section 154 requires that summonses shall be served on witnesses so as to allow them a reasonable time for reaching the Court. And by Section 172 the evidence of the witnesses in attendance shall be taken orally in open Court in the presence, &c., of the Judge, *on the day appointed for the hearing of the suit, or on some other day to which the hearing may be adjourned.*

There is nothing whatever in the Code of Civil Procedure which either expressly or impliedly declares that witnesses must necessarily be summoned before the day fixed *for the first hearing* of the suit. If a day, whether it be the first or a subsequent day, is fixed for hearing a case, the Court is not bound (and ordinarily ought not), without very good reason being shown, to adjourn the hearing in order to give a party time to summon or produce his witnesses. Nor, if the case of a party (whether plaintiff or defendant) has been gone into *and closed,* is the Court bound (nor ought it ordinarily) to summon further witnesses for him. But so long as the hearing of the suit merely stands adjourned, and so long as the party who wishes to summon witnesses has not closed his case, the Court is *bound* to summon them, unless it appears that the application is made so late that the witnesses, if summoned, could not attend, or reasonably be expected to attend in time to be examined before the closing of the case of the party summoning him. It is the daily and correct practice on the Original side of this Court to issue summonses, in the course of the actual trial of a suit, to witnesses, the necessity of obtaining whose evidence may have unexpectedly become apparent. Of course, when a witness is summoned at so late a stage of the proceedings, it is frequently a mere chance whether his attendance can be procured, and whether the person applying for the summons will ever derive any benefit from it. That, however, is a question for the applicant for the summons to consider, not for the Court; and, as we have already said, it is the duty of the Court to grant the summons if there is any reasonable probability of its being in time to procure the attendance of the witnesses before the close of the case of the party seeking the summons.

In saying this, we by no means desire to interfere with, or to detract in any degree from, the undoubted discretion which every Court has as to fixing the day of hearing and granting adjournments, and the like. All we say is, that, when the plaintiffs' case is not tried till March, the fact that the Court fixed the first hearing for a day in December, and ordered the plaintiffs to have their witnesses ready then, is no reason why the plaintiffs should not be allowed to summon new witnesses for the hearing in March, the more especially if the adjournment in December was granted for the benefit of the defendants, rather than for that of the plaintiffs.

In the present instance, the case was coming on for hearing on the 9th March. There is nothing on the record to show that the plaintiffs' case had been closed prior to the 25th of February. The defendants' witnesses had certainly not yet been any of them examined. The witnesses whom the plaintiffs desired to summon were officers of the Judge's Court, whose attendance might have been obtained probably on a few minutes' notice, certainly on a few hours'. To refuse to summon them under such circumstances was quite preposterous; and the conduct of the Principal Sudder Ameen

appears still worse, when it is borne in mind that the case was not finally heard, or the evidence gone into, until the 27th of March, more than a month after it had been declared too late to summon these witnesses.

The Principal Sudder Ameen, having refused to allow the plaintiffs to give that which would have been legal evidence as to the manner in which the attachment was made, proceeded to decide the question, of his own motion, upon that which was no legal evidence at all, namely, the returns of the Nazir, &c. The returns of Nazirs, peons, and the like, are not evidence, in themselves, to prove the service of process when that service is disputed. (See Ockhoy Chunder Dutt *versus* Erskine, 3 Weekly Reporter 11, *Misc.*). It is necessary to examine as witnesses the persons through whom the service is made, and to prove the necessary facts in detail. As was remarked by the Chief Justice in Ockhoy Chunder Dutt's case, we have "frequently observed the loose evidence which "is allowed by the Lower Courts in proof "of matters of fact in the course of procedure, such as the making of proclamations, "the service of process, and of notice of "appeal, and other matters of the like nature. Instead of requiring legal evidence "to prove service of notice of appeal and "the like, the Lower Courts frequently "take the returns of Nazirs, and receipts "of chowkeydars, without obliging the Nazir "and chowkeydars to pledge themselves on "oath or affirmation to the facts certified."

It is, in our opinion (notwithstanding the arguments of Mr. Allan, who, on behalf of the Agra Bank, strongly opposes any further evidence being taken), absolutely essential for the ends of justice that the evidence of the witnesses whom the Lower Court refused to summon should be taken now. As the Principal Sudder Ameen who tried the case is now no longer in the Rajshahye District, we direct the Judge to summon and take the evidence of these witnesses. If the plaintiffs shall apply to have the evidence of other witnesses (in addition to those named in their petition of February 25th) taken, the Judge will summon and examine such other witnesses; and *in that case* the defendants also are to be allowed to summon witnesses, and have their evidence taken. But if the plaintiffs do not desire to call any witnesses save the three named in the petition of February 25th, then the defendants are not to be at liberty to call any witnesses of their own.

The Judge will examine the witnesses very fully and with great care, bearing in mind that the issue is whether the property in question was so attached on the (29th Choitro) 10th of April 1866 as to give the attaching creditors priority, under Section 240 of Act VIII. of 1859, to an assignee whose assignment is of later date. The question is whether the attachment was made by a written order under Section 235, "duly intimated and made known" in manner directed by Section 239.

The matter is all important to the parties in this suit, as it is also to the officers of the Court, whose duty it was duly to attach this property upon the plaintiffs' application in April 1866. The Judge will act under Section 356 of Act VIII. of 1859, and will take the case up at once, and dispose of it with the least possible delay. If the Judge should not be able to transmit the evidence to us within one month from the receipt of this order and of the other papers sent him by this Court, he will explain the reason for the delay.

It is unnecessary for us at present to allude to or decide any of the other numerous points which arise on this appeal.

The 8th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Jurisdiction—Collector's order under Section 11, Act XI. of 1859.

Case No. 3033 of 1867.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 26th August 1867, affirming a decision passed by the Moonsiff of that District, dated the 24th January 1867.

Shurufoonissa Bebee (Plaintiff), *Appellant,*

versus

Hushmut Ali and others (Defendants), *Respondents.*

"nion that the special limitation provided "in Section 87 aforesaid applies to the "plaintiff's suit. Besides, it is proved by "the plaintiff's witnesses that they have "been out of possession of the disputed "land since Bhadro 1272. The plaint was "filed on the 24th Falgoon following, *i. e.*, "after lapse of upwards of three months; "consequently the suit can by no means be "saved from the operation of limitation."

The Lower Court on these facts held that Section 87, Act III. of 1864, barred plaintiffs, and that defendants were not trespassers.

The plaintiffs' suit being, accordingly, dismissed, they appeal and urge that their cause of action must be taken to be the refusal of the Municipal Commissioners to remove the stones, first conveyed in their letter of the 7th December 1865, and that consequently plaintiffs are not barred by Section 87, Act III. of 1864; further, that this was a case of possession by plaintiffs, and illegal dispossession of them by defendant, to which no special law of limitation would apply; and, lastly, that their right and possession of the land was fully proved, and so no general law of limitation would apply.

I am clearly of opinion that the letter of the 7th December 1865 cannot be properly considered (as urged by plaintiffs) to be the cause of action.

But the question whether Section 87, Act III. of 1864, applies, depends upon whether the Act itself applies, that is, whether the Commissioners had warrant for acting as if in rightful possession of the land, and are, therefore, protected by the Act. This again depends on the evidence as to their possession, and its being a rightful possession. After hearing all the evidence in the case, I think it sufficiently shown that the land in question has for more than 12 years been in the possession of Government as part of the public roadway at and near the public ghât; and that the Municipal Commissioners, under Act III. of 1864, succeeded Government in the right which Government held. In this view, I consider the Municipal Commissioners properly acted under the law cited, and I would, therefore, consider them entitled to the application of Section 87, if the cause of action is of such date as to bar the plaintiffs. The cause of action not being, in my view, the letter of 7th December 1865, which is simply one in reply to plaintiffs' attorneys in the ordinary course of business, there is no further contention on that point that Section 87 would not then apply.

On the whole, I think plaintiffs' suit must be dismissed with costs.

Phear, J.—Assuming that the plaintiffs have by their evidence established the cause of action upon which they sue, I think, on the other hand, that it is sufficiently clear from the evidence in the case that the defendants committed the wrong or wrongs with which they are charged, in the reasonable belief that they were exercising the powers conferred upon them by Act III. of 1864 (B. C.), and therefore, if the plaintiffs were in this action strictly suing them for damages consequent on that wrong, I should consider that the defendants were entitled to invoke the protection provided by Section 87 of Act III. of 1864. But on turning to the facts of the case, I doubt whether those facts would support the defendant's claim in this respect, because I think the keeping the plaintiffs out of possession would be a continuing wrong-doing, and, therefore, that, as regards the cause of action afforded by the latter part of the defendant's wrongful conduct, the plaintiffs' suit was in time.

However, on the whole merits of the case, I think that the plaintiffs are substantially suing to recover possession of property which they say is kept away from them by the defendant, and I am not prepared to say that Section 87 is intended to apply to such a case as this. I should hesitate long before coming to the conclusion that the Legislature meant by enacting this Section to give the Municipal Commissioners the power, except a suit was brought against them within three months, to retain property against the rightful owner, merely because they (the Commissioners) had taken it, in the first instance, in the honest, though mistaken, belief that they were right in so doing. I think it more reasonable to suppose that the Section, as its words imply, was directed solely to the cases of suits brought against the Commissioners for damages consequential on the *act done* by them, which is complained of.

But, whatever be the correct view of the Section, I am not satisfied, on the best consideration which I have been able to give to the evidence, that the plaintiffs have even established a *primâ-facie* claim to the plot of land which they seek to recover. I am, therefore, prepared to concur in the decree proposed by Mr. Justice Bayley.

The 8th May 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Kubooleut—Registration—Section 13, Act XVI. of 1864.

Case No. 2016 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 5th June 1867, reversing a decision passed by the Deputy Collector of that District, dated the 19th March 1867.

Amjed Ali (Plaintiff), *Appellant,*

versus

Ala Buksh (Defendant), *Respondent.*

Baboos Chunder Madhub Ghosé and *Sreenath Dass* for Appellant.

Baboo Romanath Bose and *Moulvie Syud Murhumut Hossein* for Respondent.

A kubooleut is not a "lease" within the meaning of Section 13, Act XIV. of 1864.

Macpherson, J.—THE appellant relied on a kubooleut which he alleged had been executed by the defendants; but the Lower Appellate Court held that the kubooleut could not be received in evidence, as it had not been registered, and as it was a document which, in the opinion of the Court, required to be registered (under Section 13 of Act XVI. of 1864), before it could be received in evidence in a Civil Court. The Judge ruled that the word "lease" in Section 13 of Act XIV. of 1864 includes a kubooleut as it does in the new Registration Act, XX. of 1866 (by reason of the definition of the word "lease" contained in Section 2 of the latter Act).

The appellant contends that the Lower Court was wrong in holding that the kubooleut could not be received because unregistered; and, further, that, even without the kubooleut, there was sufficient evidence before the Court to entitle him to a decree.

We think that the Judge was wrong in holding that a kubooleut is a lease within the meaning of Section 13 of Act XIV. of 1864. A kubooleut is often a mere counterpart of a lease, but it is not necessarily a mere counterpart. Moreover, as a counterpart of a thing is not the thing itself, a counterpart of a lease is not a lease. The Registration Act, as excluding certain documents from evidence, must be construed strictly; and had we nothing but the mere words used in the Act to guide us, we should say that "lease" does *not* include "kubooleut."

This view, however, is corroborated by the fact that, in the Stamp Act, X. of 1862, we find the Legislature treating a lease as one thing, and a kubooleut as another. "Leases" are dealt with in Article 39 of Schedule A, while "kubooleuts" are dealt with as "counterparts of leases" in Article 33. Again, in the new Registration Act, XX. of 1866, Section 2, "lease" is defined as including a "counterpart, a kubooleut, an undertaking to cultivate," &c. The Judge uses this as an argument to show that "lease," as used in the old Registration Act, also included "kubooleut." But it seems to us to be an argument the other way; for if the words of the old law sufficed to include "kubooleuts," what need was there for a Clause in the new law, expressly declaring that it did include it? Finally, we find that, in the rules published under the Act by the Registrar-General, "kubooleuts" were treated as *not* included in the term "lease." These rules have (under Section 64) the same force as if inserted in the Act.

We have no doubt that the construction put upon the word "lease" by the Judge below is wrong. We, therefore, reverse his decision, and remand the case to him for trial on the merits.

The 6th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Pre-emption—Construction of a previous ruling.

Case No. 1472 of 1867.

Special Appeal from a decision passed by the Judge of Dacca, dated the 15th April 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 31st August 1866.

Kodrutoollah (Plaintiff), *Appellant,*

versus

Mohuree Shaha and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

HELD that, in a previous ruling of the High Court (Weekly Reporter, Vol. I., page 234), the Court only meant to say that it could not be held upon decisions that were in conflict with other decisions of the same district, that the custom of pre-emption prevailed there; it did not say that, when there were decisions tending the same way, that that would not be satisfactory proof of the fact.

Jackson, J.—IN this case there must be an order of remand.

The suit was by a Mahomedan against a Hindoo purchaser to enforce the right of pre-emption, the vendor being a Mahomedan. The suit was one in the Dacca Court. The plaintiff, in order to prove that the custom of pre-emption prevailed in that locality, adduced several decisions, or, more precisely speaking, three decisions of the several Courts in one case, a decision of the Appellate Court of the district in a second, a decision of the Moonsiff's Court in a third, and one of the Sudder Ameen in a fourth case. These decisions all went to show that the custom of pre-emption exists in the locality; and there were no decisions produced to the contrary effect.

On this, the Judge says: "The only "evidence which the appellant has produced "on this point is two or three decisions of "the Zillah Court. Evidence exactly similar "to this was held to be quite insufficient to "establish the existence of such a custom "in the case of Indro Narain Chowdhry "*versus* Mahomed Nuzerooddeen, 1 Suther-"land, page 234."

From this it seems to me clear that the Judge understood the High Court to have ruled that the production of two or three decisions of a Zillah Court would not be sufficient in law to establish the custom of pre-emption in a given locality; and he thinks himself bound to hold to the same effect in the present case. In the case referred to in 1 Weekly Reporter, page 234, the judgment ends as follows: "*Conflict-*"*ing* decisions of the subordinate Courts, "however, cannot be held as establishing "the custom, and, in the absence of any "other evidence on which we can take "it as proved, the decisions of the Lower "Courts must be reversed, and the plaint-"iff's suit must be dismissed."

And further back: "But he (plaintiff) only "put in three decisions of inferior Courts to "show that the custom does prevail at Chit-"tagong, while the defendant put in at least "one decision, also of a subordinate Court, "showing that the custom of the right of "pre-emption amongst Hindoos of Chittagong "does *not* prevail."

It is clear, therefore, that the Court only meant to say in that case that it could not be held upon decisions which were in conflict with other decisions of the same district, that the custom of pre-emption prevailed in that district. They did not say that, when there were decisions tending the same way, that that would not be satisfactory proof of the fact. I am not prepared to say whether the decisions produced in this case were sufficient to prove the custom or not. It may be that, if they were all suits between the parties residing in the locality in which the parties to the present suit reside, and if the decisions judicially recognized the custom, and were not appealed from, or were confirmed on appeal, they would be sufficient to establish that the custom did prevail in such locality. But if the parties are from other localities, such decisions might or might not bear upon the custom. There must be a remand, the decision complained of being set aside.

The Judge must exercise his judicial mind, and determine whether, on the evidence adduced, the custom of pre-emption has been proved to exist in the locality in which it is sought to enforce it in the present suit.

The 8th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Sales under Section 110, Act X., 1859, and Act XI. of 1859—Fraud—Jurisdiction.

Case No. 2322 of 1867.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 10th August 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 15th August 1866.

Joy Doorga Debia and others (Plaintiffs), *Appellants,*

versus

Gopal Chunder Banerjee and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Appellants.

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Mr. R. T. Allan and *Baboos Ashootosh Chatterjee, Kishen Succa Mookerjee, Motee Lall Mookerjee, Rajendronath Misser,* and *Kheltur Mohun Mookerjee* for Respondents.

A sale under Section 110, Act X. of 1859, though conducted under the rules in force for the sale of estates for the recovery of demands recoverable by the same process as arrears of land-revenue, does not entail all the consequences and effect of a sale under Act XI. of 1859.

A sale by order of a Revenue Court can be set aside by a decree of a Civil Court, even if held directly under Act XI. of 1859.

Jackson, J.—We think in this case that the Courts below were in error in holding that the suit was not cognizable in the Civil Court. It was supposed in both those Courts that the sale impeached by the plaintiff was one which had taken place under Act XI. of 1859, and that the suit could not be instituted otherwise than in accordance with the provisions of Section 33 of that Act.

This appears to be a mistake. The sale, we find, took place under Section 110 of Act X. of 1859, and by the last Clause of that Section it is provided that, if the property against which execution is applied for "be an estate or a share of an estate, it "shall be sold under the rules in force for "the sale of the estates for the recovery of "demands recoverable by the same process "as arrears of land-revenue."

This, it appears to us, only provides for the mode of procedure under which the sale should take place, and does not entail all the consequences and all the effect of a sale made under Act XI. of 1859 for arrears of revenue or other Government demands.

This suit in point of form was a suit to set aside the sale in the Collector's Court. There is authority for the opinion that a sale by order of a Revenue Court can be set aside by a decree of the Civil Court upon the ground of fraud; this matter having been directly ruled by a decision of the Full Bench in the case of Nilmonee Bunnick, to be found in 5 Weekly Reporter, page 20, Act X. Rulings.

Even, however, if the sale had been directly under Act XI. of 1859, the plaintiff would not have been debarred from the remedy which she substantially sees in the suit. (See Sutherland's Privy Council Judgments, Nowab Sidhee Nazir Ali Khan *versus* Ojoodhya Ram Khan).* There can be no doubt that what the plaintiff sought was to unmask a fraud or a series of frauds by which her property was attached and sold in execution of a decree for rent, which decree had been previously satisfied, and under which sale the property had passed into the hands of the co-sharers; and it might fairly be taken as the object of the suit to compel a reconveyance of the property to the defrauded owner.

In any point of view, therefore, it appears to us that the plaintiff, if she can make out such a case as that set up in the plaint, would be entitled to relief as against the defendants.

We are not precisely informed what was the nature of the arrears for which the decree went against the plaintiff. It is said to have been an arrear of allowance in the nature of *malikana*, payable by the plaintiff as the owner of a zemindary in respect of some lakheraj land situated within the limits thereof, and formerly resumed from a holder represented by the plaintiff in the Act X. suit, and for which the allowance in question was payable under the settlement concluded in 1793. If so, it is not clear whether the suit was properly cognizable in the Collector's Court at all. If it is not, then the sale was made without jurisdiction, and cannot be supported. This must be one of the points on which the suit will have to be tried on the merits, for which purpose it must be sent back to the Lower Appellate Court.

The decision of that Court is set aside, and the case must be remitted for a new trial.

* Also 5 W. R., Privy Council, 83.

The 8th May 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Limited Liability Companies Act—Act X. of 1866—Membership—Contribution.

Cases Nos. 594 and 595 of 1867.

Miscellaneous Appeals from an order passed by the Recorder of Rangoon, dated the 16th June 1867.

Mr. James Cotton and another, *Appellants,*

versus

The Pegu Saw Mills Company, *Respondents.*

The Advocate-General and *Mr. H. A. Gray* and *Baboo Romanath Bose* for Appellants.

Mr. R. V. Doyne for Respondents.

In June 1865 was projected the Pegu Saw Mills Company, Limited, appellants being amongst the projectors, and having signed the Prospectus and entered their names in a list (attached to the Prospectus) of intending shareholders, each to a specified extent; their names were also entered, as such shareholders, in the registration of the Company under Act X. of 1866. In January 1867, certain contributors (amongst whom appellants were not) and certain creditors applied to the Recorder of Rangoon, under Clauses 4 and 5, Section 101, to have the Company wound up and an official liquidator appointed. A liquidator having been appointed, he applied to the Court to call upon each of the contributors, named in a list which he presented, to pay up his contribution. Accordingly, the Recorder declared the appellants to be contributories, and directed each of them to pay the amount appearing against his name.

HELD that this was a suit by the official liquidator to have appellants declared contributories, and an appeal, therefore, lies from the Recorder's decision so declaring them.

HELD that the liability under Sections 6, 11, 18, 22, 36, and 37 of a registered shareholder, as member of a Company, to contribute, is a *primâ-facie* liability only; it being open to him to show that, although his name is in the register, yet he did not agree to become a member; and that, as appellants were not cognizant of (much less did they assent to) the registration of their names as shareholders, whilst they refused to receive any shares or pay up any calls or deposits, the sole step taken by them of joining others in putting forth the Prospectus and affixing their names therein to a certain number of shares cannot be said to be an agreement to become members of the Company, and so they are not contributories.

Hobhouse, J.—THE papers on the record before us show that, some time in June of the year 1865, a Company, styled the "Pegu Saw Mills Company, Limited," was projected. We have not the Prospectus nor the names of all the projectors before us, but it is admitted by the learned Advocate-General on behalf of the appellants that these persons signed the Prospectus, and were amongst the projectors of the Company; that they entered their names in a list which was attached to the Prospectus as intending shareholders in the Company, each to the extent of 10 shares of 500 rupees, representing in each case an intended contribution of Rupees 5,000; and that their names were entered as such shareholders in the registration made of the Company under the provisions of Act X. of 1866.

These preliminary facts admitted, it next appears on the record that, on the 19th January 1867, certain contributors (amongst whom appellants were not) and creditors of the Company applied, under Section 101, Clauses 4 and 5, of Act X. of 1866, to the learned Recorder of Rangoon to have the Company wound up under an official liquidator, on the ground that large debts had been incurred on behalf of the Company—debts which the Company was unable to meet by reason that a large number of contributories to the Company had refused to pay up the calls due on their shares.

On the 25th February 1867, the official liquidator was appointed; and, on the 11th April following, this gentleman applied to the Court of the learned Recorder, presenting a list (Exhibit A) of contributories to the Company, showing the name of each contributor and the amount of his contribution, and praying that the Court would call upon each contributor to pay up.

This list contained the names of Cotton and Balthazar, the appellants before us, as shareholders, each to the extent of Rupees 5,000, and was sworn to be a correct list as drawn up from the books and papers of the Company.

The application of the official liquidator was entered as a miscellaneous civil suit, No. 23 of 1867, and was heard as such in the presence of appellants on the 11th and 18th May 1867; and on these two dates respectively the official liquidator swore that the debts of the Company, as by Exhibit B, amounted to Rupees 1,31,284-13-5, and the Registrar swore that the official memorandum of the association of the Company had been duly registered by seven certain shareholders of the Company, amongst whom appellants, it may incidentally be said, were not.

At the hearing of the case, appellants objected that they were not liable as contributories, because they had not signed the memorandum of association, nor had they made any application for shares, nor had they received any allotment of shares, nor had they paid any deposit on shares; and, further, because misrepresentations had been made to them as to the position and prospects of the Company.

This last objection, it may here be remarked, is abandoned by the learned Advocate-General in appeal, inasmuch as he admits that appellants did not attempt to establish the fact on which it is based in the Court below.

On the 29th May 1867, the learned Recorder delivered judgment to the following effect:—

He held that, though every formality of law had been neglected in the foundation

of the Company, yet that, inasmuch as it had been registered under Section 37 of the Act, it was not an abortive Company, but had been in existence; and, as regards appellants, he further held that they had entered their names as shareholders in the Prospectus of the 27th February 1866; that this was equivalent to an application for shares on their part; that they had actively engaged and been treated as shareholders; and that so, whether they were shareholders or not, and whether they were properly described in the register or not, and though no scrip had been issued, and though their acts had not been attended by the requisite formalities, and that, whether they had subscribed or paid for shares or not, still they were liable to be treated as contributories, and the learned Recorder declared them to be contributories, and directed that a list should be prepared showing the name of each contributor and the amount of his liability.

On the 15th June 1867, the lists were filed before the Court in the presence of all parties, and the appellants before us were declared formally liable; and on the application of the official liquidator, under date the 24th June 1867, the learned Recorder, under date the 26th June 1867, directed that appellants should each of them pay to the official liquidator, on or before the 8th July 1867, the sum appearing against his name, *i. e.*, in each case the sum of Rupees 5,000.

Execution was taken out by the official liquidator for the recovery of the said sum, but has apparently been stayed pending appeal.

It is against the judgment and order above mentioned that the appeals before us are preferred, and a preliminary objection is taken by the learned Counsel, Mr. Doyne, for respondent, that no appeal lies to this Court at all.

By Section 27, Act XXI. of 1863, it is declared that "in all suits heard and determined by the Recorder (of Rangoon) "under this Act, in which the amount or "value of the suit shall exceed 3,000 rupees, "and be less than 10,000 rupees, an appeal "shall lie to the High Court of Judicature at "Fort William in Bengal."

By Section 119 of the Indian Companies Act, it is enacted that, "as soon as may be "after making an order for winding up the "Company, the Court shall settle a list of "contributories."

By Section 122 of the same Act, it is enacted that "the Court may at any time, "after making an order for winding up the "Company, make an order on any contributory, for the time being settled in the list "of contributories directing payment to be "made of any moneys due from him to "the Company."

By Section 141 of the same Act it is enacted that "appeals from any order or decision made or given in the matter of the "winding up of a Company by the Court may "be had in the same manner and subject to "the same conditions in and subject to which "appeals may be had from any orders or "decisions of the same Court in cases within "its ordinary jurisdiction."

The appeal in this case is not, as I understand it, an appeal against the order of the learned Recorder of the 26th June 1867, which directed appellants to pay a certain sum to respondent, but is an appeal against the judgment of the learned Recorder of the 29th May, or perhaps of the 15th June 1867, which determined that appellants *were contributories to the Company.*

The order directing appellants to pay a certain sum on the particular amounts of their contribution is, in fact, nothing more than a necessary sequence to that judgment which determined that appellants were contributories, and this order must, of course, stand or fall with the judgment which preceded it, and the only question, therefore, for us to determine is whether or not that judgment is of the nature of a decision of the Court of the learned Recorder of Rangoon in a suit within the ordinary jurisdiction of that Court, and in a suit in which the amount or value exceeded 3,000 rupees, and was less than 10,000 rupees.

The amount in regard to which the learned Recorder has come to a determination is, admittedly, in the case of each appellant, the sum of Rupees 5,000, and the judgment is, in our opinion, in the nature of a decision of the same Court in a case within its ordinary jurisdiction.

There was what was in fact, and what was treated as a suit by the official liquidator against appellants to have them declared contributories, and to recover certain sums of money exceeding 3,000 rupees and not exceeding 10,000 rupees from them as such contributories, and the Court has heard and determined such suit, and an appeal, therefore,

does, in our opinion, under the provisions of the law above quoted, lie from the Court's decision.

The question, then, now is, whether appellants are or are not contributories.

Mr. Doyne, for respondent, contends that the Company was not an abortive, but an existing Company, and that appellants either by their acts or omissions constituted themselves contributories to it; that they signed the Prospectus and entered their names in such as shareholders for a specified number of shares; that they were registered as shareholders; that they have allowed their names to remain in such register; that they do not show that their names were registered improperly; and that such registration, following upon the acts of appellants precedent thereto, and not annulled by any acts subsequent thereto, concludes appellants as contributories, appellants having, in fact, held themselves out to the world as shareholders, and having thus induced the creditors of the Company to advance money on their (appellants') credit.

The learned Counsel did not cite any rulings of the Courts in support of this contention.

On the other hand, the learned Advocate-General contended that appellants were not contributories; that their acts in signing the Prospectus and in entering their names as shareholders for a certain specified number of shares were evidence merely of an intention to become shareholders, and not of having actually become shareholders; that the registration was not shown to have been effected with their knowledge or assent; that neither did they apply for shares nor were shares allotted to them; that they paid no deposit and answered no call; and that, on the contrary, when calls were made, they declined to pay up, pleading non-acceptance of any shares; and so that, under numerous rulings of the Courts at home, to which the learned Advocate-General referred at length, his clients could not be considered as contributories under the Act.

The facts appearing on the record seem to us to show conclusively that the Company was not an abortive, but an actually existing Company—a Company that was actually formed by an association of individuals; for premises were purchased, works were set up, shares or calls thereon were paid up, registration, *i. e.*, incorporation, was duly effected; the Company was at work for about two years, and, on the credit of the business and of the shareholders, moneys were lent, and debts incurred, to the extent of something over 1,31,000 rupees.

The Company, then, was not, in our opinion, what is technically called an abortive Company; and then the facts that are admitted on either side are these, *viz.*, that appellants signed the Prospectus, signed on that Prospectus their names as shareholders, each for a specified number of shares were registered as such shareholders, and made no attempt to expunge such registration; but that, on the other hand, appellants were not cognizant of, and did not assent to, such registration; that no shares were accepted by them; that no deposits were made by them; that they refused to accept shares or to pay calls on shares; and that, though they took a part in setting up, they took no part at all in the business of the Company.

It is upon these facts that the question of contributorship or the contrary arises, and has to be determined.

Sections 6, 11, 18, 22, 36, and 37 of the Companies Act, read together, seem to me to declare that every person whose name has been duly registered as a shareholder of a Company, and whose name is on the register at the time of winding up, is a present member of the Company, who has, until the contrary is shown, agreed to be a member, and who is, therefore, liable as a member to contribute to assets to an amount sufficient to pay the debts and liabilities of the Company, &c.

But this liability is a *primâ-facie* liability only, and it is, it seems to me, at all times open to a registered member to show that, though his name is in the register, yet that, in fact, he did not agree to become a member of the Company.

Now, in the case before us, Mr. Doyne, for respondent, contends that appellants did agree to become members when they signed the Prospectus and entered their names thereon as shareholders for specified shares.

But the learned Advocate-General, for appellants, contends that this was no agreement, but only an expression of an intention towards such agreement; and that the fact of the non-acceptance and non-delivery of shares, of the non-payment of calls or deposits, and of the not taking any part in the business of the Company, are evidence in law of the non-existence of any agreement of membership, and so of non-contributorship.

After giving the best attention in my power to this point of law, and consulting the authorities upon it, I think that the weight of those authorities is with the learned Advocate-General.

I find, in the first instance, no authorities in support of the thesis laid down by the learned Recorder that the mere entry in a Prospectus of a Company of the names of certain persons as intending shareholders is equivalent to an application for shares on the part of such person, and I do not find on the record any evidence of the fact found by the learned Recorder, that the appellants were actively engaged as shareholders of the Company.

And I find, on the contrary, that, whilst appellants are not shown to have been cognizant of, much less to have given their assent to, the registration of their names as shareholders, and whilst it is admitted that appellants refused to receive any shares or to pay up any calls or deposits, and had no shares allotted to them, the only step taken by appellants in the matter of the Company was their joining with others in putting forth the Prospectus of the Company, and affixing their names in that Prospectus to a certain number of shares; and the facts being so, I think that appellants cannot be said to have agreed to become members of the Company, and so are not contributories.

The learned Recorder has relied on certain doctrines which are to be found in Lindley's treatise on the Law of Partnership, and they are these :—

On the subject of contributories the learned author remarks (Edition 1863) as follows : "Those," he writes, "who, when a petition for "the winding up a Company is presented, are "shareholders in that Company, or are estop-"ped from denying that they are so, are also "contributories in it, unless they can show "good reason to the contrary. It is wholly "immaterial whether they are not pro-"perly described in the Company's regis-"ter as shareholders, or whether they are or "are not shareholders in the strict sense of "the term, and as such liable to credit-"ors."—Page 1087.

And again: "These cases are sufficient "to show that, where a person has acted and "been treated as a shareholder, he will be a "contributory, notwithstanding the non-ob-"servance of those formalities which, accord-"ing to the strict letter of the Company's "deed, must be complied with before a person "is entitled to share profits or enjoy the "other rights or privileges of a shareholder." —Page 1089.

And again: "It follows from the defini-"tion of the word 'contributories' that it is "by no means essential that a person should "be, or ever have been, a shareholder, in "order that he may be a contributory. If he "is bound to the Company to take shares in "it, that is sufficient to fix him as a contri-"butory."—Page 1111.

And again: "From a review of the cases, "relating to the winding up of the *abortive* "Companies, it therefore appears :—

"*1st.*—That if persons are actively en-"gaged in forming a Company, if they act "as a body, and, as a body, incur debts for "which they are liable, if not directly, at all "events as between each other, then they "form a Company or Association which may "be wound up, and, on its winding up, they "will be contributories, whether they have "actually subscribed for shares or not.

"*2nd.*—That persons who, without being "actually engaged in forming a Company, "agree, not only to take shares in it, but also "to share the expenses incurred in forming "the Company, are, on its winding up, liable "to be made contributories.

"*3rd.*—That persons who agree to take "shares in a Company in the process of form-"ation, and afterwards formed, as project-"ed, are, in the winding up of that Company, "liable to be made contributories, although "they never actually became shareholders in "it."—Pages 1123 and 1124.

These are the passages in Lindley on which the learned Recorder relies, though he has not quoted them so much at length.

I will first take the two passages in pages 1087 and 1089, and, for the purposes of the argument, I will assume that appellants "are shareholders, or are estopped from denying that they are so," but I would then remark that the shareholders will, in the words of the learned author, yet only be contributories, until they can show good reason to the contrary.

I then remark that, in all the cases cited in pages 1088—1090, the shareholders, who were held to be contributories, had gone far beyond the present appellants in their acts. They had bought shares, had had those shares transferred to them, had paid up and had received dividends in them, as in Strafford's, Saunderson's, and Gordon's cases; or they had availed themselves of the privileges of the

Company, as in Maguire's case; so that, even assuming appellants to have been shareholders, I think that the doctrines laid down by Lindley at pages 1087 and 1089 have no application.

I will next examine the doctrines to be found at pages 1111 and 1123, and I will assume, for the purposes of the argument in this case, that the doctrine applied at page 1123 to abortive Companies applies also to Companies such as this before us, which was a completely formed Company, and the doctrine seems to me to turn wholly on the fact as to whether or not the person sought to be made a contributory was or was not bound to take shares, and did or did not agree to take such shares.

And here, again, I find that, in all the cases cited by Lindley, the persons who were held to be contributories went far beyond the present appellants in their acts. They applied for, paid up for, and were allotted shares, as in Gilland's, Hawkin's, Blackborne's, Sharper's, and Mansfield's cases; or applied only for shares, as in Burton's case; or agreed to take them, as in Bird's case (pages 1111 and 1113); or they agreed to share expenses, paid expenses, accepted shares, or agreed to take them, as in the cases cited at pages 1121—1123.

So that here, again, I am of opinion that the doctrines relied on by the learned Recorder have no applicability to the case before us.

Having thus disposed of the grounds on which the learned Recorder found appellants liable as contributors, I believe I can state in a very few words my own reasons for considering that appellants are not contributories.

I find that appellants' names were and are still entered in the register of members of the Company, and I think, as I have indicated above, that appellants must, by reason of this entry, be deemed to be members, unless and until they show that they are not shareholders.

It is then contended that appellants are not shareholders; because, although they signed the Prospectus, they did, in fact, refuse to become, and did not become, shareholders, inasmuch as admittedly they refused to accept any shares or to pay any calls or deposits, and had no shares allotted to them.

The mere putting forth of a Prospectus and affixing their names as intending shareholders cannot, in my opinion, as contended for by Mr. Doyne for respondent, be construed into an agreement entered into by appellants to take shares, and it is quite clear, I think, as I have shown above, that appellants are not shareholders within the meaning of Lindley's definition and precedents at pages 1087 to 1089 of his book, or persons who, without being shareholders, are yet bound to take shares within the principles and precedents cited by Lindley at pages 1111 to 1113.

But I think this case may be carried further, and that, under the cases quoted by Lindley at page 1114, *et seq.*, appellants clearly cannot be held to be contributories.

In those cases shares were applied for and allotted, as in Matthew's case, and an active part taken in getting up the Company, as in Carmichael's case, and yet the persons were held not to be contributories; and it seems to me to follow that, if persons were held not to be contributories, who had gone so far in their acts as above mentioned, much less can these persons be held to be contributories, who have never gone so far in their acts, who made no application for shares, who received no allotment of shares, who took no active part in getting up the Company, and who, on the contrary, refused to accept shares, or to pay up any calls or deposits on them.

I am of opinion, therefore, that the judgment of the Court below should be set aside, and that appellants should be released from contributorship, with costs in this Court and in the Court below.

Loch, J.—I concur.

The 9th May 1868.

Present:

The Hon'ble G. Loch and E. Jackson, *Judges.*

Mortgage after attachment—Section 240, Act VIII., 1859.

Case No. 348 of 1867.

Regular Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 16th September 1867.

Munnoo Lall (Plaintiff), *Appellant,*

versus

Reet Bhungun Singh and others (Defendants), *Respondents.*

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Mr. R. V. Doyne and *Baboos Unnoda Pershad Banerjee, Onookool Chunder Mookerjee,* and *Kalee Kishen Sein* for Appellant.

The Advocate-General and *Baboos Juggodanund Mookerjee, Romesh Chunder Mitter,* and *Mohinee Mohun Roy* for Respondents.

HELD by Loch and E. Jackson, JJ., that a mortgage of any kind made after attachment is such an alienation as is contemplated by Section 240, Act VIII. of 1859, and is null and void.

HELD also by Loch, J. (*E. Jackson, J., dissentient*), that such alienation is null and void, not only as against the creditor making the attachment, but also in regard to the whole world.

Loch, J.—THE suit was brought to recover the amount of a loan with interest made by the plaintiff to Baboo Reet Bhungun Singh under a bond, dated 9th October 1863, by which Mouzah Shahpore, the property of the debtor, was mortgaged as security for the loan. The plaintiff seeks to have this property sold in liquidation of his claim, and to recover any balance from the person or other property of his debtor.

Reet Bhungun Singh does not resist the claim. The other defendants give a general answer to the claim that the mortgage to plaintiff is of no effect, as the property was under attachment when the mortgage was made. Each of this class of defendants lays claim to portions of the property on special grounds, and the claim of each may be shortly stated as follows :—

Jug Munder Dass held a decree for money against Reet Bhungun, bearing date 3rd December 1850—execution was taken out, property was attached on 4th March 1859, and sale-proceedings were about to be carried out, when the debtor filed a kistbundee, dated 2nd June 1859, by which he pledged Mouzah Shahpore as security for the debt. As the money was not paid according to the terms of the kistbundee, the decree-holder attached the property on the 13th March 1863, and proceedings to bring it to sale were going on, when the debtor agreed to sell a 4-annas share of the village to him in liquidation of his debt, and a deed of sale to that effect was executed on the 9th August 1864.

Jonessur Dass says that he held the property on a zur-i-peshgee lease, bearing date 24th July 1860, for Rupees 48,705 ; that for a further consideration of Rupees 40,400; he obtained a conditional sale of the village on 28th October 1862 ; that as the debtor failed to pay the money, he served a notice upon him of foreclosure, dated 14th August 1863, and the year of grace having expired, the sale had become final; that afterwards, out of consideration to the debtor, he entered into a settlement with him, by which he sold 5-annas share of Shahpore to defendant by a deed of sale, dated 9th August 1864.

Doorga Dass and Bheemull Dass held a decree for money against Reet Bhungun Singh, and attached the property of the debtor, who pledged Shahpore as security for the debt on 7th August 1860. Further proceedings were taken in execution in 1863, when the property, on 12th June 1863, was attached and advertized for sale, but these proceedings, as stated by Baboo Unnoda Pershad Banerjee, pleader for the appellant, were struck off on 8th September 1863. Subsequently, the defendants entered into an arrangement with the debtor, who, by a deed of sale, dated the 9th August 1864, transferred a 4-annas share of the village to him.

Lalla Choonee Lall and others held money-decrees against the debtor Reet Bhungun, and in liquidation of their claims purchased 12 annas of Mouzah Shahpore from him on 9th August 1864. They had not taken out execution against the debtor.

It is contended before us, *first*, that, if the plaintiff's mortgage is invalid by reason of the existence of an attachment in execution of a decree when it was made, then for the same reason all the private sales made to the defendants are invalid.

2nd.—It is urged that a mortgage of the kind made to the plaintiff, which was not a usufructuary mortgage, nor any transfer of possession, but merely a simple security for the payment of the debt, was not an alienation which would be void by reason of the existence of a previous attachment at the time the property was pledged.

3rd.—It is urged that the attachment is good only in favor of the party making the attachment, but it is not good against the whole world. Had Jug Munder Dass not attached the property, Choonee Lall would not have been in a position to raise an objection to the mortgage.

4th.—All four defendants dealt with Reet Bhungun as if he were competent to deal with the property. Why should Reet Bhungun have been incompetent to deal with plaintiff?

I concur with the learned Advocate-General in thinking that we have nothing to do with the defendant's purchase. We need not trouble ourselves to pronounce any opinion as to their validity, whether they are or are not so by reason of the existing attachment. We have only to deal with the plaintiff's case, and to determine whether his mortgage is valid, and enables him to sell the property in suit, or whether it is an alienation as contemplated by Section 240 of Act VIII. of 1859, and whether the attachment extends to the whole world or only to certain persons.

The words of the Section run thus: "After any attachment shall have been "made by actual seizure, or by written "order as aforesaid, and in the case of "an attachment by written order, after "it shall have been duly intimated and "made known in manner aforesaid, any "private alienation of the property attached, "whether by sale, gift, or otherwise, "during the continuance of the attachment, "shall be null and void." If, then, a mortgage after attachment is such an alienation as is contemplated by this Section, it is null and void. The learned Counsel for the appellant admits that a usufructuary mortgage would be such a transfer of possession as would come within the meaning of this Section, and would be void. What is the effect of a simple mortgage? It puts a burden upon the property, and renders it less valuable to the attaching creditor than it was before, and it in a measure defeats the object of an attachment which is to have the property liable to sale in the condition it was when the attachment was made. Though there is no transfer of possession, there is a transfer of rights and interests in the property to the injury of the attaching creditor. But the law forbids any private alienation of the property attached, whether by sale, gift, or otherwise. The word "otherwise" must be explained by the two words which preceded it. If a usufructuary mortgage comes within the meaning of the word "otherwise," why not a transfer of rights and interests under a simple mortgage?

The late Sudder Court, in a case reported at page 102 of the Sudder Decisions for 1859, held that a mortgage after attachment was invalid. It is not, however, clear from that judgment what was the exact nature of the mortgage in that case, but it appears to me that a mortgage of any kind is an alienation to a certain extent of rights and interests possessed by the mortgagor injurious to the creditor; and I think that, when once the property has come into the custody of the law, the debtor can do nothing with it, without the permission of the Court. Once it is attached, the property must remain in the condition it was in at the time of attachment, unless, by permission of the Court, the debtor be allowed to make arrangements regarding it for the benefit of creditors.

Holding, then, the opinion that a mortgage of any kind comes within the meaning of the word "alienation," as used in Section 240 of Act VIII., we have now to consider what is the effect of an attachment in regard to creditors who have not attached the property of the debtor. Is the attachment by one creditor good for the protection of his interests only, or does it, so long as it remains in force, protect the interests of other creditors, and render any alienation of the property invalid as against them also? The point has, I may say, been determined above. Looking at the words of the law, it appears to me that any alienation of property after and while under attachment is null and void. Nothing can make such alienation good. The law says: The alienation *shall be* null and void, and it does not limit this in favor of the creditor making the attachment, but in regard to the whole world. It in effect says that such alienation must be considered as if it had never been made. If this be a correct view of the law, then other creditors cannot be affected by an alienation which is declared by law to have no existence. Had the arrangement with plaintiff been entered into with the permission of the Court after hearing any objections the attaching creditor might have to urge, it would have been valid; but so long as the attachment is in force, and the property in the custody of the law, the debtor has no power to deal with it in any way, but must leave it in the condition it was when the attachment was made. Under this view of the law, it appears to me that the judgment of the Lower Court must be affirmed, and this appeal dismissed with costs.

Jackson, J.—I regret that I am obliged to differ from my learned colleague in the view which he would take of Section 240, Act VIII. of 1859. I admit that the words of that Section, read literally and taken by themselves, are sufficient to bear out the view that all alienations made during the continu-

ance of an attachment are null and void. I concur with my colleague in considering that the mortgage to the plaintiff was an alienation such as is contemplated by that Section. If there was any doubt upon the matter the action taken upon the mortgage in this very suit would remove that doubt. The plaintiff by this very suit declares that the estate in question was to some extent alienated to him, at least so as to bar any further alienation until his claim against its former proprietor was satisfied. But admitting that the mortgage to the plaintiff was an alienation, I am of opinion that such alienation is, under Section 240, Act VIII. of 1859, null and void only as against the decree-holder who moved the Court to make the attachment, and as respects all proceedings taken by such decree-holder under the attachment. If, for instance, the decree-holder who had caused the attachment had proceeded to sell, the purchaser at the sale would hold superior rights to the mortgagee, and the mortgage would, as respects him, have been a null and void alienation. Similarly, if the subsequent sale to the decree-holder had been made under Section 243, Act VIII. of 1859 through the Court, the alienation to the plaintiff would have been null and void as respects the purchase by the decree-holder.

But it is a different question how far the attachment affects a subsequent private alienation by the debtor in favor of the decree-holder. I am inclined to think that the attachment does not protect any such subsequent private contract. By attachment it has been held that the Court takes the attached estate into its own custody. But I think that it does so with the view of disposing of it for the benefit of the decree-holder in the mode prescribed by law; but not with the view of enabling the debtor and decree-holder to make their own private bargain regarding it. The only one of the defendants who had attached the debtor's estate lost all benefit from that attachment when he did not carry on the legal mode of executing his decree but entered into a private contract with the debtor, and alienations which would have been void, if he had proceeded to execute his decree, are no longer void if he fails to carry on the execution. I admit the point of law is a difficult one, the more so as the words of the Section may have a more extended meaning, and there is the fear that the decree-holder in this case may have been misled by those words. I shall be glad if the question can be referred to a Full Bench of the Court for final determination.

The 9th May 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Unregistered deeds—Section 68, Act XVI., 1864.

Case No. 2395 of 1867.

Special Appeal from a decision passed by the 2nd Principal Sudder Ameen of Hooghly, dated the 10th August 1867, reversing a decision passed by the Moonsiff of that District, dated the 24th April 1867.

Gooroo Dass Dan (Plaintiff), *Appellant,*

versus

Kooshoom Koomaree Dossee and another (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee and *Issur Chunder Chuckerbutty* for Appellant.

Baboo Tarucknath Dutt for Respondents.

Under Section 68, Act XVI. of 1864, a registered deed of sale has priority over an unregistered one of an earlier date, even where the registry was optional.

Kemp, J.—In this appeal, there are two questions for decision,—*first,* whether the special appellant's deed of sale, or that of the special respondent, is to prevail; and *second,* whether the plaintiff's vendor, having given over possession to the plaintiff of the property sold, could re-convey the same property to the special respondent.

The vendor in this case admits the sale to the special respondent, but repudiates the sale to the special appellant. The deed of the latter is of prior date to the deed of the former, but the deed of the special respondent is registered, whereas that of the special appellant is not.

The case is governed by the Registry Act XVI. of 1864. That Act came into operation on the 1st of January 1865. The value of the property sold was less than 100 rupees. Therefore, under Section 16 of the

said Act, the registry was optional. The defendant's deed is registered, but that of the plaintiff is not. The plaintiff does not, except in a general way, allege that the defendant's deed is not authentic, or that it was obtained by fraud, and no proof of such being the case was adduced. Under such circumstances, the deed of defendant being duly registered, it must have priority over the deed of the plaintiff, which relates to the same property, under Section 68 of Act XVI. of 1864.

The Lower Appellate Court did not find that the special appellant was in possession, and from the fact of the suit of the special appellant, who was plaintiff below, being for confirmation of possession, it would appear that his possession was not an admitted fact. But be that as it may, the deed of the special respondent being registered, and that of the special appellant not being so, the former must prevail. To rule otherwise, would be to frustrate the main object for which the Registration Law was enacted.

The special appeal is dismissed with costs and interest.

Jackson, J.—I also think that this appeal should be dismissed. The plaintiff appears to have obtained two deeds of sale from Sreekisto Roy. He had one of these registered, but he did not register the other because it was for a small piece of land. The defendant subsequently bought the same piece of land from Sreekisto Roy, and had his deed of sale registered. The act of Sreekisto Roy was a fraud, and is probably punishable under the Penal Code; and if it had been alleged and found that the defendant was a party to the fraud, I think the Courts ought not to have given effect to the fraudulent deed. But no fraud on the part of the defendant has been found here, and it can hardly be said that fraud was even alleged against him. Certainly, there is no statement of the facts on which the defendant is declared to have been a party to the fraud. Taking the case then to be, as to which of two innocent purchasers is to have the preference, Section 68 of Act XVI. of 1864 is conclusive that the registered deed is to have priority over the unregistered deed. Great stress was placed by the appellant's pleader upon the fact that the plaintiff had held possession under his deed, though it was not registered. That can only be considered on the question whether the defendant acted in fraud. A long undisturbed possession by the appellant and knowledge of that fact by the subsequent purchaser would be proof of his having acted fraudulently. But the possession in this case was, as stated by the plaintiff, only recent; and there is no attempt at proof that the defendant was aware of that possession. On all the circumstances of the case, I come to the conclusion that the Lower Appellate Court's decision was correct.

The 9th May 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Minors—Certificates under Act XL. of 1858.

Case No. 95 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Dinagepore, dated the 4th February 1868.

Aman Khan, *Appellant,*

versus

Mussamut Hoseena Khatoon, *Respondent.*

Mr. J. S. Rochfort and *Baboo Sreenath Banerjee* for Appellant.

Baboo Romanath Bose for Respondent.

In the grant of a certificate under Act XL. of 1858, unless under peculiar circumstances, fitness is to be preferred to mere nearness of relationship.

Glover, J.—THIS was an application for a certificate under Act XL. of 1858 for the guardianship of a minor and the management of his property. The applicants were the boy's sister and half-brother: and the Judge, holding the former to be nearer of kin, appointed her to the office.

It appears to us that this order should be set aside. The Act looks to fitness as well as to propinquity, and it has been ruled by this Court (*vide* 9 Weekly Reporter, 334) that, unless under peculiar circumstances, fitness is to be preferred to mere nearness of relationship. The half-brother of this minor

is a man of mature age and the manager of the joint-family estate. Nothing has been alleged against either his character or capability, whilst the sister is a young Purdanusheen Mahomedan woman of 18, married to a stranger, and unfitted both by education and by her antecedents to take the management of an estate. Were the certificate to be granted to her, it would practically give the entire control both of the person and property of the minor to a stranger in blood, who might take advantage of it to further his own interests.

Under these circumstances, we reverse the Lower Court's order, and direct that a certificate be granted to Aman Khan. The costs of this application and those incurred below will be paid out of the estate.

The 9th May 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Small Cause Court—Immediate execution—Refund—Section 19, Act XI., 1865.

Reference to the High Court by the Judge of the Court of Small Causes at Hooghly and Serampore, dated the 3rd April 1868.

Mr. G. A. DePenning (Judgment-debtor), *Petitioner*,

versus

Debendronath Moitro (Decree-holder), *Opposite Party*.

In authorizing (Section 19, Act XI. of 1865) immediate execution of a Small Cause Court decree, by the issue of a warrant either against the person or against the moveable property of a judgment-debtor, the Legislature never intended that the debtor should be protected from arrest until he had had a reasonable time for returning home.

Where a judgment-debtor has paid the amount of a Small Cause Court decree, he is not entitled to a refund merely because he was arrested before he reached home under an execution issued against his person by the Court, and paid the amount to obtain his discharge.

Case.—THE petitioner, G. A. DePenning, was defendant in suit No. 1093 of 1867, Small Cause Court, Serampore, brought against him by one Debendronath Moitro. A summons under Section 41 of Act VIII. of 1859 was issued to him to appear and answer the claim on the 18th of January 1868. On that day, he appeared in person to defend the action. The case was heard and determined in the presence of both parties, and judgment given against the petitioner. When the decree was passed, the plaintiff applied verbally for the immediate execution thereof against the person of the petitioner, and the Court, under the power vested in it by Section 19, Act XI. of 1865, made an order for the issue of a warrant of arrest against the person of the judgment-debtor. As the petitioner was proceeding on his way home from the Court, he was arrested and sent to the Civil Jail of Serampore. While in confinement, he paid the amount of the decree, and obtained his release; he now complains by a petition that the arrest of his person under the circumstances aforesaid was illegal, as he had attended the Court in pursuance of a summons issued for his appearance, and prays that the sum paid by him under the pressure of illegal arrest and illegal confinement might be refunded to him from the decree-holder to whom it has been paid away.

The questions of law on which an authoritative ruling is solicited are—

1st.—Whether, under the circumstances stated above, the arrest of the petitioner was illegal?

2nd.—Whether, in the event of the Court holding that his arrest was illegal, he is entitled to a refund of the money paid by him under the pressure of such arrest and the subsequent confinement.

There is no statute, as far as I am aware, which protects a party or a witness from arrest under civil process when he attends a Court of Justice for prosecuting or defending a suit, or for giving evidence, as the case may be. But all the authorities on law seem to be agreed that, when a person is required to attend a Court either as a party to a suit or as a witness, he cannot be arrested in execution of a warrant is-

suing out of a Civil Court on his way to the Court, at Court, and on his way back. Taylor (Section 936) says: "In order to "encourage witnesses to come forward "voluntarily, they as well as parties, Barris-"ters, Attorneys, and, in short, all persons "who have that relation to a suit which "calls for their attendance, are protected "from arrest while going to the place "of trial, while attending there for the "purpose of the cause, and while returning "home; *eundo, morando, et redeundo.*" Norton, in his work on Evidence, intended to be applicable to the Courts of this country, observes (Section 360): "It may be "shortly stated that witnesses are pro-"tected from arrest, *eundo, morando, et* "*redeundo (i. e.)*, on their way to the Court, "at Court, and on their way back."

Nor does the principle in question as to the protection of parties and witnesses rest entirely on the authority of law-writers, without any support from the views of the highest Court in the country. The late Sudder Court held that a person, being in attendance on a Collector to defend a suit or claim pending before that officer, is protected from arrest under civil process, in like manner as persons in attendance on a Magistrate to answer a criminal charge, and that in either case the protection will last only as long as the party is in actual attendance or coming to, or returning from, the Court. (Construction No. 893, Cal. C., 1st August 1834.) True it is that this ruling of the Sudder Court applies only to the case in which a person attends before a Collector. But if a party in attendance on a Collector enjoys the privilege of execution from arrest, I see no reason why that privilege should be withheld from a party attending a Civil Court.

It would, I think, be contrary to the whole policy of the law to put a person in a worse position than he would otherwise have been in, by reason of his complying with a summons issued by a Court for his appearance. Every person against whom a suit is instituted has a right to appear and defend himself. To expose him to the risk of arrest when he attends to answer the claim against him would be virtually to deprive him of that right. It is said that he might employ a vakeel to act and plead for him, and thus avoid the risk of arrest. But every person has a right to plead his own case in person. He may not have the means of employing a pleader. To hold that, in such a case, he must submit to the suit against him being decided *ex parte* in his absence would be monstrous. I am of opinion, therefore, that a defendant, who appears to answer the claim against him, is entitled to protection from arrest under civil process on his way to the Court, at Court, and on his way back.

But the point remains to be considered whether Section 19, Act XI. of 1865, takes away or interferes with the indemnity which he would otherwise have enjoyed. Section 19, Act XI. of 1865, provides: "When a decree is passed in any "suit of the nature and amount cognizable "under this Act, the Court passing the decree "may, at the same time that it passes the de-"cree, on the verbal application of the party "in whose favor the decree is given, order "immediate execution thereof by the issue of "warrant, directed either against the person "of the judgment-debtor, if he is within the "local limits of the jurisdiction of the Court "passing the decree, or," &c. It is contended that, under this Section, a party in whose favor a decree is passed by a Court of Small Causes is entitled on a verbal application for the execution thereof, to obtain a warrant for the arrest of the judgment-debtor, and to have that warrant executed at once, whether the judgment-debtor was in attendance in Court to defend the case, or is on his way home back from the Court; otherwise it is said that this Section would be wholly nugatory, the judgment-debtor being permitted to leave the Court, and allowed an opportunity, after returning home, to elude the writ issued for his arrest. I think that this contention is not sound. The same objection might be urged against the adoption of the principle in question in the case of decrees of other Courts than those of Small Causes. I see no reason why a defendant, who appears to answer the claim brought against him in a Small Cause Court, should be debarred from the privilege which defendants in other Courts enjoy. If there was anything in the law enacted to regulate the procedure of Small Cause Courts which took away such privilege from defendants appearing in those Courts, undoubtedly I should be bound to follow the express provisions of the statute without reference to any rule or principle of law of the country that may be found in any of the standard works of English Law or any ruling of the late Sudder Court on the state of the law existing before Act XI. of 1865 was en-

acted; but Section 19 of the Act in question does not seem to be contrary to the principle I have already mentioned. As I understand the Section, it simply authorizes the Judge of a Court of Small Causes, at the same time that it passes a decree, on the verbal application of the party in whose favor it is given, to issue a warrant against the person of the judgment-debtor. If he is within the local limits of the Court's jurisdiction, all that a decree-holder is entitled to under that Section is to obtain warrant at the time when the decree is passed, without his being required to put in a written application upon a proper stamp for execution of his decree under the provisions of Section 211, Act VIII. of 1859, and to go through the preliminaries which the law prescribes as necessary to be observed before a warrant can issue. There is nothing in Section 19 which gives a warrant of arrest issued under that Section a greater force and efficacy than any other warrants of arrest have. The warrant, therefore, must be executed subject to all the conditions and restrictions under which other warrants are executed. If a defendant who attends a Court of Small Causes in pursuance of a summons issued for his appearance be liable, as soon as judgment is given against him, to be arrested, parties who have the misfortune of being sued in such a Court would be deterred from making their defence, and would be deprived of a right to which every defendant is entitled, *viz.*, that of laying his case before the Court to enable it, from the facts elicited from the statements of both parties, to pronounce a more satisfactory judgment than if it had been left to come to a conclusion from the allegations of the plaintiff only, and the proofs adduced by him. It may be that a person against whom a suit for Rupees 500 is brought in a Small Cause Court has not the means of mustering up that sum on so short a notice as is given by the summons to a defendant in a Small Cause Court case, and if he is a man with sense of honor, he would much rather not appear, and suffer judgment being given *ex-parte* against him, than expose himself to the risk of being arrested as soon as judgment is passed. For the above reasons, I am of opinion that the arrest of the petitioner was illegal.

With regard to the second question, it appears to me that, if the arrest of the petitioner was illegal, the money paid by him under the pressure of such arrest and of his subsequent confinement in jail is to be considered as money not realized by due process of law, but as money illegally exacted. It is, therefore, not available in equity to satisfy a decree of the plaintiff by whose illegal conduct the money was wrung from the petitioner. The decree-holder is not to be permitted to take advantage of his own wrongful act, and is liable to refund the amount in question. He may, however, proceed to realize the sum due to him under the decree in any mode prescribed by the law.

The judgment of the High Court was delivered as follows by :—

Peacock, C. J.—This case is very clearly stated and well argued by the Judge of the Small Cause Court in the reasons which he has given for his opinion.

We are, however, of opinion that, when, by Section 19 of Act XI. of 1865, a Small Cause Court passing a decree was authorized to order immediate execution by the issue of a warrant, either against the person or against the moveable property of the judgment-debtor, it was not intended that the debtor should be protected from arrest under the warrant, until after he had had a reasonable time for returning to his home. In other words, the Legislature never intended, when it authorized immediate execution, to give the judgment-debtor a fair chance of getting away.

With regard to the second question, it appears to us that it would be very unreasonable, after the plaintiff had obtained a decree against the defendant, and the defendant had paid the amount, to compel the plaintiff to return it to him, merely because he was arrested before he reached home under an execution issued against his person by the Court, and paid the amount decreed against him in order to obtain his discharge. It appears to us that to order such a refund would be very much like trifling with the administration of justice.

The 11th May 1868.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Hindoo Law — Marriages between different castes—Jurisdiction—Conjugal rights.

Case No. 2166 of 1867.

Special Appeal from a decision passed by the Deputy Commissioner of Kamroop, dated the 6th June 1867, affirming a decision passed by the Sudder Moonsiff of that District, dated the 9th January 1867.

Melaram Nudial (Defendant), *Appellant,*

versus

Thanooram Bamun (Plaintiff), *Respondent.*

Baboo Nuleet Chunder Sein for Appellant.

Baboo Obhoy Churn Bose for Respondent.

The general Hindoo Law being against a marriage between persons of distinct castes (*e. g.*, Domes and Harees), local custom can alone sanction it.

A Civil Court cannot pass a decree for the recovery of the person of a wife, the proper order being for the restitution of conjugal rights.

Mitter, J.—We are of opinion that the decision of the Lower Appellate Court in this case is defective. The plaintiff is a Dome Brahmin, and the girl to whom he says he was married is alleged to be a Haree. It is to be observed that Domes and Harees are two distinct castes, and the question is whether a marriage between a Dome Brahmin and a Haree girl is good and binding. Local custom is the only authority by which such a marriage can be sanctioned, the general Hindoo Law being against it. The Lower Appellate Court ought, therefore, to come to a distinct finding as to whether such a custom exists or not, and the case ought to be remanded to it for that purpose.

We are also of opinion that the Civil Courts cannot pass a decree for the recovery of the person of the wife, the proper order in all such cases being an order for the restitution of conjugal rights, as ruled in the judgment of this Court, dated 23rd July 1866, reported in VI. Weekly Reporter, page 105. The decree passed by the Lower Appellate Court is reversed, and the case is remanded for a fresh trial with reference to the above remarks.

The 11th May 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Jurisdiction—Land leased for a school and a church—Liability to enhancement by judicial proceedings—Section 17, Act X., 1859.

Case No. 1797 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 21st May 1867, affirming a decision passed by the Deputy Collector of that District, dated the 13th March 1866.

Ranee Shurno Moyee (Plaintiff), *Appellant,*

versus

Reverend C. Blumhardt (Defendant), *Respondent.*

Baboos Bhuggobutty Churn Ghose and *Sreenath Doss* for Appellant.

Mr. M. L. Sandel and *Baboo Onookool Chunder Mookerjee* for Respondent.

Revenue Courts have no jurisdiction in a suit to recover arrears of rent at an enhanced rate from a tenant to whom land had been leased for the express purpose of building a school and a church.

No tenures are liable to enhancement of rent by judicial proceedings, except the tenures of ryots having right of occupancy.

Phear, J.—The plaintiff sues in the Revenue Court to recover arrears of rent at an enhanced rate after notice served upon the

defendant according to the provisions of Section 13, Act X. of 1859. The land in respect of which the plaintiff claims these arrears was let to the defendant in a series of two or three takings, all of which are now comprehended, or, at any rate, referred to, in the pottah of 1842. It appears that Mr. Blumhardt, in the first instance, took some five beegahs of land for the purpose of building a school. He afterwards took fifteen beegahs more; and then, again, we think, five beegahs; and, lastly, two additional beegahs. The last plot of land was for the purpose of building a church upon, and the intermediate plots were let to Mr. Blumhardt for the express purpose of carrying out more effectually the object for which he had first taken the five beegahs, namely, the building and maintaining of a school. We have considered the terms of the pottahs, and the acknowledged purposes for which the land was let, in connection with the various decisions to which we have been referred, namely, with the decisions reported in the VIII. Volume, Weekly Reporter, page 251, and in Volume VII., Weekly Reporter, page 237, and also Volume VII., Weekly Reporter, page 374, and Volume V., Weekly Reporter, page 34, and Volume I., Indian Jurist, new series, page 427; and we are of opinion that this case falls within that class of cases which is held by these decisions, not to be the subject of the legislation of Act X. of 1859. It follows, therefore, that the Collector's Court had no jurisdiction to entertain the plaintiff's suit, which must, consequently, be dismissed.

For my own part, however, I wish to justify the conclusion at which I have arrived by another argument. Section 17, Act X. of 1859, no doubt, by implication, does make the subject to which it refers liable to enhancement of rent undert he circumstances of one or other of the alternatives mentioned in that Section; but the subject of Section 17 is a *ryot having a right of occupancy* only, and, as far as I know, there is no other part of Act X. and no other enactment outside Act X. of 1859, which expressly makes any tenure liable to enhancement of rent. Therefore, if any tenure, not being that of a ryot having a right of occupancy, is liable to be enhanced in rent by judicial proceedings, it must be upon the foundation of custom, or of agreement expressed or implied. Now, in the particular case before us, I suppose both sides would be unanimous in saying that Mr. Blumhardt is not a ryot having a right of occupancy within the meaning of Act X. of 1859. If his tenure is liable to enhancement, it must be by reason of some custom affecting it, and making it so liable, or because, by the terms of the relation between himself and the plaintiff, he has expressly or impliedly agreed that it should be so. Now, certainly, to my understanding, there is no custom which is judicially recognized within the operation of which Mr. Blumhardt's holding could come. No other custom has been established by evidence. It is not suggested that there has ever before been an instance of the enhancement of rent of land let and occupied as the site of school-premises and a church, and there is nothing in the terms of the agreement between Mr. Blumhardt and the plaintiff, so far as they have been disclosed to us, which should make him liable to enhancement. Therefore, even supposing that this was a question of enhancement of such a character in regard to the tenure, and the persons affected by it, as might properly be the subject of the jurisdiction of the Revenue Courts, it seems to me that the plaintiff had failed to make out, as a matter of right, her claim to any enhancement at all. Whichever way, therefore, the case is looked at, it seems to me that the plaintiff's suit ought to be dismissed. The appeal, therefore, is dismissed, and the decision of the Lower Appellate Court affirmed with costs.

The 11th May 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Fraudulent failure to pay rent—Section 10, Act XIV., 1859.

Case No. 1576 of 1867.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 18th April 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 21st December 1865.

Bhugwan Chunder Roy and others (Defendants), *Appellants,*

versus

Raj Chunder Roy (Plaintiff), *Respondent.*

Baboos Onookool Chunder Mookerjee and *Bhuggobutty Chunder Ghose* for Appellants.

Baboo Anund Chunder Ghosal for Respondent.

Where one of two co-owners of a putnee fraudulently fails to pay his share of rent, and permits the putnee to be sold by the zemindar for arrears, the other co-owner's cause of action against him accrues at the date of sale when the fraud is consummated.

Phear, J.—THE plaintiff and the first defendant were co-owners in a certain putnee. It seems that the said defendant failed to pay his share of the rent due to the zemindar, and that, as a consequence, the putnee was sold by the zemindar for arrears of rent, on the 1st Jeyt 1260. Shortly after the sale for arrears of rent, namely, on the 25th Assin 1260, it is said that the first defendant obtained possession of the putnee as owner, either by reason of its having been bought at the sale *benamee* for him, or because he subsequently bought it from the purchaser at that sale. The plaintiff now seeks to recover back his share in the putnee upon grounds of action which are set out in the plaint, but which we are unable, from the plaint itself, to understand in such a way as to see that they constitute a cause of suit. We gather from the argument which has been placed before us by the pleader for the plaintiff that the cause of action intended to be sued upon is, that the defendant originally defaulted in the payment of his share of the rent, with the purpose of bringing about a sale by the zemindar for arrears of rent, in order to deprive the plaintiff of his share in the property, and, by purchasing himself at the sale, to become sole owner of the putnee, to the exclusion of the plaintiff. And he has stated to us a scheme of a somewhat complex nature, which, he said, was the plan followed by the defendant for the purpose of effecting this fraud. We certainly cannot see that the ground of action thus described by the plaintiff's pleader is really disclosed in the plaint, or in the plaint taken together with the plaintiff's written statement; and we cannot discover in these documents any other legal cause of suit.

But assuming that the defendant is liable to the charge of fraud, which the plaintiff's pleader has put before us, it is clear that that fraud against the plaintiff was consummated by the sale on the 1st Jeyt 1260, and therefore that the plaintiff's cause of action accrued at that date. If so, inasmuch as he did not sue until the 6th Assin 1272, his suit is barred by lapse of time. But then it is said that, inasmuch as the essence of the cause of action in this case is the fraud of the defendant, the time prescribed by the Act XIV. of 1859 does not, under the provisions of Section 10, begin to run until the moment when the fraud was first discovered by the party wronged, that is, by the plaintiff. The objection on the ground of limitation was taken by the defendant in the Court below, but the Lower Appellate Court overruled the plea, because it considered that the case did fall within the saving of Section 10, Act XIV. of 1859, and that the plaintiff did not, in fact, discover the fraud until 25th Assin 1260, that is, until the date when Omes Chunder, the first-named defendant, is said to have taken actual possession of the property, namely, the putnee which was sold. The reasoning of the Judge seems to be this, that the fraud of the first defendant consisted in his purchasing the property at the sale for arrears of rent, although he sues the person by whose default the sale was brought about, and that this is strictly prohibited by the provisions of Act VIII. of 1859. Further, that this illegal act of the first-named defendant could not, under the circumstances of the case, have been discovered by the plaintiff, until actual possession was taken by the defendant in Assin 1260. Thus, he concludes that, according to Section 10, the plaintiff's cause of action must be attributed to this date.

Now, this seems to us an entire misapprehension in regard to the matter of fraud, which is referred to in Section 10, Act XIV. of 1859. The fraud there referred to means the fraud against the plaintiff, which constitutes the substantial matter of his complaint. Now, although the bidding and purchasing at the auction-sale by the defaulter himself was an infringement of the provisions of Act VIII. of 1859, it was not in itself a fraud against the plaintiff, nor even, as we understand the case of the plaintiff as put forward by his pleader, has it any relation whatever in this particular case to the actual fraud relied upon. It was the particular end no doubt, according to the plaintiff, which the defendant had in view when he committed the alleged fraud; but it is not the fraud itself, even though, as the Judge below observes, it was an act done in infringement of Act VIII. of 1859. The defendant's fraud against the plaintiff would have been as complete, and the injury caused thereby to the plaintiff would have

been as great as it is now said to be, if the defendant had been outbid at the sale, and a stranger had bought the property. We cannot see, therefore, even supposing that the cause of action upon which the plaintiff intended to sue was set out in his plaint, that the Judge is right in considering that it was brought by the provisions of Section 10, Act XIV. of 1859, within the period of limitation prescribed by law in that behalf; and that, consequently, the bringing of the suit was not barred. On this ground, we are obliged to say that the conclusion of the Lower Appellate Court is wrong, in so far as it overrules the plea of limitation. But we further think, as we have already said, that the plaint, even taken together with the written statement of the plaintiff, does not disclose a cause of action against the defendant, and therefore that the suit ought, by the plaintiff's own showing, to be dismissed. This is one of those cases wherein we have so often lately had to observe that great mischief is done, and much harassment caused, to the parties by the circumstance of the Court of first instance not having done its duty in rejecting a plaint which ought never to have been filed.

We decree the appeal, reverse the decision of the Lower Appellate Court, and dismiss the plaintiff's suit with costs of all the Courts.

The 11th May 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Certificate under Act XL. of 1858 (Sections 9, 19, and 21)—Guardian's accounts—Guardian's fitness.

Case No. 40 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 14th December 1867.

Ram Dyal Gooye and another, *Appellants,*

versus

Amrit Lall Khamaroo, *Respondent.*

Baboos Romesh Chunder Mitter and *Mohinee Mohun Roy* for Appellants.

Baboo Nil Monee Sein for Respondent.

An applicant for a certificate under Act XL. of 1858 having alleged that the appointed guardians had neglected their charge in various ways, the Judge called upon the guardians to produce their accounts, and, on their failing to do so, took away their certificate, and gave it to the applicant.

HELD that the Judge would have been justified by Section 21 in cancelling the guardians' certificate if sufficient cause were shown; but he had no authority to do what he did, the accounts which a Judge can call for under that Section being those which a discharged guardian is to furnish to his successor in office; and the only way in which a guardian retaining office can be made to furnish such accounts is by a regular suit brought by a relative or friend of the minor.

HELD that, before appointing a guardian, the Judge should satisfy himself, under Section 9, of the applicant's fitness for the office.

Glover, J.—THIS was an application by one Amrit Lall Khamaroo for a certificate under Act XL. of 1858, on the allegation that the appointed guardians, Ram Dyal and Mussamat Brojo Soonduree, had neglected their charge in various specified ways.

On receiving the application, the Judge appears to have called upon the guardians to produce their accounts, and, on their failing to do so, took away their certificate, which he granted on the same day to Amrit Lall.

The original guardians now appeal.

The Judge does not state under what Section of the Act he proceeded, and it appears to us that there is no Section under which he could have called on Ram Dyal and Brojo Soonduree to produce their accounts so long as they remained in the office of guardians.

It has been suggested by Counsel that he proceeded under Section 19 of the Act, but Section 19 refers to third parties, relatives, or friends of a minor wishing to force a guardian to give in his accounts; and, moreover, that Section provides that, for such a purpose, a regular suit must be instituted by the relative or friend in question, a simple application for such purpose not being sufficient. The Full Bench decision in the case of Nanee Bibee *versus* Khajah Surwar Hossein, 7 Weekly Reporter 522, has ruled this point.

The only Section under which the Judge could have acted, if he thought that the guardians had neglected their trust, was Section 21. By that Section he would have been justified in summarily cancelling the guardian's certificate, if waste were proved, or any other sufficient cause shown; but the Section gave him no authority to call upon Ram Dyal and Brojo Soonduree, whilst still guardians of the minor, for accounts, or to make their neglect to file them a reason for cancelling their certificate. The accounts which a Judge can call for under Section 21

are those which are to be furnished by a discharged guardian to his successor in office, and not those in the hands of a guardian who still retains his office.

The only way in which such a guardian can be made to furnish such accounts is by a regular suit brought against him by some relative or friend of the minor. A Judge has, it seems to us, no power to demand them.

The case must, therefore, be remanded in order that the Judge, before cancelling the certificates of the original guardians, may take evidence as to the negligence and waste alleged against them, and decide whether there is "sufficient cause" for his interference. If he consider that there is such sufficient cause, he can cancel the certificates at once without calling for accounts.

But before appointing Amrit Lall Khamaroo, who appears to be a man of low caste and position, and is alleged to be illiterate and incapable, the Judge should satisfy himself, with reference to Section 9 of the Act, as to the proposed guardian's fitness for the office he wishes to undertake.

The 11th May 1868.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Presumption afforded by possession—Onus probandi—Caveat emptor.

Case No. 2338 of 1867.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 17th June 1867, reversing a decision passed by the Moonsiff of that District, dated the 24th December 1866.

Shahaboodeen Chowdhry and others (Plaintiffs), *Appellants,*

versus

Ram Gutty Chuckerbutty and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Shushee Bhoosun Bose* for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

When parties are in possession of an estate, it is generally to be presumed that they have been in possession as owners; and it lies on the party alleging that that possession is of a different nature, such as that of an under-tenant, to prove the allegation.

Where a party purchases an estate sold in execution, after notice that parties other than the judgment-debtor claim rights and interests in the property, the rule of *caveat emptor* applies.

Jackson, J.—THE defendant in this case, Ram Gutty Chuckerbutty, appears to have obtained a decree against one Fukir Chand Nundee; and in execution of that decree he applied to the Court to sell the right, title, and interest of the judgment-debtor in a certain *turruff* called Aboo Shurreeff, which had been sold by the Collector for arrears of Government revenue in 1196 *Mughee*, and of which this Fukir Chand Nundee was the designated purchaser.

Thereupon, Shahaboodeen Chowdhry, the plaintiff in the present suit, entered, we are told, an objection under Section 246 of the Civil Procedure Code, alleging himself to be the proprietor and in possession of the rights in question on his own behalf.

This objection, if made, was overruled in the execution-proceedings in consequence of the claimant failing to establish his possession to the satisfaction of the Court. The sale, at any rate, took place, and the decree-holder himself became the purchaser, it seems, for the very small sum of Rupees 130. Thereupon the claimant brought this suit to establish his rights.

The Moonsiff in whose Court it was tried, gave judgment, for the plaintiffs, and ordered that "the sale effected under date the 24th "of April 1865 be reversed, that the plaint-"iffs do enjoy, as at present, the uninterrupt-"ed possession of the different portions and "shares of lands claimed by them, and do re-"ceive costs from defendant No. 1," &c.

This decree coming before the Zillah Judge in appeal, the Judge was of opinion that, although the plaintiff had established his case of uninterrupted possession for many years in the land in dispute, he had failed to make out his allegation that he had acquired any proprietary right by a re-conveyance from Fukir Chand; and that his possession was not mâlikee, or proprietary, but in the nature of that of an under-tenant; and thereupon he reversed the Moonsiff's order, and dismissed the suit.

From this decision the plaintiff appeals specially. It seems that no howala from Fukir Chand Nundee to the plaintiff was produced, and it may be assumed that the re-conveyance to the plaintiff has not been satisfactorily made out; and we think that there can be little doubt that the true statement of the case would be that the purchase on the part of Fukir Chand was *ab initio* a *benamee* purchase.

The Government sale, it is true, was not made under the recent Sale Laws of which the provisions are very stringent as to *benamee* transactions, but it was apparently made under Regulation XI. of 1822, which provides in such cases a penalty limited in amount, or if the discovery of the *benamee* purchase be made within two years, the Collector is authorized to cancel the sale.

Nevertheless, the parties may have been influenced by the consequences which would follow if the facts were truly stated, and may, for this reason, have set up the alleged re-conveyance which they were unable to prove. Nevertheless, the broad fact is proved that, for thirty years and more, the plaintiff, and not Fukir Chand Nundee, has been in possession of the *turruf*. The circumstance that Fukir Chand Nundee's name was registered in the Collector's books, and that the payment of Government revenue was made in his name, and occasionally by his agency, is not one of such significance as in any degree to affect the inference arising from the fact of actual possession.

But the Judge has chosen to infer that the possession was not of a proprietary kind. Now, when parties are in possession of an estate, it is generally to be presumed that they have been in possession as owners; and it lies on the party making the allegation that that possession is of a different nature, such as that of an under-tenant or the like, to prove such allegation. Now, in the present case, there is no proof of this. It appears, therefore, that the plaintiff is entitled to the entire benefit of the presumptions arising from his long possession. That possession, as it has been frequently ruled, does confer a *primâ-facie* title, and would entitle the party who establishes it to maintain himself in possession till a better title is proved.

In the present case, the present purchaser cannot claim the immunities and privileges of a purchaser without notice. He himself caused the estate to be put up to sale. On his doing so, a claim was at once made on behalf of the plaintiff, and consequently the purchaser had full notice that persons other than the judgment-debtor claimed rights and interests in the property. If after that he chooses to make the purchase, the rule of *caveat emptor* applies, and he must take the consequences.

The plaintiff is entitled to a judgment; the decision of the Judge must be set aside, and a decree given in favor of the plaintiff. But under the circumstances of the case, seeing that the plaintiff has chosen to allow Fukir Chund Nundee to appear through all these series of years as the ostensible owner, and has thus encouraged the belief that the property was his, and might be resorted to in satisfaction of decrees given against him, we think that the plaintiff should have no costs, and that each party should pay his own costs of the whole of the proceedings.

There seemed to be some question whether the claim under Section 246 was actually preferred or no. This is not very clear; but the position of the purchaser would not be materially affected, if it should turn out that no such claim was made in the execution-proceedings, because the purchase not being one by private contract, but a purchase at a sale of the rights and interests of the judgment-debtor, there was nothing guaranteed to the purchaser, and he purchased at his own risk, and therefore is not in the position of an innocent purchaser without notice.

In giving this judgment it must be understood that we do not restore that portion of the Moonsiff's decree which declared a reversal of the sale. That could not properly be done, and was unnecessary. The decree-holder purchased the rights and interests of the judgment-debtor; he has got them, and must make the most of them, but the sale should not have been set aside.

The 12th May 1868.

Present:

The Hon'ble G. Loch and F. A. Glover,

Judges.

Res adjudicata—Section 2, Act VIII., 1859.

Case No. 1329 of 1867.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 19th February 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 12th February 1866.

Madhoo Pershad (Plaintiff),

Appellant,

versus

Lalljee Shahoo and others (Defendants),

Respondents.

e

Baboos Kalee Kishen Sein and *Debendro Narain Bose* for Appellant.

Mr. C. Gregory for Respondents.

After the partners of a trading firm had dissolved partnership, and divided assets and liabilities, a suit was brought against the firm by a creditor, and decreed, notwithstanding the plea put in by one of the partners (*M*), that by the private arrangement among the partners, the debt sued for pertained to the other partner's (*L's*) share of the liabilities.

HELD that this was not *res adjudicata* as between *M* and *L*, and that the former was not barred by Section 2, Act VIII. of 1859, from suing the latter to recover his share of the property sold in execution of the above decree.

Glover, J.—THE parties to this suit were, at one time, partners in a trading firm, who, by a private arrangement between themselves in 1855, dissolved partnership, and divided assets and liabilities in certain proportions.

A creditor of the firm, one Jankee Ram, sued all the partners, and obtained a decree in spite of the plaintiff's (Madhoo's) plea that, by the arrangement above mentioned, the particular debt sued for appertained to the defendant Lalljee's share of the liabilities.

The decree-holder took out execution, and sold the joint property in satisfaction of his claim.

And the plaintiff now sues to recover from his partners his share of that property, on the ground that, by the articles of agreement, he was not liable for the debt on account of which the property was sold.

The Judge (in opposition to the view taken by the Court of first instance) decided that the plaintiff's suit was barred by Section 2, Act VIII. of 1859, because his plea of non-liability under the arrangement had already been adjudicated upon in the suit brought against the firm by Jankee Ram.

It appears to us that the Judge was wrong. The cause of action to Jankee Ram was non-payment of a debt due by the firm collectively, and no private arrangement between the partners could defeat his claim to have his debt satisfied from the property of the firm, to which, and not to any particular individual of it, he gave credit. The plea, therefore, of Madhoo that Jankee Ram's claim was one of the Mozufferpore liabilities, and as such pertained to Lalljee under the private arrangement between the members of the firm, was no answer to Jankee Ram; but, if proved, it would have been a very sufficient reason, as between Madhoo and Lalljee, why the former should not be liable for debts which, by private agreement, had been specially allotted to the latter.

The present suit, therefore, is essentially different from the one already decided, and the parties to it hold very different positions; and if Madhoo can prove the agreement alleged by him to have been entered into between him and the defendant, there is no reason why he should not recover from Lalljee.

We, therefore, reverse the Judge's order, and direct him to try the appeal on its merits. The costs of this appeal will be paid by the respondents.

The 12th May 1868.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Joint Hindoo family—Presumption—High Court—Appeal—Procedure—Section 327, Code of Civil Procedure.

Cases Nos. 292, 268, 273, and 269 of 1867.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Patna, dated the 16th July 1867.

Badul Singh and others (Defendants), *Appellants,*

versus

Chutterdharee Singh and others (Plaintiffs), *Respondents.*

Baboos Unnoda Pershad Banerjee and *Kishen Succa Mookerjee* for Appellants.

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Respondents.

Certain Hindoos, descended from a common ancestor, after having lived in commensality and joint estate, separated, no deed of separation being executed, or reservation expressed of any kind. About 11 years after, one of the parties to the separation sued the others, alleging that certain immoveable property, which stood in the name of the defendants or their ancestor, had remained in the possession of the defendants on the allegation of exclusive purchase; but that it would be proved to have been acquired by joint ancestral income during the time the family was joint.

HELD that the common presumption of Hindoo Law in favor of members of a joint-family did not apply to such a case, and it lay on the plaintiffs to show why they were silent so long.

HELD, also, that, as other property was proved to have been separately acquired by the members of the family, there was no more presumption of joint than of separate acquisition.

Among the properties in a suit for possession was one of which the beneficial owner, though he applied under Section 73 of the Civil Procedure Code, was not allowed by the Court to be made a defendant; notwithstanding judgment was given for the plaintiff in respect of the property in question, with costs, against one of the defendants who was the ostensible owner. Some of the defendants appealed, but the one last mentioned appealed separately against the award of costs.

HELD that as the judgment (which was erroneous) was on a ground common to all the defendants, and the appeal was substantially against the whole decree, the High Court was competent, under Section 337, Civil Procedure Code, to reverse the decree, though only some of the defendants had appealed, and though the one who had appealed as to costs had engrossed his appeal only on a stamp to cover the amount of those costs.

Jackson, J.—THESE four appeals arose out of two suits, which may be denominated cross-suits, which were tried together in the Court of the Principal Sudder Ameen of Patna: the appeal No. 292 being on the part of the defendants in one suit, and the other three appeals being preferred by separate defendants in the other suit.

It is convenient to dispose of these four appeals in one judgment, but I shall advert to them in the order in which they have been named above.

The whole of the parties to all the appeals are descended from one common ancestor, Hoorul Singh; and for the purposes of this litigation they may be divided into two parties, one being that of Chutterdharee Singh, descended from the 2nd and 4th sons, Dabee Singh and Ghomandee Singh; and the other, the party of Badul Singh, descended from the first and third sons, Bholah Singh and Leela Singh.

The parties having formerly lived in commensality and joint estate appear to have separated in Bysack 1262 Fuslee.

According to the written statements, the separation at that time in estate was as complete as the parties could make it. No deed of separation appears to have been executed, no reservation of any kind was expressed, no difference or quarrel appears to have taken place, and the separation was as noiseless and peaceable as any separation could possibly be.

About eleven years and five or six months after this separation, the party of Chutturdharee commenced a suit in the Principal Sudder Ameen's Court, alleging that certain immoveable property, which stood in the name of the defendants or their ancestor, had remained in the possession of the defendants on the allegation of exclusive purchase; "but it would be satisfactorily proved "that the mouzahs in question were ac-"quired by ancestors, or by joint ancestral "income, during the time the family was "joint; and it was stated that the cause of action arose in Bysack 1262, when, as above stated, the separation took place.

The suit was filed on the 25th of August 1866.

The defendants, for some reason unexplained, did not file their written statements until the 29th December of that year; and, in the same breath, they instituted an exactly similar suit against the plaintiffs in the first suit. In their written statements, as defendants, they denied that the disputed property had been acquired by means of joint proceeds of ancestral property. They alleged on the contrary that the acquisition of the property in dispute had arisen by means of moneys borrowed by the defendants, for which they alone were liable, and that, in fact, the property had been, and was, in the possession of the parties from whom they (the defendants) had borrowed the money as security for the loan. They maintain that the suit instituted for the recovery of a share in such property after so long a time is unjust and unreasonable; and they further said that the plaintiffs, before they could be entitled on any principle of Hindoo Law to share in the property acquired as stated, must contribute to the purchase, and so entitle themselves to participate.

It may, at the same time, be stated that the allegations on the part of the plaintiffs and defendants in the cross-suits are exactly the same.

The Principal Sudder Ameen took up these suits together, and starting with the declaration that, as the property had been acquired at the period when the family were joint in estate, therefore the presumption was that all the members of the joint-family were entitled to share in the property, and that the burden of proving separate acquisition lay on those who alleged it, then proceeded to inquire into the evidence of that allegation set up by the defendants.

In the case in which Chutturdharee's party were plaintiffs, the judgment of the Principal Sudder Ameen is very much taken up with the examination of the evidence with regard to three mouzahs, Burra Goburdhone, Burra Gossain Doss, and Chuck

Aheda, no doubt for the reason that it was specially in respect of these three mouzahs that the defendants accepted and endeavoured to acquit themselves of the burden of proving a separate acquisition of the property. In respect of these mouzahs the defendants showed that, at all events, they had borrowed precisely at the time of their acquisition two sums, the larger from Mussamut Misrain, and the other, a much smaller sum, from Sheo Pershad, which together were equal to the amount expended on the purchase. They showed that the amount was borrowed exclusively by Badul Singh, the principal defendant; that a mortgage of Mokeempore and other villages was at that time executed by him to Mussamut Misrain, who in turn gave a *Kutkeenah* of these properties to Meerban Singh, a brother of Badul Singh. They also showed that Mussamut Misrain in 1857 had obtained a decree for 5,000 rupees on a bond executed in her favor, and in execution of that decree had arrested Badul Singh, and that Badul Singh was released from arrest on payment of Rupees 5,549 to the creditor, and that this amount was again raised by a mortgage of the three villages in dispute, and by a further mortgage of Jugdespore and other villages.

In fact, they show, if their evidence is to be believed, that the whole of the transaction relating to the purchase of these three mouzahs was carried on by Badul Singh; that he had borrowed the money, and had made himself liable; that he had executed mortgages in respect of this property; and that possession of the first mortgaged lands had, nevertheless, been retained by the sub-tenure to the brother.

The whole of this evidence, which to my mind is quite satisfactory, the Principal Sudder Ameen gets rid of by a theory of his own: collusion between Mussamut Misrain and Badul. No reason is assigned or suggested why Mussamut Misrain should bring a fictitious suit and obtain a decree, and in fictitious execution of that decree make a fictitious arrest of Badul. She appears to be a Mussulman lady wholly unconnected with the parties, and the idea of collusion with Badul is quite gratuitous. She was paid up by sums of money borrowed from other parties; and although it might have thrown much light on the subject to look at the nature of these later transactions, the Principal Sudder Ameen "*declines*" to go into the matter. "The Court declines to enter into "the merits of these allegations, since on the "*bonâ fide* character of the debt incurred "from Misrain, the decision of this case "mainly depends."

It seems to me that, if the rule of law be that which the Principal Sudder Ameen states it to be, and if it be right in his opinion that it lay upon the defendants to prove their allegation of separate acquisition, they have thoroughly discharged themselves of that burthen by the evidence to which I have alluded. But it seems to me the defendants did a great deal more than they were bound to do.

I am of opinion that the application of the common presumption of Hindoo law to such a case as this is entirely out of place. The separation between the parties having taken place so long ago as eleven years before the commencement of suit, and there being nothing to show that anything was reserved at that separation, it certainly lay on the plaintiffs to show why they were silent so long; and the presumption in favor of the members of a joint-family, at all times capable of being easily rebutted, had no force at all in a case like the present.

We have looked at the oral evidence recorded by the Principal Sudder Ameen, and that evidence, if it is worth anything, is altogether on one side as to the acquisition of the properties.

It must not be forgotten that the plaintiffs in their plaint took upon themselves the proof of the allegation that the property was acquired from joint-funds; and in this they have wholly failed. If there had been a presumption such as that relied on by the Principal Sudder Ameen—and the evidence to which I have referred entirely overcomes that presumption in respect of the three mouzahs I have named—it entirely disappeared in respect of other property separately held, because we then have the case of a family whereof the members are proved to have in some instances acquired separate property, after which there is no more presumption in favor of joint than of separate acquisition, and the burthen of proof rests on the plaintiffs.

But if this be the fact in the first suit brought by Chutturdharee, the plaintiffs have put themselves more conclusively out of Court by their answer in the cross-suit brought by the defendants. In that case their allegations are just the same as those used by the defendants in the first suit.

They allege separation and separate acquisition, and complain of the unreasonableness of setting up a claim so long after the separation. Therefore, in my opinion, the plaintiffs ought to have failed, and their suit ought to have been dismissed.

The Principal Sudder Ameen has taken what I may call a pedantic view of the presumption of Hindoo law in favor of joint families. That view is, I think, erroneous, and his decision must be set aside with costs.

The next two appeals, Nos. 268 and 273, are appeals by the defendant in the second or cross-appeal. Here the parties change sides, and after hearing the vakeel for the appellant after he had proceeded a certain length, he was stopped by the Court, and the vakeel for the respondent was invited to support the judgment, which invitation he declined.

The same reasons which I have used in my judgment in the other suit apply with equal force to this case, and the judgment of the Lower Appellate Court in these cases also must be reversed with all costs.

The judgment in No. 269 involves a point altogether different from that discussed in the other cases, and must be noticed separately.

It appears that among the properties in the second suit was one Mahomedpore Bustee *alias* Kitchnee. The ostensible owner of this was the defendant Omedee Singh, and this defendant put in a written statement in the suit, to the effect that the beneficial interest in the property was in his son Lutchmee Narain. That son applied to be made a defendant under Section 73 of the Procedure Code; but his prayer was disallowed, the Principal Sudder Ameen afterwards observing that his judgment was not binding upon persons who were not parties to the suit. But he gave judgment for the plaintiffs in respect of the mouzah in question with costs against Omedee Singh in common with the other defendants.

Omedee Singh has appealed against this part of the judgment separately, and the respondents admit that he is entitled to appeal separately as to costs, but they contend that that appeal and the other appeals will not enable this Court to set aside the judgment as regards Mahomedpore Bustee, inasmuch as none of the defendants before this Court claim any interest in that property.

It appears to me, however, to admit of little doubt that, having some of the defendants before us as appellants, and finding the judgment of the Lower Court to proceed upon a ground common to all the defendants, and the appeal being substantially against the whole decree, we are competent, under Section 337, Civil Procedure Code, to reverse the decree in favor of all the defendants.

It is true that Omedee Singh has not engrossed his appeal on a stamp which fully represents the value of Mouzah Mahomedpore Bustee, but only on a stamp to cover his appeal as to costs. It is not certain whether the stamp-duty on the three petitions of appeal in these cases taken together amounts to the whole sum which would have been the stamp-duty if the appeal were one; but this is immaterial. I think that substantially the several defendants have appealed against the whole decision, and that we ought to reverse that decision in favor of all the defendants.

But more than this. It is clear that the Principal Sudder Ameen having before him a suit relating to a particular mouzah, and it having transpired that a person not a party to the suit had the right, title, and interest in that mouzah, and the Principal Sudder Ameen having given a decree for possession of that mouzah, and made another party not interested liable for costs, the decree being on this and other grounds declared erroneous, we ought not simply to reverse this part of the decree as to costs, but to go on and declare that the decree as to that mouzah is entirely set aside. It would be absurd if a decree in such circumstances were allowed to stand. I think, therefore, that we must reverse not merely particular portions of the decree but the whole decree. The four appeals will be allowed, and the two suits will be dismissed with costs.

It is very unfortunate that the parties in this litigation, after peaceful enjoyment of their respective shares for nearly twelve years, should have suddenly rushed to arms, and wasted their means in this fruitless litigation.

Mitter, J.—I entirely concur with my learned colleague. The position of the parties in these two suits is of such a peculiar nature that their arguments in the one case completely neutralize their arguments in the other.

If I were at liberty to draw my own inference from the facts admitted, the only infer-

ence that can be drawn is that there must have been some express understanding between the parties with reference to the properties they are now fighting for, in consequence whereof those properties were intentionally excluded from the partition made in 1262 F. S. As, however, neither party has thought it proper, for obvious reasons, to disclose the real circumstances which transpired at the time of the partition above alluded to I am unable to rest my judgment upon this inference. Nevertheless, it is clear to my mind that these are not cases in which the plaintiffs can and ought to be permitted to take their stand upon the naked presumption of Hindoo law, according to which every property acquired during a state of union is to be considered as joint until the contrary is shown.

It is admitted that the family-estate had been partitioned so far back as 1262. It is also admitted that ever since that time, down to the date of the institution of the earliest of these two suits, more than eleven years have elapsed, during which time the properties claimed by one party have been exclusively held in their possession without any protest or remonstrance on the part of the other. No explanation whatever has been given as to why and under what circumstances these properties were not included in the general partition; nor is there any evidence to show that any attempt in that direction was made by either of the parties. Under such circumstances, therefore, it might be safely presumed that these properties were in the same condition before the date of the said partition in which they are now found to be. No evidence whatever has been given by either of the parties to prove anything to the contrary, and I think, therefore, that the Court would be perfectly justified in throwing out both these suits on the ground of limitation. Be this as it may, it is evident that the circumstances specified above are quite sufficient to dispel all presumptions of joint ownership; and, until the existence of such ownership is established by the clearest evidence, the parties must be left in the same condition in which they have so long continued to be. There can be no stereotyped mode for rebutting the presumption of Hindoo law above alluded to, and I do not see any reason why, in the present instance, it should be held that that presumption has not been amply rebutted by the conduct of the parties themselves. Now, the plaintiffs in neither of these two cases have given any satisfactory evidence to show that the properties in dispute were acquired from the joint funds of the family; and, in the absence of such evidence, both the suits ought to be dismissed with costs.

The 13th May 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Notice under Municipal Act—Sections 48 and 81, Act III. (B. C.) of 1864.

Case No. 376 of 1867.

Regular Appeal from a decision passed by the Judge of Hooghly, dated the 26th June 1867.

Gopee Kishen Gossain (Plaintiff), *Appellant,*

versus

Mr. W. H. Ryland, Vice-Chairman of the Serampore Municipality (Defendant), *Respondent.*

Mr. G. C. Paul and *Baboo Obhoy Churn Bose* for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

A notice under any of the Sections of Act III. (B.C.) of 1864 preceding Section 81 may, under that Section, either be served upon the person addressed or left with some servant of the family.

The mistake of a few rupees in a notice, caused by an error in addition, is not sufficient to impeach or affect the demand where the directions of the Municipal Act have been substantially complied with, Section 48 protecting the Commissioners against such mistakes.

Kemp, J.—This was a suit against the Chairman and Vice-Chairman of the Municipal Commissioners for the town of Serampore for the recovery of Rupees 1,500, on the allegation that a carriage belonging to the plaintiff had been illegally distrained and sold to recover house-tax.

The sale of the carriage took place on the 3rd August 1866, from which date the plaintiff alleges that his cause of action arose.

In the plaint, which is verified, the plaintiff does not state that no notice was served upon him under the provisions of Section 45 of the Municipal Act. It is stated in the plaint that a notice received by the plaintiff of any demand was on the 26th July 1866.

In the written statement of the Serampore Municipality, it is averred that a notice in due form was served on the plaintiff on the 23rd June 1866, under Section 45, Act III. of 1864; that, in consequence of the plaintiff's deliberate and persistent refusal of payment, the carriage, the subject of this suit, was sold at public auction for Rupees 350 on the 3rd August 1866.

The Judge laid down the following issues:—

1st.—Was notice duly served in form A of Section 45, Act III. of 1864?

2nd.—If not, was the sale of the plaintiff's carriage illegal, and how much damages is plaintiff entitled to?

3rd.—Was the mistake in the amount of demand duly rectified, and did the plaintiff refuse to pay the sum really due?

4th.—Did the plaintiff make a legal tender of the sum actually due?

5th.—If such tender was legal, then was the sale of the plaintiff's carriage illegal, and what damages is he entitled to?

The Judge found that a notice had been duly served, and that all the after-proceedings were in due form and strictly legal; that plaintiff made no legal tender of the sum due, but refused to pay what was due; that the sale of the carriage was a legal one, and the plaintiff entitled to no damages. The suit was dismissed with costs.

The main point of contention before us was, that no service of notice such as is required under Section 45, Act III. of 1864, had been proved. It is admitted that, if this point be decided in favor of the plaintiff, the whole of the proceedings, including the sale of the plaintiff's carriage, were illegal.

The Commissioners examined a sircar no longer in their employ. He deposes to service of the notice on the servant of the plaintiff, under the directions of the plaintiff. A service of notice under any of the Sections of Act III. of 1864, preceding Section 81 of the said Act, may, under the latter Section, be served either upon the person to whom the notice is addressed, or by leaving it with some servant of the family.

The plaintiff in his deposition does not state that no service was made by leaving the notice with his servant: he simply states that no service was made upon him personally. It is clear from the record that the plaintiff has hitherto resisted the demands of the Municipal Commissioners, and has never paid any amount due under the Act for house-tax except under protest, and after correspondence with the Committee conducted on the plaintiff's behalf through his attorney, Mr. Hart.

It is also shown in the record that a list of defaulters under the Act was drawn out, amongst whom, and at the head of whom, we find the plaintiff's name. The initials of Mr. Ryland, the Vice-Chairman of the Committee, are on this list. Notices according to the list were made over to the collecting sircar, and the witness Khettur Mohun distinctly deposes that, by directions of the plaintiff, he left the notice, under Section 45 of the Act, with the plaintiff's servant, whom he named. The plaintiff does not in his deposition venture to contradict this; and after hearing the evidence of the said witness Khettur Mohun read, we have no doubt that the notice was served in compliance with the requirements of the Act.

It is quite improbable (considering the position of the plaintiff and the Municipal Committee, the former having persistently resisted all attempts made by the latter to realize the tax, and the fact that nothing was ever paid by the plaintiff except under protest) that any of the precautions necessary to guarantee the regularity and validity of the processes under which the levy of the tax was made would be neglected.

A small sum in excess of the amount of tax really due was inserted in the notice, but this was a pure mistake caused by an error in addition. The mistake was rectified by the Vice-Chairman, and the plaintiff was called upon to pay the sum really due. He refused to do so, and insisted upon paying the sum stated in the notice, and nothing short of that sum. His conduct in refusing to pay what was really due, and respecting which he had no objection to make, and in insisting upon payment of a larger sum than was justly due, led to the sale of the carriage—a sale brought about by the plaintiff's own obstinacy.

We have also Mr. Ryland's evidence, to the effect that no objection was made by the plaintiff or his mooktear to the non-service of a notice under Section 45. The mooktear of the plaintiff took the money stated to be due in the notice, but refused, under instructions from his employer, to pay what was actually due, and insisted upon paying what was admittedly not due. The mistake of a few rupees caused by an obvious error in the addition of the various items was not sufficient grounds for impeaching or affecting the demand, inasmuch as the directions of the Act had been substantially complied with. The error, moreover, was rectified before the sale, and the plaintiff was asked to pay what was really due, and refused to do so. Section 48, Act III. of 1864, protects the Municipal Commissioners against any mistakes in the amount of assessment due in cases where the directions of that Act, as in this case, have been substantially and in effect complied with.

The appeal is dismissed, and the decision of the Judge confirmed. Plaintiff to pay costs with interest.

The 13th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Award by Settlement-officer—Regulation VII., 1822—Limitation—Clause 6, Section 1, Act XIV., 1859.

Case No. 2530 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 26th June 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th December 1866.

Sreechund Baboo (Defendant), *Appellant,*

versus

Mullick Choolhun (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee, Khetturnath Bose, and *Nil Madhub Sein* for Appellant.

Messrs. R. E. Twidale and *C. Gregory* for Respondent.

On a Collector proceeding to settle a mortgaged estate, both mortgagee and mortgagor appeared before him, and contended for the right of settlement. His award under Regulation VII. of 1822 was in favor of the mortgagee in possession, on the ground that the period of redemption had expired, and he settled the estate with him.

HELD that, as the mortgagor allowed that award to remain unchallenged for three years, it became binding under Clause 6, Section 1, Act XIV. of 1859.

Jackson, J.—THIS was a suit to recover possession of certain immoveable property mortgaged as long ago as 1818.

The defendant, amongst other things, represented that the suit was barred by limitation, inasmuch as the plaintiff was bound by an adverse award of the Settlement Officer made in 1826, whereby that officer, conceiving the mortgagee in possession to have acquired an absolute title to the property, declared him to be the malik, and concluded a settlement with him. It may be stated that the mortgage was only in respect of a 4-annas share of the property; and that of the remaining 12 annas, the present defendants are the undisputed owners as purchasers from the original proprietors, who were in this case the mortgagors.

This case, which was a suit in the Principal Sudder Ameen's Court, appears to have come on first before Moulvie Iradut Ally Khan, the then Principal Sudder Ameen of Patna; and he, by his proceeding of the 26th of July 1866, tried and determined certain issues in bar, and amongst them that of limitation. He then curiously directed that the parties should produce evidence on a later day on the issues of fact; and then this case, half tried, came for trial of those issues before a subsequent Principal Sudder Ameen, Baboo Grish Chunder Ghose, and consequently the decree in this suit is drawn on a judgment passed half by one Judge and half by another, who possibly disagreed with his predecessor as to the first half of the decision.

The judgment being for the plaintiff, the defendant appealed to the Judge, and the Judge, under the ruling of a decision

reported at page 1135 of the Sudder Dewanny Reports for 1859, held that the award by the Settlement Authorities made in 1826 was not a summary award of a nature which becomes binding unless contested by a Civil suit within three years.

The case referred to, we may remark, was decided by the late Sudder Court upon a question arising on Act XIII. of 1848. We have to deal with Clause 6, Section 1 of Act XIV. of 1859, which is, no doubt, in substance the same, but the wording of which differs materially from that of the earlier enactment. Clause 6 declares: "To suits brought by "any person to contest the justice of an "award which shall have been made under "Regulation VII., 1822, Regulation IX., "1825, and Regulation IX., 1833, of the "Bengal Code, *or to recover any property* "*comprised in such award*, the period of "three years from the date of the final award "or order in the case." It seems, therefore, that, if an award has been made by the Revenue Authorities under Regulation VII, 1822, relating to this property, and that the object of the present suit is to recover the property comprised in such award, the defendant is entitled to apply the provisions of Clause 6, and to a decree, the suit being barred after the lapse of three years.

Mr. Gregory, for the special respondent, contends that the clause in question cannot refer to the present case, that it refers only to cases in which the contest is regarding the proprietary right.

The proceeding of the Collector has been read before us, and it appears that on his proceeding to make a settlement of the mehal, the two contending parties set their claims before him: the old proprietor alleging that the estate had been merely mortgaged with a remaining right of redemption; the mortgagee, that the period of redemption having expired, he had become absolute owner.

The Collector adopted this latter view, and stated that, as the time for redemption had expired, he concluded the settlement with him, referring the mortgagor to the Civil Court.

It is quite clear, therefore, that by this adverse decision of the Revenue Authorities, the mortgagor was thrown on a suit in the Civil Court; and if he allowed that award to remain unchallenged, he was bound by it at the expiration of the period allowed for his suit.

It appears to us to be a subject of satisfaction that we are enabled to apply the provisions of this clause to a suit like the present. More than 40 years ago, the plaintiff's ancestor represented that of an advance of Rupees 250 made on this property, he had re-paid Rupees 175, and that, consequently, only 75 rupees remained to be paid; and notwithstanding the trifling amount of that advance still due, he allowed the property to remain in the hands of the mortgagee and be transferred to purchasers, and he now brings this stale suit to recover the property with wassilat, amounting to 20 times the value of the advance made.

This is a case in which justice is clearly with the defendant, and we are well pleased to be able to reverse the decision of the Lower Courts, and order the suit to be dismissed with costs.

The 13th May 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Execution—Decree-holder—Limitation.

Case No. 506 of 1867.

Miscellaneous Appeal from an order passed by the Officiating Judge of Backergunge, dated the 29th June 1867, affirming an order passed by the Principal Sudder Ameen of that District, dated the 29th April 1867.

Rajah Sutto Churn Ghosal, *Appellant,*

versus

Bhyrub Chunder Brohmo, *Respondent.*

Baboos Obhoy Chunder Bose and *Hem Chunder Banerjee* for Appellant.

Baboo Gopal Lall Mitter for Respondent.

HELD by Loch, J., dismissing the appeal, that an order of Court restoring an execution-case to the file is no guarantee of the *bona fides* of the decree-holder, and, if it be proceeded with no further, will be no better protection against limitation than the petition on which it was passed.

Held by Mitter, J.—*Contra.*

Mitter, J.—I AM of opinion that this decree is not barred by the provisions of Section 20, Act XIV. of 1859. It appears that an order was passed by the Court for restoring the execution-case to the file within three years next before the date of the last application. I think that this order is a proceeding *for keeping the decree in force, although it is not a proceeding for enforcing it.* I think that the Legislature, when it referred to proceedings of both these descriptions, intended to draw some distinction between them. A warrant for the arrest of the person of the judgment-debtor, or a process of attachment issued against his property, is a proceeding of the latter class; but an order for the restoration of an execution-case to the file, and which thereby directs the execution to be proceeded with, is a proceeding of the first-mentioned class, *i. e*, is a proceeding *for keeping the decree in force.* It has been decided that an order striking off an execution-case from the file is not a proceeding within the meaning of Section 20, but the proceeding before us is of an opposite character. Nor can such a proceeding be impugned on the ground of want of *bona fides*, for it is an act of the Court itself. It has been already decided by a Full Bench in the case reported in Volume VII., Weekly Reporter, page 515, Miscellaneous Rulings, that an act of the Court cannot be impugned as *mala fide*, and I think that the same principle ought to be applied to the proceeding before us. I would, therefore, reverse the decision of the Lower Courts, and remand this case to the Court of first instance. The respondent ought to pay the costs incurred by the appellant both here and in the Lower Courts.

Loch, J.—I cannot concur in the view taken by my colleague. There can, of course, be no question of the *bona fides* of the order of the Court ordering the application for execution to be registered, and directing the party to proceed with the execution. But what we have to look to is the *bona fides* of the party making the application. In making it, did he intend to carry out execution—did he intend to take further steps to realize the debt due to him? If there is no valid objection to proceeding with the execution apparent on the face of the application, the Court cannot refuse to admit it on the register; but, by so doing, it does not guarantee that the decree-holder is acting in good faith. Where a notice is served through the Court or other process issued at the instance of the decree-holder, means of judging of his good faith in applying for execution are afforded; but the order of the Court merely restoring an execution-case to the file, or directing a fresh application to be registered, does not, in my opinion, assist the applicant at all; the petition filed, and the order to proceed passed thereon, are merely acts to start the case; but if it be proceeded with no further, that order will be no better protection against limitation than the petition upon which it was passed.

The decree in this case was passed in 1850, and was alive in 1859, when Act XIV. of that year was passed. Something appears to have been done in August 1860; but from that date to 5th April 1864 nothing effective in furtherance of execution was done. Petitions for execution were put in on 4th May 1861 and 14th August 1862, and the usual orders passed upon them; and they were struck off for default, no steps having been taken by the decree-holder to carry out execution. On the application of 25th April 1864, notice was served on the debtor; but by that time execution was barred by limitation, and it has been ruled by this Court that where limitation has once operated to prevent execution, no subsequent acts of the decree-holder can restore to him the right once lost of executing his decree.

Under these circumstances, I would confirm the orders of the Lower Court, and dismiss this appeal with costs.

The 14th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Evidence (Documentary and oral)—Power of Civil Ameen—Section 180, Act VIII., 1859.

Case No. 87 of 1868.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 19th June 1867, reversing a decision passed by the Moonsiff of that District, dated the 28th December 1866.

Mohun Lall Roy (Plaintiff), *Appellant,*

versus

Urnopoorna Dossee and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Gopal Lall Mitter* for Appellant.

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Baboos Kalee Mohun Doss, Nuleet Chunder Sein, Issur Chunder Chuckerbutty, and *Hem Chunder Banerjee* for Respondents.

Where a pottah is obscure, its meaning may be elucidated by oral testimony.

There are no limits to the powers conferred by Act VIII. of 1859 on a Civil Ameen for the purpose of making an investigation.

Jackson, J.—THE plaintiff in this case sued for confirmation of his right in certain jotes held under a *mourosee* pottah granted by Gobind Chunder Biswas and others, who were the proprietors of considerable jotes in Kismut Mullickpore.

It seems that these jotedars, on the 2nd Cheyt 1267, had granted to the defendants a *mourosee* lease of the lands comprised in the jote, with a reservation of the holdings of four ryots, and also of 10 bounds or parcels of *khamar* land estimated to contain about 20 pakees of land; and a few days afterwards, on the 15th of Cheyt of the same year, these jotedars granted to the plaintiff, that is to say, Boykunto Lall Roy, a minor who is represented by the plaintiff, a distinct pottah for the *khamar* lands so reserved and the holdings of those four ryots. And, subsequently, the jotedars sold absolutely their jotedaree rights to Shamasoonduree Dassea, the wife of Mohun Lall Roy, plaintiff.

After the parties had been in possession for some years of the lands leased to them, a dispute arose regarding some portion of the land comprised in the jote, and held by one Issur Chunder Chand, and the defendants sued Issur Chunder for an arrear of rent in the Collector's Court. Thereupon the plaintiff intervened. The Deputy Collector, before whom the suit was tried, dismissed the suit, but that order of dismissal was reversed on appeal by the Collector of the district; and the present plaintiff, being aggrieved by that decision, brought a regular suit to establish his right, and also claimed to recover from the defendant the 12 rupees which he had recovered in the Act X. suit.

The Moonsiff gave the plaintiff a decree, which, on appeal, was reversed by the Principal Sudder Ameen, and that decision came before this Court on special appeal.

On hearing the special appeal, we were of opinion that the reasons for which the Principal Sudder Ameen had reversed the judgment of the Moonsiff were insufficient and erroneous. He observed that the *onus* had been laid by the Moonsiff on the wrong party; he set aside the report of the Civil Court Ameen, because, in his opinion, the Ameen had made "uncalled-for remarks" in that report; he observed that the pottah on which the plaintiffs rely "did not contain the line of demarcation which he expected to see," dividing the jote into *khamar* and *mourosee* tenures; apparently, therefore, setting aside the plaintiff's pottah, because it did not contain a line of demarcation separating the lands referred to in that pottah from the lands previously leased to the defendants.

Then he went on to say:—

"For the witnesses adduced by the plaint-"iffs, I remark that, since their documentary "evidence, which is essential to an action "for real property, does not apply to the "issue, their testimony *per se* is insufficient "to assure them a favorable decree."

He, therefore, reversed the Moonsiff's decision, and ordered the suit to be dismissed.

We were of opinion that the pottah was not to be disregarded, because it contained no boundary-line of the kind mentioned by the Principal Sudder Ameen; and we were further of opinion that the oral evidence adduced by the plaintiff, far from being insufficient, was of a highly important character, and such as ought to have been considered together with the pottah, and, unless rebutted by still stronger evidence, would quite justify the Moonsiff in making the decree which he did make. We, therefore, set aside the Principal Sudder Ameen's decision, and ordered a remand; but, being of opinion that it would be more satisfactory if the case were tried here than if it went back to the Principal Sudder Ameen, we resolved to try it ourselves.

To-day, accordingly, we have heard the pleader of the defendant (appellant), who has addressed us at great length, and has read and commented on such portions of the evidence as he thought proper.

It appears to me that the judgment of the Moonsiff was right. It may be that he has stated too broadly the position that the burden of proof in this case lay on the defendant. He says: "As the defendant has admitted "the plaintiff's proprietary right, the disputed "land must belong to the plaintiff, if it does "not appertain to the defendants' *mourosee* "estate."

The statement of the law can hardly be supported. No doubt, it was for the plaintiff.

who came into Court to establish his right, especially with the adverse decision of the Collector's Court against him, to show affirmatively that the land for which he sued was comprised in the pottah. But it seems to me that he has most completely acquitted himself of that burden. The pottahs under which the parties held being unfortunately obscure, inasmuch as the defendants' pottah contained no boundaries, and that granted to the plaintiffs contained no reference to the previous lease granted to the defendants, the plaintiffs did what they ought to have done, and which was the best thing they could have done, namely, to cause the lessors to be examined, and also to ask the Court to depute an Ameen to hold a local investigation.

Now, the report of the Ameen, which is of great importance, is unequivocally on the side of the plaintiffs; and on that of the defendants there is no evidence whatever to contradict or to be put in competition with that of the lessors, who knew exactly what was given, and what was intended to be given under the pottah, and who, as they have sold their jotedaree rights, have no purpose to serve one way or the other.

The report of the Ameen, which is strong evidence for the plaintiffs, has been objected to by the appellant's pleader in the same sense as it was condemned by the Principal Sudder Ameen. He contends that the Ameen, in making the inquiry, went beyond the scope of his duties; that he framed issues, looked into documents, and expressed his opinion freely on questions, which are beyond the competency of an Ameen; and it was remarked that different Benches of this Court have in various cases—none of which, however, have been cited—laid down what are the duties of a Civil Court Ameen. But on reference to that Section of the Procedure Code which relates to the deputation of Ameens, I can see no limits to the powers conferred for the purpose of making an investigation.

Section 180, Act VIII. of 1859, says:—

"In any suit or other judicial proceeding "in which the Court may deem a local in-"vestigation to be requisite or proper, for "the purpose of elucidating the matters in "dispute, or of ascertaining the amount of "any mesne-profits or damages, the Court "may issue a commission to an officer of the "Court appointed to execute such commis-"sion, or, if there be no such officer, to any "suitable person, directing him to make "such investigation and to report thereon "to the Court. In all such cases, unless "otherwise directed by the order of ap-"pointment, the Commissioner shall have "power to examine any witnesses who "may be produced to him by the parties "or any of them, the parties themselves, "and any other persons whom he may think "proper to call upon to give evidence in "the matters referred to him; *and also* "*to call for and examine documents and* "*other papers relevant to the subject of* "*inquiry* * * *. The Commissioner, "after such local inspection as he may deem "necessary, and after reducing to writing, in "the manner hereinbefore prescribed for "taking the depositions of witnesses in the "presence of the Judge, the depositions "taken by him, shall return the depositions, "together with his report in writing, sub-"scribed with his name, to the Court. The "report and depositions shall be taken as "evidence in the suit, and shall form part "of the record," &c.

This seems to give the widest power and discretion to the Ameen to inquire as he may into the matters referred to him for investigation.

It has been remarked that several of the witnesses who have deposed in this case have given evidence, not directly bearing upon the rights acquired by the plaintiff from the lessors, but on the question of occupancy and possession; and this testimony has been looked upon, apparently, by the Principal Sudder Ameen and by the appellant's pleader as irrelevant. But it seems to me, in a case like the present, to be evidence of a most important kind. When we find that the two parties to this suit within a few days of each other obtained separate leases some half a dozen years before the commencement of these proceedings, and that so long a period followed without any kind of dispute, it is natural to suppose that they were put into possession of that which had been leased to them, and made their own arrangements as to that possession; and where there is any obscurity as to the terms of the pottah, much light must be thrown on the case by ascertaining how the parties dealt with the property under the respective leases.

If, therefore, we find that the plaintiffs immediately took possession and converted the land into a garden, and otherwise exercised rights of ownership over the land for which they sue, it seems to me only fair to infer

that these were part of the lands granted to them by their lease.

Therefore it seems to me that the decision of the Moonsiff, although wanting in accuracy in some respects, is in the main right; that the plaintiffs are entitled to the land for which they sue; and that, therefore, the judgment of the Moonsiff must be affirmed, and this appeal must be dismissed with all costs.

Mitter, J.—I am also of the same opinion.

It appears to me that the decision of this case entirely depended on the solution of the question as to whether or not the disputed lands were included in the lease granted by Gobind Chunder Biswas and others to the defendant who is the appellant before us.

Unfortunately, however, the principal document which could have thrown the greatest light on this question, namely, the pottah granted to the defendant (appellant), does not enable us to determine it one way or the other. No boundaries are given either of the lands leased to the defendant or of those which were excluded from that lease. Under these circumstances, the only way in which this question can be satisfactorily determined is by examining the evidence adduced by the parties respectively as to the mode in which they have been dealing with the property in dispute.

On this fact, there can be only one opinion, and that opinion is entirely in favor of the plaintiff (respondent). The plaintiff has proved, by the testimony of unimpeachable witnesses, that ever since the date of the lease, which was granted to him on the 15th of Cheyt 1267, he has been in exclusive possession of the land in dispute, first by planting a garden on it, and afterwards by placing upon it certain ryots, of whom Issur Chunder Nundee, the defendant in the Act X. case, was one.

The evidence of the common lessors, the evidence of some of the ryots who are in actual occupation of the land in question, together with the report of the Ameen, conclusively prove that the disputed lands were held by the plaintiff in the manner alleged by him. The only ground upon which the evidence of these witnesses is sought to be got rid of is by saying that these parties have colluded with the plaintiff. Not a tittle of evidence has been produced to substantiate this allegation; nor does the record disclose one single circumstance from which collusion or fraud can be inferred.

The case originally set up by the defendant in the Courts below, as far as I. can understand it from his petition of objection to the Ameen's report and the second ground of appeal taken by him before the Principal Sudder Ameen, was that this land was not *khamar*. Now, it has been satisfactorily established by the evidence on both sides that the land is *khamar*. It is argued that the mere fact of their being *khamar* lands does not prove anything, because *khamar* lands were also included in the lease granted to the defendant.

This contention, however, cannot stand, for whether *khamar* lands were or were not granted to the appellant, it is perfectly clear that he did not claim the disputed lands as part of the *khamar* lands leased to him.

The evidence of three witnesses adduced by the appellant has been read to us by his pleader; but looking to their evidence, it appears to me to be so full of inconsistencies and contradictions that I do not feel the slightest hesitation in rejecting it as wholly unworthy of belief.

The first witness whose evidence was read is Mohesh Chunder Chund. This witness deposed that the lands with regard to which Urnopoorna had granted a pottah to Issur Chunder Nundee were formerly in the occupation of the lessors; that those lands were afterwards granted by the lessors to Shamasoonduree Dassee, the wife of the plaintiff; and that it was Shamasoonduree who had granted a sub-lease to Issur Chunder Nundee, by virtue of which lease Issur Chunder Nundee had been in the occupation thereof. It appears to me that these statements are utterly inconsistent with the case originally set up by the appellant himself; and the same remark is equally applicable to the depositions of the two remaining witnesses.

I am of opinion, therefore, that this appeal ought to be dismissed with all costs.

The 15th May 1868.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Suits for rent from lakherajdars — Onus probandi—Limitation—Deduction.

Special Appeal from a decision passed by the Deputy Commissioner of Chota Nagpore, dated the 30th March 1867, affirming a decision passed by the Deputy Commissioner of that District, dated the 7th August 1886.

Prodhan Gopal Singh and another (Plaintiffs), *Appellants,*

versus

Bhoop Roy Ojha and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboos Romesh Chunder Mitter and *Poorno Chunder Shome* for Respondents.

Where a plaintiff claims rent on account of lands as *mál* from defendants, who set up a *lakheraj* title and produce *lakheraj* sunnuds in support, he has first of all to prove that he has collected rents from the lands as *mál* within 12 years of the suit; and in calculating the period of limitation, the plaintiff is not entitled to deduction on account of the periods of pendency of suits for rent and for small portions of the land.

Bayley, J.—THE pleas taken in this special appeal are :—

I.—That limitation does not bar the suit, as the relation existed of landlord and tenant, and once a tenant always a tenant.

II.—That in calculating the period within which the suit might be brought, a deduction should have been allowed for the intermediate periods of all pending suits.

III.—That limitation would not apply to the lands referred to in the suits brought within 12 years.

On the one hand, it is not denied by defendant that they farmed the village till 1904 Sumbut (1848 A.D.); but, on the other, plaintiff does not prove that he has ever collected rents from these lands as *mál*, which he distinctly alleges it still to be. The defendants again say that they have held it *lakheraj*.

The first Court held that, although defendants did not prove their *lakheraj title*, still plaintiff was barred by limitation under Clause 14, Section 1, Act XIV. of 1859, inasmuch as, with a *lakheraj* title clearly set up by defendants against plaintiff in 1905 or 1849 A. D., plaintiff did not bring this suit till 17 years and 4½ months had expired. The first Court, however, allowed them a deduction of one year 2 months and 11 days for a suit brought on the 5th July 1861, but it disallowed any deduction for a suit for 3 beegahs in August 1850, and a suit brought in February 1855 for 13 beegahs, and held that those suits for 16 beegahs could not be deemed the same litigation as the present suit for 76 beegahs.

The Lower Appellate Court has held that limitation bars the suit, as plaintiffs admitted that they had not received rent for the lands now claimed, since the defendants ceased to farm the village in Sumbut 1904 (1848 A. D.). As to the deductions claimed for pendency of other suits, the Lower Appellate Court held that these were rent-suits, and for small portions of the lands; and "there has been no such prosecution of these alleged rights" by plaintiffs for the 76 beegahs of land as would save them from limitation. Plaintiff's suit was thus dismissed by both Courts.

This special appeal by plaintiff is accordingly brought, and the grounds have been before set forth.

We quite concur with the Lower Appellate Court that plaintiff, who claims these lands as *mál*, and is opposed by defendants, who set forth a *lakheraj* title; and have filed *lakheraj* sunnuds in support of it, has first of all to prove that he has collected rents for them as *mál* within 12 years of suit. This plaintiff utterly fails to do. Nor do we think that the suits for rent and for small portions of the land can be deducted in calculating the period allowed, because really those suits were actually not identical as to their whole subject-matter with this suit. The plaintiff lost in every suit and every appeal; and on the whole, it is difficult to say it was the same litigation.

In this view, we dismiss this special appeal with costs.

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The 15th May 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Minor—Ratification.

Case No. 2068 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 26th June 1867, affirming a decision passed by the Moonsiff of that District, dated the 10th August 1866.

Kebul Kristo Doss (Defendant), *Appellant,*

versus

Ram Coomar Shah (Plaintiff), *Respondent.*

Baboo Ashootosh Chatterjee for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

In a suit to set aside a sale effected by plaintiff's mother during his minority, it appearing that plaintiff, eleven months after attaining his majority, signed for his mother a written statement in another suit to the effect that the property had been sold by her to the defendant, and that he in that suit conducted his mother's defence, which was that the purchaser from her was entitled to what he claimed, it was held that he must be considered to have acquiesced in, and ratified, the sale.

Macpherson, J.—A CERTAIN share (the property of the plaintiff) in a talook having been sold to the defendant by the plaintiff's mother during his minority, the suit out of which this appeal arises was instituted to set aside the sale and recover possession of the share.

The chief issues below were whether the plaintiff's suit was not barred by limitation, and whether the plaintiff had not ratified and confirmed the sale by his conduct after he attained majority. The Lower Appellate Court decided both these points in favor of the plaintiff, and upheld the decree which the Court of first instance had passed in his favor.

The defendant appeals, and contends that the issue as to limitation has not been properly tried, and that the Principal Sudder Ameen is wrong in supposing that the acts relied on as acts of ratification were acts *during* minority.

The point as to limitation has, I think, been properly tried. The contention throughout has been that neither the plaintiff nor his father before him were in possession of the disputed property within twelve years prior to the institution of the plaintiff's suit (on the 19th Magh 1272, or 31st January 1866). But the Principal Sudder Ameen has found as a fact that the plaintiff's mother was in possession until she was turned out by one Doorga Churn Sein after the 6th of Assar 1263. The facts being so found (and we cannot interfere with the finding in special appeal), the suit is not barred, whether the plaint was or was not filed within three years of the plaintiff's attaining his majority, for it was filed within twelve years of the plaintiff (and his mother and guardian) being ousted.

As regards the question of ratification, it appears to me that the Principal Sudder Ameen has made a mistake in thinking that the acts relied upon are acts done during the *minority* of the plaintiff. They are, in fact, acts done at least eleven months after he attained his full age.

The plaintiff's mother having been dispossessed (as found by the Principal Sudder Ameen) about 1263, she was out of possession at the time she sold to the defendant. And we find that the defendant only paid Rupees 75 for the share which the plaintiff in this suit values at Rupees 295. Doubtless, the mother sold and the defendant purchased with the knowledge that he would have to sue before he got anything, and the plaintiff did, in fact, almost immediately bring a suit against Doorga Churn Sein, in which he succeeded. In this suit the appellant who claimed through the purchase from the plaintiff's mother made her a defendant. And what the appellant now chiefly relies on as showing that he assented to and ratified what his mother had done is, that whereas the mother filed a written statement in the suit against Doorga Churn Sein, in which she expressly stated that the property had been sold by her to the appellant, this written statement was signed by the hand of the plaintiff who signed it *bakalum* for his mother. In addition to this, the plaintiff (as is found as a fact by the Lower Appellate Court) con-

ducted the defence in that suit on behalf of his mother, and her whole defence was that the appellant was entitled to what he claimed from Doorga Churn because of his purchase from her.

The Principal Sudder Ameen says all this occurred while the plaintiff was a minor. But in saying this he has evidently forgotten to consider the dates which clearly prove that the plaintiff was of age eleven months before the written statement was filed.

The Principal Sudder Ameen has held rightly that the plaintiff attained majority on completing his fifteenth year. He was born on the 25th Magh 1251. Therefore he attained majority on the 25th Magh 1266. The written statement of the mother was not filed till the 28th Pous 1267, nearly eleven months afterwards. The "conduct" of the suit referred to by the Principal Sudder Ameen may have been and probably was even subsequent to that.

It may be said that a person who had only so recently attained his full age ought not to have his conduct construed into a confirmation of, and assent to, his guardian's acts. But in the first place the position of one who gives a release to his guardian nearly a year after he reaches majority is very different from that of a person who does so within a few days or weeks. And in the second place the whole circumstances of the case must be looked at; and considering that the appellant in this case merely bought a property from which the mother had been dispossessed; that he, in fact, merely bought a right of suit; that the plaintiff by his acts, after he came of age, encouraged and induced the appellant to prosecute the suit against Doorga Churn Sein (which, as a matter of course, the plaintiff never would have done if he had supposed it possible that the plaintiff would dispute his mother's act); and that there is no evidence whatever to lead to the conclusion that in what he did in Doorga Churn Sein's suit, the plaintiff was acting otherwise than with his own free consent and will, or that he acted in ignorance of the true state of affairs; bearing all these considerations in mind, I think that what the plaintiff did after he came of age prevents his recovering in this suit. I think that, as a legal inference from his conduct, I am bound to hold that he did acquiesce in, and ratify and confirm, what his mother had done, and that he cannot now be heard to say that what she did was unwarranted, and therefore is not binding upon him.

Upon this ground, I would reverse the decrees of the Lower Courts, and would dismiss the plaintiff's suit with all costs here and in the Courts below.

Bayley, J.—I concur in thinking that the act of plaintiff by signing the mother's written statement "*bakalum*" eleven months after attaining majority, and by his doing so with the fullest means of knowledge of the facts, is sufficient ratification. I agree in reversing the order of the Lower Appellate Court, and in dismissing the plaintiff's suit with all costs.

The 15th May 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Redemption — Mortgagee's accounts — Conditional decree — Re-conveyance — Powers of Court.

Case No. 156 of 1867.

Regular Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 16th March 1867.

Mokund Lall Sookul (Plaintiff), *Appellant,*

versus

Goluck Chunder Dutt (Defendant), *Respondent.*

Mr. R. E. Twidale and *Baboo Sreenath Dass* for Appellant.

Baboos Romesh Chunder Mitter, Unnoda Pershad Banerjee, and *Sreenath Banerjee* for Respondent.

In a suit for redemption of mortgaged property, it was—HELD (*by Bayley, J.*) that the law only requires that the mortgagee's account of receipts and disbursements shall be made out, filed in Court, and then sworn to as correct by the mortgagee.

HELD (*by Phear, J.*) that mortgagees are bound to exhibit the detailed items of *all* their actual receipts and disbursements to the time of accounting, verified by themselves and accompanied by all vouchers.

HELD (*by Bayley, J.*) to be a rule of law which has been followed in practice, and which this Court must follow, that no redemption can be decreed in such a suit as long as there is any balance found due.

HELD (*by Phear, J.*) that plaintiff ought to obtain a decree for re-conveyance on payment of the balance found to be due with interest and costs of suit within a time specified, and that the Court is not bound by the previous practice but has full power to mould its decrees in such a way as to meet the exigencies of each case.

Bayley, J.—The history and particulars of this litigation (commenced in 1852) are set forth in the first and following pages of the paper book. It is needless to recapitulate them now. Suffice it to say that we remanded this case on the 7th May 1866, * with these remarks:—

"The account which the mortgagee by "law has to put into Court is not that of his "agent or tehsildar given by the latter for "his master's (the mortgagee's) information "as to such agent's collections. The jumma-"wassil-bakee paper, however, is this latter "only. The account to be put in under "the law is one to be made, verified, and "proved by the mortgagee himself in the "way before indicated. His jumma-wassil-"bakee papers, duly attested by those who "prepared them or who collected according "to them, and supported by the receipts of "the talookdars or ryots, who also may be "called to depose to those receipts and to "what was the real demand and balance of "each of their respective tenures, may well "be adduced to support the mortgagee's own "account when made and put into Court "under the law cited.

"In fact, the account required from the "mortgagee is one setting forth what he "has realized, from what portions of the "mortgaged property, in what terms or "periods, with what loss and gain on the "several assets, with what necessary deduc-"tions, and what remains then as the net "profits which can be taken as actual reali-"zations towards liquidating the sum due "under the mortgage transaction."

Upon this remand, the Lower Court held that the principal and interest had not been realized by the mortgagee when this suit was brought. The plaintiff's suit was dismissed with costs.

Plaintiff appeals and urges—

1. That the accounts filed by the mortgagee are not as required by law, but mere abstracts of jumma-wassil-bakee papers already deemed insufficient.

2. That, in fact, no proper accounts were kept by the mortgagee as admitted by him.

3. And that the defendant's towjee of 1190, filed by the mortgagee, was spurious and untrustworthy, and contradicted by the towjee and a Collectorate paper of the neighbouring zemindars filed by plaintiff.

4. That the defendant's towjee of 1190 refers only to Dhurmpore, and not to six other villages exclusive of Dhurmpore.

The memorandum of appeal is a long argumentative statement as to the evidence, but the above are the essential matters of appeal before us for decision.

With respect to the accounts, I have to observe that their truth and correctness have been deposed to by Goluck Chunder Dutt, who managed the estates and prepared the accounts. He states that he himself prepared these accounts; that Kashee Mohun drew out the fair copies now filed in Court; that they have been prepared from the tehsildar's jumma-wassil-bakee and jumma-khurruch papers; that besides the jumma-wassil-bakee and jumma-khurruch accounts, defendants possess *no* other papers showing the collections from the estate; and that the kubooleuts and fysallahs (filed in the record) are the only documents they possess to show the areas of the lands held by the talookdars and ryots.

The original towjee of 1190, delivered by the mortgagor, and according to which the demand or jumma had been regulated, and original jumma-wassil-bakee papers from 1193 to 1242 have been filed.

Now as to the amount. It certainly is an account of receipts and disbursements during the incumbency of the mortgagee. I do not myself see that it is to be rejected, because it is based on private collection papers. The collection papers themselves would not be the account, but there is no reason why they should not afford the materials for the account, just as private memoranda are not accounts, but afford means and legitimate means to prepare a due account, such as a mortgagee has to give of his usufruct.

It is true that the defendants have shown that previously no accounts of the character of the balance sheet required by the law have been accurately or regularly prepared or kept. But the law only requires that the mortgagee's account of receipts and disburse-

* *See* 5 W. R., Civil Rulings, 271.

ments shall be made out, filed in Court, and then sworn to as correct by the mortgagee. Of course, if such an account can be shown to be false or incorrect, it is open to the mortgagor to show that fact.

But I do not think that such fact is shown in this case. I do not see why the towjee of 1190 should be declared a forgery. No proof of this is on the face of it, or otherwise, directly brought to bear on it. The date, 1190, is referred to by appellant as subsequent to the deed, which was of 1189, and there is a difference of eight villages in the two papers. But if the towjee be forged, why could it not have been made to run both as to date and details in unison with the mortgage deed?

For my own part, too, I think that it is quite a common practice to specify or denominate the main village only, when others are in fact comprised in it; and by custom the one is understood to comprise the others. The taidad and the Collectorate Chittas show that such was the case. What the Talook Megerra really was, was what had to be seen; and under that head the additional villages might well come. I think as to the taidad that the remark on the paper that it is not admitted to be correct, is no reason in itself for its having been rejected, because that was done under a general precautionary rule prevailing in all Collectorates as to such papers. It is notorious that these precise words can be found on records in every Collectorate in the country.

I concur, too, with the Lower Court that there is no reason that a towjee of 1190 should detail all under-tenures and areas. It was a rough memorandum of estimated assets which Lalla Tiluck himself thought sufficient; and those taking from him might, therefore, well adopt it, and it does not follow that they were to go beyond it, or lose their mortgager-ights.

And, lastly, there is, I think, sufficient direct evidence from defendant's witnesses as to its genuineness and authenticity, especially to the signature on it being true. The towjee, moreover, spoken of by Kalee Dass, plaintiff's witness, shows from its terms that this impeached one of 1190 was not so different as to warrant a conclusion that the latter is a forgery, or that the collections were not made according to it, as they were according to Kalee Dass.

Again, this was a talookee collection which is not evidently so direct a gathering into the hand of the malik of all available assets as a ryotee one, and thus the mortgagee who represented the malik could not obtain the fuller rates which the talookdar might.

In respect to the evidence brought forward by either party as to the real rates as shown by the judgments in certain rent suits, I think there is not much proof that the rate of ½ per kanee adopted by the Court was wrong, or that it is 2 rupees per kanee, as he alleges.

On the whole case, I do not see sufficient reason for saying that the decision of the Lower Court is so far substantially wrong that we should reverse it. I have, however, doubts as to whether 5 per cent., and not 10 per cent., for collection-charges is not enough in a *talookdaree* mehal, as defendant admitted this to be. Thus, with this exception, I would dismiss this appeal with costs.

I should be glad if the mortgagor could be allowed to redeem on paying what the Court, after a full trial and adjustment of accounts in a suit, might deem due. The mortgagor cannot always anticipate what will be the *exact* sum finally deemed due by the Court. But I think the rule of law stated in the three first lines of page 172, last edition, Macpherson on Mortgages, and the cases there cited (to which I know none opposed) are totally against this, the decisions being to the effect that as long as there is any balance found due, no redemption can be decreed in that suit. I concur so far with the view of Mr. Justice Phear, that I think it would be only equitable and just to allow redemption on immediate payment of such sum as may be found due by a Court. But as the decisions entirely conflict with this view, I would agree to the matter being referred to the Full Bench. I find, however, that Mr. Justice Phear thinks that, although the practice has been contrary to the view he takes, it is not necessary to refer it to a Full Bench. I entirely differ from this, and therefore can only say that I hold we must follow the practice, and I uphold the Lower Court's decision as it stands.

Phear, J.—I cannot say that I am satisfied with the manner in which the defendants have accounted. They are, in my opinion, bound to exhibit the detailed items of *all* their actual receipts and disbursements since 1189 M. S. up to the time of accounting,

verified by themselves, and accompanied by all vouchers. Both the towjee and the taidad, upon which so much importance has been set, are really irrelevant papers. If these are authentic, the first would show merely what amount would have been collected had the collections been made at the original rates; and the second would perhaps properly lead to the inference that Dhurmpore in the towjee was comprehensive of six mouzahs besides Dhurmpore; but neither of these affords the least evidence as to the amount of the collections which were, in fact, made by the defendants during the period under account.

In truth, the only direct evidence of the collections is that afforded by the jumma-wassil-bakee papers and jumma-khurruch papers; and these must be vague enough, if it cannot be shown from them that they cover all holding in the six villages alleged by plaintiff to be omitted from the account, as well as in the others. I confess I greatly distrust the story that these mortgagees have, during these large number of years (for much of which time they considered themselves absolute owners), kept no other zemindary-accounts than the loose jumma-wassil-bakee and jumma-khurruch papers which are filed in this suit. Indeed, I think there is much on the record to lead to the inference that they possessed, in some other form, minute details of the estate. The defendants should produce vouchers for every disbursement, or reasonably account for their not possessing such vouchers. No item should be allowed which is not either admitted by the plaintiffs or supported by evidence of some sort. For instance, neither 10 per cent. nor 5 per cent. should be allowed for collection-charges, but only so much as the expenses of collection actually amounted to, and if proper vouchers for this are not forthcoming, at least some evidence should be adduced sufficient to lead to a reasonable estimate of what the expenses under this head probably were.

On the whole, I am of opinion that the case should be sent back in order that the account may be re-taken, and I would reserve the question of costs until the result can be reported to this Court. I would further remove the cause into this Court for trial.

But even if the account found to be correct by the Lower Court be adopted, I think the suit ought not to be dismissed. I think the plaintiff ought to obtain a decree for re-conveyance on payment of the balance found to be due, with interest and costs of suit, within a time specified. No doubt, it has been the practice of some of our Courts to treat a suit for redemption as if it were a suit for ejectment, in which the plaintiff could not have any decree except by showing that every condition precedent necessary to entitle him to immediate possession had been fulfilled. This is particularly the case with the Courts of the North-Western Provinces. (See Sudder Dewanny Adawlut Reports, North-Western Provinces, 1849, page 37.)

In the case reported in the 5th Volume, North-Western Provinces Sudder Dewanny Adawlut Reports, 1850, page 104, the plaintiff sued to recover possession of land by redemption of mortgage, alleging that the mortgagee had over-paid himself, and that there was a surplus due from him to the plaintiff. The Principal Sudder Ameen, who tried the suit on regular appeal, found that the plaintiff's allegation was not made out, and that there was still a certain balance (not distinguishing between principal and interest) due from the mortgagor to the defendant, mortgagee; but he gave the plaintiff a conditional decree to the effect that the plaintiff should recover possession on making good the balance. On special appeal against this decision, the Sudder Dewanny Adawlut declared that the Principal Sudder Ameen's decree was contrary to *judicial usage*, referring for authority to Bhubotee Singh *versus* Bheem Singh, Sudder Dewanny Adawlut, North-Western Provinces, 19th January 1847, but giving no reasons for the usage, and dismissed the plaintiff's suit. So again, in 6 North-Western Provinces Sudder Dewanny Adawlut Reports, 1851, page 221, the Sudder Dewanny Adawlut is reported to have decided on special appeal that, when, in a suit for the redemption of a mortgage, a balance is found to be due to the mortgagee, the *course to be pursued* is to dismiss the suit. And in 10 North-Western Provinces Sudder Dewanny Adawlut, page 543, we find the Sudder Dewanny Adawlut repeating the same doctrine, and declaring that, in a suit for redemption, if anything is due to the mortgagee, and plaintiff do not show that he had tendered that amount, his suit must be dismissed, for a decree cannot be given conditional on payment of the sum due.

The practice of the Courts of Bengal appears to have been in this matter the same as that of the North-Western Provinces, although there are few, if any, decisions respecting it. Probably the propriety of

the practice was seldom, if ever, seriously called in question. The very ill-reasoned case (perhaps because badly reported) which is given in Sudder Dewanny Adawlut Reports, 1849, page 392, seems to lay down that, in the opinion of the majority of the Court, the mortgagor has no right to have accounts rendered by the mortgagee and taken by the Court, except when he is in a position to show that the mortgagee is paid off. And the argument attributed by the report to the minority (namely, Mr. A. Dick) is even more untenable than I conceive this conclusion to be. I apprehend that this ruling is entirely opposed to the spirit of the Regulations.

By Section 11 of Regulation XI. of 1793, the mortgagor could require the mortgagee to produce and swear to his accounts in Court, and the Court was to adjust them. The Legislature evidently contemplated that the mortgagor should, when he desired, have the right to come into Court to ask for a judicial determination, as between him and the mortgagee, of the amount due on the mortgage; in other words, for a judicial declaration which should be binding between him and the mortgagee, of the sum of money on the payment of which he should be entitled to obtain a reconveyance. This enactment was repealed by Act XXVIII. of 1855, but substantially its provisions regarding the rendering and adjustment of mortgagee's accounts were re-produced. Regulations I. of 1798 and XVII. of 1806 have really no bearing upon this point. The first of these only gave the *mortgagor* certain practical facilities for establishing that he had complied with the terms of his agreement of mortgage, namely, that he had *paid* or *tendered* the amount due within the time specified in the mortgage; and the second gave him an indefinite extension of time for these purposes beyond the time so specified, subject to a right on the part of the mortgagee to terminate this extension by proper proceedings in Court. Both these Regulations were passed for the benefit of the mortgagor, and neither of them in any way affected his right to require accounts from the mortgagee, and to redeem upon their adjustment, supposing him to do so in time.

In the present case, it has been decided by the highest authority that the plaintiff's right to redeem is alive. The suit before us is brought by him to make the defendants (his mortgagees) account, and to have it declared, on adjustment of their account, that the mortgage is paid off, and that the plaintiff is entitled to recover possession of the mortgaged lands. No doubt, the plaintiff has framed his plaint on his own view that the mortgage-debt is already discharged, but substantively the suit is brought to ascertain, as between the parties, what is the state of the account; and I think the plaintiff is entitled to have the result judicially declared in a form which will enable him to recover by process of Court, if necessary, possession of the mortgaged lands, on payment of the balance due from him, without bringing a fresh suit for that purpose. For my own part, I do not feel pressed by the contrary practice of the Court. We have full power to mould our decrees in such a way as best to meet the exigencies of each case. I do not propose here to declare anything with regard to the rights of the parties beyond that which the Courts have always in effect done. I desire only not to stop at the mere declaration of these rights. I would go on to direct that the defendant should re-convey on payment by the plaintiff, and this direction would in no way alter the relative position or rights of the parties. It would only have the effect of possibly preventing the necessity for a future suit from arising. I see no reason to have recourse to the authority of a Full Bench to enable us to do this.

The 16th May 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Registration — Jurisdiction — Section 15, Act XVI., 1864.

Case No. 2184 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 2nd August 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 8th May 1867.

Ram Lall Singh and others (Plaintiffs), *Appellants,*

versus

Thakoor Dyal and others (Defendants), *Respondents.*

Baboo Unnoda Pershad Banerjee for Appellants.

Baboos Onookool Chunder Mookerjee and *Chunder Madhub Ghose* for Respondents.

A party, after purchasing a property, applied to have his deed registered; but the vendor not attending to admit the execution, the Deputy Registrar refused, under Act XVI. of 1864, to register, and referred the applicant to the Civil Court. Application was accordingly made, under Section 15, to the Principal Sudder Ameen, who, after hearing the vendor's plea that the whole consideration had not been paid, ordered the registration to be made, and this was accordingly done on 2nd February 1866.

HELD that, though the Deputy Registrar's order was a proper one, the application to the Civil Court was warranted by the terms of Section 15, and the Civil Court had jurisdiction in the matter.

Loch, J.—THE plaintiffs sued for confirmation of possession for entry of their names in the Collector's Register in regard to 7 annas of Mouzah Kurrungowan, *aslee* and *dakhilee*, Pergunnah Champore, and to set aside certain zur-i-pesh ticca leases in favor of defendant No. 2, and the kutkina held by defendants Nos. 3 and 4 from defendant No. 2.

It is stated that plaintiff purchased the property in question from defendant No. 1 on 20th August 1865, and was put into possession; that his possession was disturbed by the defendants Nos. 2, 3, and 4, who, in collusion with the defendant No. 1, had set up certain leases under which they claimed to hold possession.

It appears that, after the plaintiff had made the purchase, he applied, on 26th August 1865, to have his deed registered. As the vendor did not attend to admit the execution, and the Deputy Registrar, under the law then in force, Act XVI. of 1864, had no power to compel his attendance, he, on 9th September 1865, refused to register the deed, and referred the plaintiff to the Civil Court. An application was then made to the Principal Sudder Ameen on 18th September 1865, under Section 15, Act XVI. of 1864, praying that an order might be issued, directing the vendor to register the deed; and after hearing what the vendor had to say, who admitted the execution, but pleaded that the whole consideration had not been paid, the Principal Sudder Ameen, on 25th November 1865, directed the registration to be made; and, in compliance with this order, the Deputy Registrar registered the plaintiff's deed of sale on 24th February 1866.

We do not understand how any question as to plaintiff's title could have been raised in this case. Looking at the written statements of the defendants' vendor, we find that he admits execution of the deed, but denies the plaintiff's possession and the payment of full consideration. The other defendants plead that they hold under a lease received from the original proprietor, and state that, under a note of assignment from their lessor, they pay their rents to some party other than plaintiff. Plaintiff's title was not called in question—only his possession and payment of consideration; and both these points have been determined in plaintiff's favor. As, however, the question of plaintiff's title has been gone into, and the Judge, relying, though reluctantly, on a judgment of a Division Bench of this Court, reported in 6 Weekly Reporter, page 61, has dismissed the plaintiff's claim, on the ground that, under that ruling, the Principal Sudder Ameen had no jurisdiction to direct the registration of the deed under the provisions of Section 15, Act XVI. of 1864, and that the registration so made is null and void, and that consequently plaintiff's deed cannot be admitted in evidence, we must dispose of the question as brought before us in special appeal.

We find that, under the provisions of Section 29, Act XVI. of 1864, the Deputy Registrar refused to register the deed, as the vendor did not appear to admit execution, and this order is perfectly correct. The plaintiff then applied to the Principal Sudder Ameen, under Section 15 of the Act, for an order directing the Deputy Registrar to make the registry. This order he obtained on 25th November 1865. His application to the Principal Sudder Ameen was made on 18th September 1865 within nine days from the Deputy Registrar's order, and he obtained the order for registration, within four months of the same date. But it is urged—and the contention is in a measure supported by the decision of this Court quoted above—that as the order of the Deputy Registrar was correct, no application could be made to the Civil Court; and that it is only in cases where the order of the Deputy Registrar is improper that such application can be made.

Looking at the terms of Section 15, we think that this contention cannot be maintained. The opening words of Section 15 are: "If a District Registrar or Deputy "Registrar shall refuse to register an instru-"ment falling within the provisions of Sec-

"tion 13, it shall be lawful for any person "interested to institute a regular suit to "establish his right to have such instru-"ment registered." It concludes with these words: "The petition of plaint in any suit "instituted under this Section shall be "written upon paper bearing a stamp of the "value of eight annas." And it may be remarked, in passing, that no time for filing such suit is specified, and therefore it may be presumed that the general law of limitation is applicable to such suits.

The new law, Act XX. of 1866, has changed the regular suit into a simple application, and limited the period within which such application may be presented to thirty days. (See Sections 83 and 84.) It appears to us that the law permits an application or suit under Section 15 in every case in which the Deputy Registrar refused to register, and the reason for allowing this was that the Deputy Registrar had no authority to make enquiries as to the right of the party applying to have the deed registered. All that he could do was to refuse to register if the party executing refused to attend, or, attending, denied execution. He had not authority to enquire whether the deed had or had not been executed; and as deeds of the kind before us are obliged to be registered within a limited time after execution, it was necessary to provide some means to give relief to parties whose deeds the Deputy Registrar, for any reason, refused to register; and this relief was given, I apprehend, by the provision of Section 15, which afforded a speedy mode of enquiry into the right of the party interested to have the deed executed. Were it otherwise, we should have this injustice under color of law, that a party, after receiving consideration and executing a deed of sale, might refuse to attend at the Registrar's office to admit the execution. That officer could only in such circumstances refuse to register the deed; but as his order was a proper one, the party would not be able to take advantage of the provisions of Section 15 of Act XVI. of 1864, and would lose the benefit of his title-deed, which could not be produced in evidence.

But we do not think that the present case is on all fours with the case quoted by the Judge. In that case the Lower Courts refused to entertain any application under Section 15. In this case the Principal Sudder Ameen admitted the application, and, after hearing the parties, directed the Deputy Registrar to register the document, which was duly carried out. This order, whether right or wrong, was the order of a competent Court having jurisdiction in the matter, and we do not think that the Judge was in a position to set aside or look behind the order passed by the Principal Sudder Ameen. He was bound to accept it as an order of a competent Court, leaving any party dissatisfied therewith to take such steps as he should be advised to do to have it set aside. He could not in the appeal beforce him set aside an order which had become final. We think, therefore, that the order of the Judge must be reversed, and that of the first Court restored. The special appellant will get his costs in all Courts. The special appellant will pay the costs of the lessee who has unnecessarily been made a respondent in this appeal.

Mitter, J.—I concur with my learned colleague in both these cases. I think that the validity of the registration of the plaintiff's kabala is no longer open to be questioned by the vendor (respondent). This registration has been effected in pursuance of a decree of the Civil Court that has become final by operation of law. I do not think that there is the slightest reason for contending that this decree is vitiated by want of jurisdiction. It was passed in a suit of a civil nature, and whether the provisions of Section 15, Act XVI. of 1864, were applicable to it or not, it is perfectly clear that, in the absence of any legislative provision to the contrary, the Civil Court had ample jurisdiction to entertain it. The utmost that can be said is, that the Principal Sudder Ameen who decided it had committed an error in law in acting upon a document which he had no power to act upon under the provisions of Section 13. But this objection, if it has any force at all, cannot amount to want of jurisdiction. Every error of law that is committed by a Court of justice is not to be considered as an illegal assumption of jurisdiction, and I do not see any reason why the error complained of in this case, if it were an error at all, should be considered in that light. Holding this view of the case, I am of opinion that these two special appeals ought to be decreed with all costs in all the Courts.

The 16th May 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Service-tenure—Right of occupancy—Cultivators—Section 6, Act X, 1859.

Cases Nos. 1995 to 1997 of 1867.

Special Appeals from a decision passed by the Judge of Tipperah, dated the 5th June 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 6th December 1866.

Kalee Churn Singh and others (Plaintiffs), *Appellants,*

versus

Ameeroddeen and others (Defendants), *Respondents.*

Baboo Otool Chunder Mookerjee for Appellants.

Baboo Romanath Bose for Respondents.

The benefits of Section 6 of Act X. of 1859 are not restricted to those who with their own hands till the soil, but apply to those who are actual cultivators in the sense of deriving their profits from the *produce* directly.

Bayley, J.—It is admitted by the pleaders on both sides that these three special appeals will be governed by one and the same decision here.

The plaintiff in these cases sued under a jotedaree-pottah of the 1st Assin 1275, for rents against certain defendants as the actual cultivators.

These defendants did not appear.

The other defendants (certain palkee-bearers) intervened under Section 77, Act X. of 1859, and stated that the lands the rents of which were sued for were held rent-free by them as service-grants.

The first Court gave plaintiff a decree, holding that the land did not belong to defendants (the palkee-bearers) as a service-tenure.

On appeal, the Lower Appellate Court held that the defendants, palkee-bearers, had been in possession of the lands, even if not doing service as bearers, for so long a period as to give them the right of occupancy under Section 6, Act X. of 1859.

Against this holding, the plaintiff appeals specially, and urges that it is clear from the kubooleut entered into by these defendants with the Rajah of Tipperah that they have no other rights than to hold the lands as long as they perform the service of palkee-bearers; that they have ceased to do that service; and that, consequently, their rights in these tenures have ceased also: further, that the Principal Sudder Ameen has decreed their right of occupancy under Section 6, Act X. of 1859, when they themselves did not set up originally any such right or plea, and, indeed, entirely abandoned their grounds of appeal in order to set up this one completely new defence, and that the Principal Sudder Ameen should not, therefore, have adjudicated the case upon it. The special appellants add that the special respondents are jotedars or middle-men, and not the actual cultivators, to whom alone Section 6, Act X., applies.

I am of opinion that it was quite open to the Lower Appellate Court to allow the defendants to amend their grounds of appeal; nor can I say that it has erred in law in doing so.

I further think that the benefits of Section 6 are not restricted to those who with their own hands till the soil, but extend to those who are *bonâ fide* actual cultivators in the sense that they derive the profits from the *produce* directly, and are not middle-men who have no connection with the produce except by receiving the rents in cash or kind from those who do directly derive their profits from the produce.

The cases cited in Weekly Reporter, page 26, Privy Council cases, and 6 Weekly Reporter 80 and 206, do not go beyond the question of the right to hold service-lands, *as service-lands*, after the service has ceased. Those cases do not in any way refer to rights of actual cultivators under Section 6, Act X. of 1859, irrespective of service.

On the whole, I see no ground on this petition of special appeal for interfering with

the decision of the Lower Appellate Court, and therefore dismiss these three special appeals with costs.

Macpherson, J.—I concur in thinking that these special appeals should be dismissed with costs. On the facts as found by the Lower Court, it appears to me that the Judge took a correct view of the position of the respondents.

The 18th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Right of suit—Confirmation of title—Possession notwithstanding an award under Act IV. of 1840.

Case No. 2132 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Furreedpore in Dacca, dated the 8th March 1867, reversing a decision passed by the Moonsiff of Muksoodpore, dated the 10th August 1866.

Shiboo Soonduree Dabee and others (Plaintiffs), *Appellants,*

versus

Mr. J. Beckwith and others (Defendants), *Respondents.*

Baboo Nuleet Chunder Sein for Appellants.

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Respondents.

In a suit for confirmation of plaintiff's right to land within a *kharija talook*, by the setting aside of an adverse award under Act IV. of 1840 (which had been confirmed in appeal), where it was found that after defendant had held the land for a year under the award in question, plaintiffs had again entered into possession, it was held that, as plaintiffs were in possession, though in contravention of the Magistrate's order, they did not need the Court's intervention to put them in possession, and their omission to sue for possession was no bar to their title being investigated.

Jackson, J.—THE plaintiffs in this case sued for a confirmation of their right to a small piece of ground within their portion of a certain *kharija talook* by setting aside an adverse award made under Act IV. of 1840.

They alleged that, while they were in peaceful possession, Mr. Beckwith, the principal defendant, having made certain complaints against the ryots in respect of a portion of the lands, proceedings were commenced under the Act, and an order made in the defendant's favor on the 8th April 1861, which order was confirmed on appeal on the 31st May following; that notwithstanding the issue of a warrant in accordance therewith, and the consequent sowing of a little indigo, the defendants had never succeeded in getting possession, or in ousting the plaintiffs, who accordingly had continued in possession; but that, inasmuch as the order in question was likely to be injurious to the plaintiffs, they stated their cause of action to have arisen from the order in appeal, and prayed for a reversal of the order and a declaration (with costs of suit, &c.) of right based on the continued possession and title of their ancestor and themselves.

The plaint was filed on the 30th May 1864, just within three years from the date of the decision in appeal.

The Moonsiff of Muksoodpore gave judgment for the plaintiffs, being of opinion that the plaintiffs, although dispossessed under the Act IV. award, had got irregularly into possession again, but that such illegal act on their part would not prejudice their rights. He thought the plaintiff's title made out, and the adverse possession for more than 12 years set up by the defendant not proved.

The defendant appealed against this decision, and the appeal was heard before Mr. Hutchinson, the Principal Sudder Ameen of Furreedpore, who held that the plaintiffs, having alleged continuous possession, were bound to prove that allegation; that, as the defendant had got into possession under the award, the plaintiffs could not be considered in lawful possession; and as they had omitted to sue for possession, their title could not be investigated. He, therefore, set aside the judgment of the Moonsiff, and ordered the plaintiffs' suit to be dismissed.

The reasoning on which the Principal Sudder Ameen bases this conclusion is somewhat obscure, and at first sight suggests the view that he considered the plaintiffs not to be in possession at all.

If this had been his real finding as to the fact, I should have been disposed to think that his decision was right, as in my opinion a plaintiff who comes into Court asking for a declaration of right based upon a certain state of facts is, if he can maintain his suit at all, bound to establish his facts strictly as alleged ; and if, as was supposed on the argument before us, the Lower Appellate Court had found untrue the material allegation, as it seems to me. of possession so prominently set forth and relied on in the plaint, I should have supported its decision that the plaintiffs were not entitled to their decree.

But a more careful examination of that decision has satisfied me that the Lower Appellate Court has not taken this view of the facts; but that, in accordance with the report of an Ameen who held a local enquiry, he has substantially affirmed the finding of the Moonsiff, who found that the defendant had held the land for one year, cultivating it with indigo; and that plaintiffs had, after such dispossession under the order passed by the Magistrate, again entered into possession. He also observes that such possession could not be considered legal—a remark which has likewise been adopted by the Principal Sudder Ameen. This observation, however, was made by the Moonsiff apparently for the purpose of showing that the plaintiffs were not to be prejudiced by this illegal act on their part, the question of title alone being before the Court.

But the Principal Sudder Ameen appears to have considered that a possession contrary to law was no possession at all, and, further, that plaintiffs, being thus constructively out of possession, were bound to include in their plaint a prayer for possession as well as one for declaration of title, without which further prayer they could not maintain their suit.

This opinion pre-supposes an objection to the suit, on the ground that a merely declaratory decree was sought, consequential relief not being asked for, and such objection is precisely that which Section 15 of the Civil Procedure Code was framed to defeat.

If the case were as supposed by the Principal Sudder Ameen, the plaintiff would have been entitled to consequential relief if he had asked for it, and in such a case the Section clearly applies (Rooke *versus* Lord Kensington, cited in Broughton's Code of Civil Procedure, 2nd edition, under the 15th Section).

But here it seems that the plaintiffs were in possession, and did not require the intervention of the Court to put them in. It may be that, in taking such possession, they contravened an order of the Magistrate and Sessions Judge, and exposed themselves to penal consequences. It may also be that the defendant, if he had sued under Section 15, Act XIV. of 1859, might have recovered the possession. But the plaintiffs' possession was a fact, and could not be ignored.

It has been held in a Madras case that a "suit ought not to be entertained where the plaintiff is in possession of all his alleged rights, and is not in a position to bring an action;" to which Mr. Broughton's note adds the words, *i. e.*, to establish his title to land of which he is in possession. This might seem to be authority for holding that the present suit could not be maintained.

2 High Court Reports, page 333.

It is right, therefore, to observe that, in the case in question, the plaintiff seems to have sought a decree, less for the purpose of declaring his own rights, than to negative some claim alleged to have been set up by the defendants, and the Court observed (page 335) that the plaintiff had "all his rights uninvaded and intact."

Here the case is quite otherwise; the plaintiff was a party bound by an order respecting the possession of property made under Act IV. of 1840, and, if the defendants had claimed to get back the possession, might, in suing to recover the property, have found herself barred by Clause 7, Section 1, Act XIV. of 1859.

But the order would hold good only until the rights of the parties disputing had been determined by a competent Court, and could not be pleaded after such determination.

The plaintiff had, therefore, a good cause of action, and as her allegations were found to be substantially true, she was entitled, if she made out her title, to the judgment of the Court.

The Principal Sudder Ameen's decision must, therefore, be reversed, and the case must be remanded to him for a determination of the plaintiff's right.

Mitter, J.—I concur generally with my learned colleague. I merely wish to add that I am not quite prepared to hold that, if the plaintiff had failed to establish her possession subsequent to the date of the Act IV. award, her suit ought to have been dismissed.

The 18th May 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Action for rent—Kubooleut—Possession.

Case No. 893 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Hooghly, dated the 30th January 1867, affirming a decision passed by the Deputy Collector of that District, dated the 27th March 1866.

Hurish Chunder Koondoo (Defendant), *Appellant,*

versus

Mohinee Mohun Mitter (Plaintiff), *Respondent.*

Mr. C. Gregory and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboo Roopnath Banerjee for Respondent.

A landlord cannot claim rent under a kubooleut where the lessee has never obtained possession, delivery of possession being ordinarily a condition necessary for the maintenance of an action for rent.

Mitter, J.—THIS was a suit for arrears of rent on a kubooleut. The Lower Appellate Court has decreed the suit upon the ground that, the kubooleut being admitted, the defendant (special appellant) is bound to pay rent under it, even though he did not obtain possession of the premises leased to him. We are of opinion that this decision is erroneous. It is to be borne in mind that there is nothing in the kubooleut which says that the special appellant would be liable for rent, whether he obtains possession or not. We think that, in the absence of such a condition, at all events, it would be manifestly unjust and inequitable to decree a claim for rent where the lessee has never obtained possession of the land in consideration for which the rent was agreed to be paid. The kubooleut is nothing more than the evidence of the contract, but the contract itself consists in the exchange of something more substantial than a mere piece of writing. It is, indeed, true that the special appellant has given no evidence to show that he demanded possession from the landlord, although it is admitted that he made several attempts, unsuccessful as they were, to obtain it from the hands of a third party who opposed his entrance upon the land. We think, however, that the delivery of possession on the part of the landlord is ordinarily a condition necessary for the maintenance of an action for rent; and it was, therefore, necessary for the landlord himself to show that the tenant was able to receive possession. Suppose, for instance, a suit is brought upon a bond for money lent; the defendant admits the execution of the bond, but pleads non-liability, on the ground that the consideration stated therein has never been received by him; and suppose, also, that this last-mentioned fact has been established by evidence. Can any Court of equity and good conscience decree the suit merely upon the ground that the defendant has not demanded the payment of the consideration above referred to? Why, then, are we to adopt a different principle in the case of a kubooleut? We think that the custom of granting amulnamahs in addition to pottahs, which is so generally prevalent in this country, is a sufficient confirmation of the principle.

The special appeal is accordingly decreed, and the suit brought by the plaintiff (special respondent) is dismissed with costs in all the Courts.

The 18th May 1868.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Certificate under Act XL. of 1858.

Case No. 102 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 8th February 1868.

Nobin Chunder Shaha, *Appellant,*

versus

Raj Narain Shaha, *Respondent.*

Baboo Sreenath Banerjee for Appellant.

Baboo Kalee Mohun Doss for Respondent.

A certificate under Section 3 of Act XL. of 1858 is purely an authority for the administration of property, and ought not to be issued where there is neither present right nor prospective possession.

Bayley, J.—WE do not think any sufficient cause has been shown in this case for our interference with the order of the Court below.

The petitioner is neither in possession of property, nor next heir. The mother is alive, and so long as she lives, she is next heir, and therefore a certificate granted to the petitioner would not be according to law, unless, upon special facts found to exist, the mother were disqualified. This is not shown to us in the present case.

We may add that we consider the certificate to be granted under Section 3 of Act XL. of 1858 is purely an authority for the administration of property, and we think the Legislature never intended it to be issued where, as in this case, there is neither present right to possession nor even a vested right to future possession.

We reject the petition with costs.

The 19th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Mortgage—Year of grace—Holidays—Regulation XVII. of 1806.

Case No. 2531 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 25th September 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 5th April 1867.

Kumola Kant Mytee (Plaintiff), *Appellant,*

versus

Sreemutty Narainee Dossee and others (Defendants), *Respondents.*

Baboos Mohendro Lall Shome and *Bhowanee Churn Dutt* for Appellant.

Baboo Ashootosh Dhur for Respondents.

The year of grace allowed to a mortgagor by Regulation XVII. of 1806 to tender or deposit the amount due to the mortgagee includes authorized holidays; the mortgagor not being entitled to the deduction of any holidays which may occur when that year expires.

Jackson, J.—In this case we think that the decision of the Zillah Judge is erroneous. He has determined that, inasmuch as the Civil Court was closed on the day in which the year of grace allowed to the mortgagor expired, the deposit was properly made on the first day on which the Civil Court sat after the holidays.

The question does not arise in this case whether the year of grace is to be computed from the date of the *issue* of notice to the mortgagor or from the date on which the mortgagee's petition was *notified* to the mortgagor, because more than a year had elapsed since either of those dates before the deposit was made in the present instance. But, assuming that the latter of these two dates is the time from which the year of grace is to be computed, it appears to us that it would be necessary to make a deposit in the Civil Court strictly within the year; and that the mortgagor is not entitled to the deduction of any holidays which may occur at the time when the year of grace expires.

Sections 7 and 8, Regulation XVII., 1806, allow the mortgagor an alternative, that is to say, he is permitted either to tender the amount due to the mortgagee, or, if he prefers it for his protection, he may deposit the amount in the Zillah Court. But in any case the tender or deposit is to be made within the "reasonable and limited time" referred to in Section 1 (or the Preamble) of that Regulation. If the party paying the money desires for his own safety and convenience to deposit it in Court, he must avail himself of this privilege at a time when it is within his reach.

The authorized holidays of the Civil Court are always notified beforehand, so that parties may know when resort to the Civil Court is open to them; so that, if the year of grace falls upon a day when the Civil Court is closed, it is the business of the party to come at some previous time. If we were to hold otherwise, we should be allowing the mortgagor to extend the year of grace at pleasure. He might say: "If I "pay the money to the mortgagee, I must "do it within one year; but if I pay it into "Court, I shall have 13 or 14 months."

The decision of the Lower Appellate Court is set aside, and that of the Court of first instance is restored with all costs.

The 19th May 1868.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo widow's personal debts—Liability of her husband's estate.

Case No. 104 of 1868.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Mymensingh, dated the 14th December 1867.

Chundrabulee Debia (Objector), *Appellant,*

versus

Mr. Brody (Decree-holder), *Respondent.*

Mr. G. C. Paul and *Baboos Onookool Chunder Mookerjee* and *Kalee Prosunno Dutt* for Appellant.

Baboo Shushee Bhooshun Sein for Respondent.

* By Hindoo law a widow is allowed, during her lifetime, to make the fullest use of the usufruct of her husband's estate; but whatever part of it she leaves behind at her death becomes the property of the next heir, and is not liable for her personal debts, unless such debts have been contracted under legal necessity and for the benefit of the estate.

Glover, J.—THE decree-holder in this case, Mr. Brody, endeavoured to take out execution for certain mesne-profits and costs which had been decreed to his judgment-debtor, Bhoobun Moyee Debia, by the Privy Council decision of the 26th of May 1865.

Bhoobun Moyee died before execution was taken out, and the decree-holder's claim is objected to by the person who has succeeded to the property, Chundrabulee Debia, the mother of Bhoobun Moyee's husband, and next heir, on the expiry of Bhoobun Moyee's life-interest, as widow of her husband.

Chundrabulee Debia denies that the wassilat, &c., decreed by the Privy Council, belonged absolutely to her daughter-in-law, or can be made liable for her personal debts. They formed part of the estate of her deceased husband, to which, and not to Bhoobun Moyee's estate, she (Chundrabulee) has succeeded.

The Principal Sudder Ameen held that the liability or otherwise of Bhowanee Kishore's estate for the particular debt claimed by the decree-holder could not be determined in the execution department, but must form the subject of a regular suit.

But he allowed the decree to be satisfied from the mesne-profits, rents, and costs, which the judgment of the Privy Council had declared to be the right of Bhoobun Moyee, on the ground, that as she would have had absolute control over these sums had she lived, they became her sole and particular property out of which her liabilities could be satisfied after her death.

Against this decision Chundrabulee Debia appeals, urging that whatever accumulations may have been made by Bhoobun Moyee, these at her death became part and parcel of the estate, and, as such, passed to appellant as next heir of her son Bhowanee Kishore. By Hindoo law Bhoobun Moyee was allowed to make the fullest use of the usufruct of the estate so long as she lived; but whatever part of it she left behind became the property of the next heir, and was not liable for the widow's personal debts. If the decree-holder wished to make the estate liable, on the ground that the debt was incurred for some one of the necessary purposes which the Hindoo Law allows, he could establish his claim in a regular suit.

It seems to me that the decree-holder must fail in this application, and that he cannot use the decree passed in favor of Bhoobun Moyee as that lady's personal property. To do so, it must be shown that the decree was of the nature of *streedhun*, and it certainly cannot be contended that it comes under any of the six descriptions of property mentioned in the *Dyabhaga* as *streedhun*.

A Hindoo widow with a life-interest in her deceased husband's estate would be entitled to make the fullest use of the usufruct of that estate; and it seems doubtful, under the late rulings of the Privy Council, whether she could be in any way restrained, however wasteful her expenditure, so long as she kept within the limits of her income, and made no attempt at alienation. If, on the contrary, she chooses to econo-

mise, she can, during her lifetime, give away her savings to any one she pleases; but if she have left savings undisposed of at the time of her death, these would form part of the estate, and go with that estate to the next heir of her deceased husband. Now, the decree sought to be attached in this case must be taken as representing a certain part of the usufruct of the estate, which Bhoobun Moyee did not expend during her lifetime, and which, therefore, at her death, ceased to belong to her. It is argued that the money advanced by Mr. Brody was employed in getting the Privy Council decree, and that it therefore represents the actual usufruct of the estates, which Bhoobun Moyee ought to have enjoyed during the time she was kept out of possession. and which she did enjoy in this manner.

But, supposing this to be so, the difficulty in the decree-holder's way would be still the same. Bhoobun Moyee might, during her lifetime, have taken out execution of her decree, and have spent the proceeds; but the fact remains that she did *not* do so, but left the decree behind her untouched.

After hearing the arguments on both sides, and referring to the text-books of Hindoo Law, and the cases decided under them, I am of opinion that no amount of accumulations which a Hindoo widow may leave behind at the time of her death can be considered as belonging to her, but that they must go to swell the estate. And it is not unreasonable that this should be so. A Hindoo widow is supposed by law to take her husband's estate for maintenance only, and she is most straitly enjoined to live a life of economy, austerity, and seclusion, expending the proceeds of her estate on religious observances for the good of her husband's soul. She gets these somewhat anomalous privileges, and by them keeps her husband's nearest of kin out of property to which he has a much stronger claim than herself, because she is prevented by law and custom from contracting any other marriage, and without such privileges she might be thrust out to starve. But it was never contemplated that she should expend the produce of her estate wastefully, or do more than support herself in a decent and proper manner; and that she should leave to her own relatives, or convert into her own *streedhun*, the accumulations she might have made, appears to me opposed to every principle of Hindoo law as applied to widows.

It seems to me, therefore, that the decree sought to be attached cannot be made liable for any personal debts of Bhoobun Moyee.

The decree-holder can, of course, recover his money, if he can show that the estate was bound for the debt, that is to say, that, when the money was borrowed, the lender, after making due enquiry, was satisfied of the existence of a reasonably credited necessity, such as the Hindoo law allows.

I would therefore allow the appeal, and reject the decree-holder's application to take out execution, with costs, and would pass the same order in the seven other cognate cases, which are on all fours with this.

Kemp, J.—I concur generally in this judgment. The decrees obtained by Mr. Brody were on confession of judgment. The debts, as far as the decrees are guides to the character of the debts, were personal debts of the life-tenant Bhoobun Moyee. Whether the estate of her husband Bhowanee Kishore is charged with these debts will depend upon whether they were contracted under a legal necessity and for the benefit of the estate. This question cannot be tried in this stage of the case.

The opposite party, Chundrabulee, does not succeed to the estate of the judgment-debtor Bhoobun Moyee, but as heiress of her son Bhowanee Kishore. Chundrabulee takes the *corpus* of the estate as well as all increments on that *corpus*, such as accumulations of profits, wassilat, costs, &c., not enjoyed by the life-tenant. She succeeds to the residue of the estate after the widow's use of it. These accumulations cannot be considered to be the *streedhun* of the widow, for they do not fall within any of the classes enumerated in the *Dyabhaga* as constituting a woman's separate or peculiar property.

I would reverse the order of the Principal Sudder Ameen.

The 19th May 1868.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Discovery of lost property — Cause of action — Jurisdiction.

Case No. 2033 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 18th June 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 27th September 1866.

Ram Pertap Singh (Defendant), *Appellant,*

versus

Bholabutty Koonwar (Plaintiff), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Respondent.

Where property lost in one district is found in another, in the possession of a party who refuses to restore it, the owner's cause of action arises from the date of such refusal; and a suit to recover possession of the property must be instituted in the district in which it is found.

Loch, J.—PLAINTIFF sued to recover possession of an elephant belonging to him, which was illegally detained by the defendant. Both the Lower Courts have given plaintiff a decree for the possession of the elephant. In special appeal it is urged that the Tirhoot Courts were in no way competent to deal with the case, as the cause of action arose in the Chumparun District, where the defendant resides.

It appears that the elephant in question disappeared from the plaintiff's premises in Zillah Tirhoot, and was found after some months in the defendant's possession in the District of Chumparun, which is subordinate to the Sarun Civil Courts. The defendant pleaded that he had purchased it from Ghuznam Shah, who was charged with the theft of the animal, but was acquitted from want of proof. Plaintiff instituted a suit to recover possession in the Tirhoot Court, and both the Lower Courts have held that plaintiff was entitled to bring his action in the Tirhoot Court, as the loss of the elephant, which occurred in Tirhoot, was his cause of action. We think the loss of the elephant gave him no cause of action till he found it in the possession of some person who refused to restore it. The loss of the animal would give him a right to recover it if he found it straying, but it gave him no right of action against any one. It was only when he found it in the defendant's possession, and defendant refused to restore it, that plaintiff's right of action as against the defendant arose. Now, the refusal to restore was made in Chumparun, which is within the civil jurisdiction of Zillah Sarun; and as the defendant also resides within the civil jurisdiction of that district, we think the suit should have been instituted in the Sarun Court. We think, therefore, that the proceedings of the Lower Courts must be quashed as having been conducted without jurisdiction, and that the defendant must recover his costs in all Courts.

The 20th May 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Declaratory decree—Section 15, Act VIII. of 1859—Forged documents.

Case No. 2546 of 1867.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 13th August 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 22nd May 1867.

Sheo Lall Chowdhur (Defendant), *Appellant,*

versus

Chunder Benode Oopadhya and others (Plaintiffs), *Respondents.*

b

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Respondents.

In a suit to obtain a declaration that two pottahs and a chittah, which had been put forward in a *butwarrah*, were forgeries, it was held that, as no action had been taken on the documents in question, and plaintiff's rights were in no way prejudiced, the Court could not make any binding declaration of right.

Kemp, J.—THE pleader for the special appellant contends that this suit, which is a declaratory suit, cannot be entertained in the Civil Court under the provisions of Section 15, Act VIII. of 1859.

The suit was to obtain a declaration that two pottahs and a chittah, put forward by the special appellant in the course of a *butwarrah*, are forgeries.

Both the Lower Courts have held that the suit will lie, and that the pottahs and chittah, if not forged, are not proved.

It is very clear that, in a case of this description, we could not make any binding declaration of right, such, for instance, that the plaintiff had a right to sue to enhance the rent of the tenure of the defendant. The plaintiff was not injured in his rights by the defendant putting forward this pottah in the course of the *butwarrah*. The *butwarrah* would proceed upon the existing assets, and the parties to the decision would not be precluded from exercising their proprietory rights, such as a right to enhance, because a pottah was produced purporting to be a mokurruree pottah. It appears to us that this suit is brought to get rid, beforehand, of evidence which the defendant would mainly rely upon in a suit for enhancement, which can only be brought under Act X. of 1859. In a suit under that Act, the whole question can be tried, *viz.*, the right to enhance, the *bona fides* of the pottah, and whether the defendant, independent of the pottah, has been able to prove that his tenure is protected from enhancement under any of the presumptions which Act X. gives him an opportunity of relying upon.

In the case quoted by the pleaders for the special respondent at Volume III., page 209, Weekly Reporter, the pottah had been publicly put forward in a Court of justice, and the learned Judges who decided that case held that it could not be said that the action was premature.

In this case no action has been taken on the pottah; the rights of the plaintiff are in no way prejudiced.

In this view of the case, we reverse the decision of the Lower Court, and dismiss the plaintiff's claim. Appeal decreed with costs and interest.

The 20th May 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Evidence.

Case No. 2200 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 22nd May 1867, affirming a decision passed by the Deputy Collector of that District, dated the 19th May 1866.

Gorachand Sircar (Defendant), *Appellant,*

versus

Ram Narain Chowdhry and others (Plaintiffs), *Respondents.*

Baboos Sreenath Banerjee and *Nil Monee Sein* for Appellant.

Mr. R. E. Twidale for Respondents.

Evidence given when a party never had the opportunity either to examine or to cross-examine the witnesses, or to rebut their testimony by fresh evidence, is not legally admissible for or against him, unless he consents that it should be so used.

Phear, J.—THIS is a suit brought to recover arrears of rent at an enhanced rate after notice given in pursuance of the provisions of Section 13. Act X. of 1859. It is one of six cases which were remanded to the Court of first instance, in order that the rates of rent might be fixed. The Deputy Collector

in his judgment says: "The plaintiff has "already obtained decrees against ryots of "the same village, and he now requests to "be allowed to rely on the same evidence in "these six cases. The request was granted, "and he finally (yesterday) produced authen-"ticated copies from the Judge's Court (where "the case lies in appeal) of the evidence "given in the case of the same plaintiff Ram "Narain Chowdhry against Suroop Mundul. "That evidence is in every way applicable "to the present case." The Deputy Collector then proceeded to fix the rate of rent in this case upon the materials furnished to him in this manner by the plaintiff, drawn from Suroop Mundul's case.

Against the decision of the Deputy Collector, the defendant appealed to the Judge, and one of his grounds of appeal was that the case had been determined without evidence. Upon this ground of appeal the Judge remarked: "The Deputy Collector has adopted the pro-"portionate rent decreed in that case, that is, "Suroop Mundul's case. It is urged by "the Counsel for the defendants that the "Deputy Collector should have taken fresh "evidence instead of adopting that decision. "In considering this objection, it is necessary "to bear in mind the nature of the question "decided in Suroop Mundul's case." The Judge then discusses the nature of that question, and gives reasons for coming to the conclusion that it would be unreasonable to expect that the plaintiff in this case, who is the same person as the plaintiff in Suroop Mundul's case, should be obliged to bring the same witnesses and the same evidence in this case as he had produced at the trial of that (Suroop Mundul's) case. The Judge adds: "Moreover, I observe that it is re-"corded by the Deputy Collector that, on "the first day for hearing, neither party pro-"duced evidence, but that the plaintiff asked "for a postponement to allow him to file "copies of the evidence as to rates in Suroop "Mundul's case, and that this postponement "was granted with the consent of the defend-"ant's representative in this case." Upon this, he seems to conclude that the defendants had consented that the present case should be tried upon the evidence already given in Suroop Mundul's case, but the Judge was in error in his construction of the Deputy Collector's order, which is in English, and which runs in these words: "Plaint-"iff's mooktear prays for adjournment to "enable him to produce copies of documents "filed in Suroop Mundul's case, on which he "relies to prove rates. *Granted*, with con-"sent of defendant, there being no wit-"nesses present on either side, and the 4th "of May is fixed for hearing."

It seems to us, judging from the actual words of the Collector himself, that the consent of the defendant only extended to the production of documents filed in Suroop Mundul's case, and did not amount to a consent, as the Judge puts it, that the "copies of the evidence" given in that case should be produced as evidence in this case. This being so, there is no express consent on the part of the defendant that the determination of the present case should be made to depend either upon the evidence or on the decision in Suroop Mundul's case, and we are unable to gather from the other side that anything has occurred on the part of the defendant which would amount to an implied consent to that effect. The reasoning both of the first Court and of the second Court in arriving at the conclusion that this evidence might be used in this case without the consent of the other party is certainly not in conformity with the law of procedure of our Courts. Whether the Court does or does not consider evidence given on another occasion and between other parties appropriate and valuable for the decision of the case which is before it is not of itself a reason for the admission or rejection of such evidence. The Court is bound to try the matter between the parties who are before it upon such evidence as those parties in their discretion produce for the purpose, and, at the time when the evidence is tendered, to decide whether or not it is legally admissible. Now, it is certainly the right of every litigant, unless he waives it, to have the opportunity of cross-examining witnesses whose testimony is to be used against him, and even, when circumstances require, to adduce evidence on his own behalf to meet the evidence which such cross-examination may have brought forward. He is also entitled himself to examine the witnesses who can give evidence in support of his case, in order that he may bring out the necessary information as fully as he thinks possible and in the form which he considers most favorable to himself. It follows that evidence given, when the party never had the opportunity either to examine or to cross-examine, as the case may be, or to rebut by fresh evidence, is not legally admissible as evidence for or against him, unless he consents that it should be so used.

With this view, we feel bound, however reluctantly, having regard to the expense

of the litigation and the sum at stake between the parties, to say that there has not been such a trial in this case as the defendant is entitled to; and consequently we remand the case to the Lower Appellate Court, in order that that Court might send it to the Deputy Collector for re-trial upon its merits. A reasonable time must be given to enable each party to produce such evidence as they think proper. The costs will abide the event.

The 20th May 1868.

Present:

The Hon'ble A. G. Macpherson, *Judge.*

Reviews.

Case No. 45 of 1868.

*Application for Review of Judgment passed by the Hon'ble Justices W. S. Seton-Karr and A. G. Macpherson, on the 3rd January 1868, in Special Appeal No. 1471 of 1867.**

Prosunnonath Dutt and others, Defendants (Respondents), *Petitioners,*

versus

Judoonath Paul, Plaintiff (Appellant), *Opposite Party.*

Mr. Bourke and *Baboo Otool Chunder Mookerjee* for Petitioners.

Baboos Onookool Chunder Mookerjee and *Hem Chunder Banerjee* for Opposite Party.

Reviews are not granted merely to supply defects on the part of pleaders in the conduct of appeals.

Macpherson, J.—THE judgment of the Lower Appellate Court commences with these words:—

"The appellants in this case are found "to be the actual parties in possession of a "putnee, the lease of which was granted to "one Shuamonee Dossee, a female relative. "The question raised before this Court is— "whether a Collector can, under Act "X.," &c.

The Judge decided the question stated in favor of the appellants before him (the present petitioners for review); and the Judge does not decide, or in fact allude to, any of the other issues which had originally been raised in the suit; nor is there any reason to suppose that the parties or their pleaders wished him to decide any save the one question with which he dealt.

The plaintiff appealed specially to this Court against the Judge's decision. The case was argued at length before Mr. Justice Seton-Karr and myself. The arguments were confined to the one point which the Judge had decided. It was never suggested or even hinted that any issue of fact remained in dispute, or that any other question whatever save the one still remained to be disposed of either by this Court or by the Lower Appellate Court. We gave our judgment in open Court at the close of the argument, reversing the decree of the Judge, and restoring and affirming that of the Court of first instance; and it was not even then suggested that a remand was requisite, and that we ought not to have simply set aside the decree of the Judge.

Now, I am asked to review our judgment, on the ground that the case ought to have been remanded if we thought the Judge had decided the point of law wrongly. It is said that there are various questions of fact still to be determined by the Lower Appellate Court.

It appears to me from the judgment of the Judge that the parties, when before him, rested their case upon the point of law, and that that was the only point on which his opinion was sought. If they had desired his opinion upon the issues of fact, a decision of which is not asked for, the appellants should have raised those issues *seriatim*, and should have prayed for a distinct decision of them. It is clear, however, that they desired nothing of the sort.

Then, if a remand was necessary, the proper time to ask for it was at the hearing of the special appeal. The pleaders then engaged on behalf of the petitioners did not think a remand necessary any more than we did. The present application is not made by those pleaders (Baboos Kishen Kishore Ghose and Ashootosh Chatterjee), but by Mr. Bourke and Baboo Otool Chunder Mookerjee, who now pray for a review on a series of grounds which I now hear of for the first time.

Reviews are not granted merely to supply defects on the part of pleaders in their conduct of appeals. If a remand was necessary

* See *ante*, p. 71.

in this case, the pleaders of the petitioners should have asked for it at the hearing. If they neglected their duty, which I am very far from suggesting that they did, their neglect is no reason why our judgment should be reviewed. I reject the application with costs.

The 20th May 1868.

Present:

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

Possession—Mesne-profits.

Cases Nos. 2296 to 2303 and 3284 to 3286 of 1867.

Special Appeals from a decision passed by the Judge of Rajshahye, dated the 12th June 1867, affirming a decision passed by the Moonsiff of Shahzadpore, dated the 3rd December 1866.

Zumurudoonissa (Defendant), *Appellant,*

versus

Radha Churn Ghuttuck (Plaintiff), *Respondent.*

Baboo Nuleet Chunder Sein for Appellant.

Baboos Chunder Madhub Ghose and *Sreenath Doss* for Respondent.

HELD by Macpherson, J., that a decree for possession does not necessarily involve a right to mesne-profits, and that the plaintiff suing for mesne-profits must prove his title.

HELD by Jackson, J.—*Contra.*

Jackson, J.—I WOULD dismiss these appeals. They are for the mesne-profits of certain lands from which the defendants had forcibly dispossessed the plaintiff, and in which the plaintiff was restored to possession in a suit under Section 15, Act XIV. of 1859.

The plaintiff now sues to recover the amount collected by the defendants during the period they held possession. The Judge has decreed the claim upon the strength of the possessory decree, without going into the title of the parties. It is contended for the defendants, on special appeal, that the plaintiff must prove his title before he can recover the mesne-profits.

I admit that, as a general rule, mesne-profits cannot be recovered until title is established. But the decree in the suit for possession is, in my opinion, sufficient title to recover from the defendants what the defendants have obtained by force and illegally. The title of the plaintiff to possession carries with it the title to recover the mesne-profits during the time he was dispossessed. It may be that the defendants hold a superior title to the plaintiff, but it does not follow that they are entitled to retain these mesne-profits, as it may also be that they labor under some disability in asserting their title. For instance, it may be that the defendants, having been out of possession for more than 12 years, are barred from a hearing on the question of title. In such a case it would not be right that the question as to whether the plaintiff should receive the mesne-profits during the time he was forcibly and illegally kept out of possession should depend on the decision on an issue as to whether the plaintiff or the defendant has the superior title to the land. The plaintiff, though holding an inferior title, would be entitled to the mesne-profits.

Macpherson, J.—I do not concur in the judgment of Mr. Justice Elphinstone Jackson. I think that the appellant's first ground of appeal is good, and that the respondents are not entitled to a decree for mesne-profits without proving their title. The mere decree in the suit for possession in no degree shows that the respondents have any right to the collections made by the appellants; and for all that that decree proves to the contrary, the appellants may be the persons lawfully entitled to them.

In each of these cases, the decree of the Lower Courts is reversed, and the plaintiff's suits are dismissed with costs both here and in the Courts below.

The 20th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Cross-decrees—Set-off—Execution—Section 209, Act VIII., 1859—Limitation.

Case No. 650 of 1867.

Miscellaneous Appeal from an order passed by the Officiating Judge of Midnapore, dated the 19th September 1867.

Nubo Lall Khan and another (Decree-holder), *Appellant,*

versus

The Maharanee of Burdwan (Judgment-debtor), *Respondent.*

Baboo Kalee Prosunno Dutt for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

In a suit for resumption of land, plaintiff obtained a decree for a portion of her claim with costs in proportion. Subsequently, on application for a review, she obtained a further decree for the rest of her claim. The latter decree was reversed in appeal by the High Court, who gave defendants all costs of the proceeding in proportion. Plaintiff allowed more than three years to elapse from the date of the former decree without applying for execution; but when defendant applied to execute his decree for costs, she petitioned for a set-off of so much of the costs as had been decreed to her.

HELD that these two judgments and decrees must be treated as if reduced to one, wherein judgment was given in part for the plaintiff, and in part for the defendant; and before issuing a warrant of execution, the Court was bound to ascertain how much, on the whole case, was due to the party executing, and to issue a warrant for that sum, and no more.

HELD further that no question of limitation could arise in respect to the execution of the first decree, which became incapable of execution as soon as the High Court's decree in appeal (which was for a larger sum) was passed; but that the latter, under Section 209, Code of Civil Procedure, could only be executed to the extent of the difference between the two decrees.

Jackson, J.—IT appears to me in this case that the Judge is substantially right. The suit was one for the resumption of various parcels of land. At first, the Court which tried the case gave the Ranee (the plaintiff) a decree for a portion of her claim, which, in fact, was not seriously resisted by the defendant, and the decree bore costs in proportion. Subsequently, the Ranee, not satisfied with that partial decree, applied to the Court for a review of its judgment, and obtained from the same Court, some time in May 1863, a further decree for the rest of her claim. That subsequent and supplementary decree was carried in appeal to the High Court, and the High Court in 1865 reversed the further decree, and gave judgment for the defendants on that part of the case, with all costs of the proceedings in proportion.

The Ranee allowed more than three years to elapse from 1863 without making any application to execute the partial decree which she had at first got, and which had not been disturbed. But in 1867, the defendant applied to execute his decree for costs. Thereupon, the Ranee petitioned that, before executing the defendant's decree, so much of the costs as had been decreed to her under the decision of 1863 might be deducted and set off.

The defendant to this replied that her (the Ranee's) decree was incapable of being set off by reason of its being barred by the lapse of three years.

The Judge seems to hold that the Ranee's decree was not barred, inasmuch as her appearance in the High Court to resist the appeal of the defendant was a proceeding taken by her to keep her decree in force, and on that ground he holds that her decree was not barred, and that she might execute it.

Against this decision the defendant now appeals, urging, as he urged in the Court below, that execution of the Ranee's decree was barred, and that in such case the provisions of Section 209 will not apply. A case has been referred to,* which is cited in Broughton's Civil Procedure Code, 2nd Edition, in the note on Section 209. It is reported in Wyman's Reports, page 109.

It would appear from that case that, if the decrees had been separate and independent decrees, there would be authority against allowing the party who held the decree for the smaller sum to set it off against the larger one. This case, it appears to me, is distinguishable from such a case as that. I am clearly of opinion that, although in form the decree obtained by the defendant is distinct from the decree passed in the other portion of the case, yet substantially these two judgments and decrees being in the same suit, and relating to parts of the same subject-matter, are, in fact, only parts of one general judgment and decree. And we must deal with the matter before us as if the two decrees had been reduced to one, wherein judgment was given in part for the plaintiff, and in part for the defendant, with proportionate costs to the several parties. That being so, it is the duty of the Court, before issuing a warrant of execution, to ascertain how much on the whole case is actually due to the party executing, and to issue a warrant for that sum, and no more.

Another point is suggested by my learned brother Dwarkanath Mitter, of which the Ranee appears entitled to claim the benefit. The defendant proposes to bar the execution of her decree by the words of Section 20 of Act XIV. of 1859. That Section enacts: "No process of execution shall issue from "any Court not established by Royal Charter "to enforce any judgment, decree, or order "of such Court," &c.

Now, the Ranee is not here asking for any *process of execution.* She only asks "that the Court, having the proceedings be-"fore it, will refrain from issuing a warrant "of execution except for such sum as on a

* *See* 5 W. R., Miscellaneous Rulings, p. 16.

"review of the whole of the proceedings "appears to be due from her." The words of the Section do not deprive her of the benefit of Section 209, or rather of the principle to be applied to this case by analogy from Section 209. I am of opinion, therefore, that, for the reasons stated, the Judge was right in refusing to execute the decree without taking into account the amount due under her decree to the Ranee (plaintiff), and therefore the appeal must be dismissed with costs and interest.

Mitter, J.—I entirely concur with my learned colleague. It appears, that at the time when the decree of May 1865 was passed in favor of the appellant before us, the Ranee's decree of May 1863 was not barred by the Law of Limitation. The moment, however, that the former decree, which was for a larger sum of money, was passed by the Court, the Ranee's decree became incapable of execution under the provisions of Section 209 of the Procedure Code. From that moment the Ranee became incompetent to execute her decree; and she could not have, therefore, taken out any process of execution within the meaning of Section 20, Act XIV. of 1859, nor is she asking for it at the present moment. All that she says is, that the appellant should not be permitted to take out execution for anything more than the difference between the respective amounts of the two decrees; and in this respect her contention is borne out by the express wording of Section 209. The question of limitation, therefore, cannot arise in the present case. The Ranee's decree has been merged, as it were, in the decree obtained against her by operation of law, and the same law also declares that the latter decree can be executed only to the extent of the difference stated above. I would, therefore, dismiss this appeal with costs.

The 20th May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Res adjudicata—Collateral facts.

Case No. 2800 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 17th August 1867, affirming a decision passed by the Deputy Collector of that District, dated the 30th May 1867.

Modhoo Ram Dey (Plaintiff), *Appellant,*

versus

Boydonath Doss and others (Defendants), *Respondents.*

Baboo Sreenath Banerjee for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

When a Court of competent jurisdiction, in deciding upon a particular subject-matter, thinks it necessary to go into collateral facts for the purposes of its decision, its opinion on those facts is not conclusively binding in a subsequent suit which relates to a different subject-matter.

Jackson, J.—It appears to us that the decision of the Lower Appellate Court is erroneous. The previous decision of the Revenue Court in the suit for a kubooleut was conclusive so far as the object of that particular suit extended. Neither that decree nor the kubooleut executed under its direction are produced. The decision of the Appellate Court in the rent suit is indeed here, but that merely affirms the previous judgment, and states no particulars of the case. We may, therefore, assume that the kubooleut executed was one without a term, and, therefore, operative as a kubooleut for a year only. That period having long since expired, the decision of the Collector is not further operative.

It is manifest that in that suit the decision by which the defendant was ordered to pay rent at an enhanced rate proceeded erroneously on the supposition that he was an ordinary ryot, although the plaintiff in his plaint had described him as a talookdar. The final determination of the question, whether he was or was not a talookdar, rested with the Civil Court. He *has* resorted to the Civil Court, and has obtained a binding decree that he is a talookdar. Therefore, he is fully competent to apply to the Revenue Court for abatement of his rent: and, in deciding his claim, the Revenue Court ought to accept the final decision of the Civil Court, and ought then to enquire at what rates talookdars of a similar description are paying, and, if those rates are less than that which he pays, to allow him abatement accordingly. With these directions the case must be remanded.

Mitter, J.—I entirely concur. It has been contended that, inasmuch as in a former suit for a *kubooleut* instituted by the special respondent against the special appellant

a kubooleut has been decreed against the latter at the rates paid by neighbouring ryots, the special appellant is precluded from instituting this action for abatement of rent, on the ground that he has obtained a decision of the Civil Court, declaring his right to hold the lands in question as a talookdar. This contention is not sound. The special appellant is not seeking to defeat the object of the previous suit. That was a suit for a kubooleut, and, in the absence of any evidence to the contrary, it must be presumed that the kubooleut decreed was for one year only; and this one year having passed away, the kubooleut is no longer in force. Under these circumstances, it is abundantly clear that the special appellant has every right to institute an action for abatement of rent, it being manifest that such a decree would not interfere with the decree passed in the former suit, which decree is no longer in operation.

It cannot be said that, because a Court of competent jurisdiction, in deciding upon a particular subject-matter, thought it necessary to go into collateral facts for the purposes of that decision, that the opinion of that Court on those collateral facts is conclusively binding in a subsequent suit which relates to a different subject-matter.

The very authority quoted by the respondent's pleader in support of his contention is against him. The Judges in that case (5 Weekly Reporter, Act X. Rulings, page 3) in one portion of their judgment say as follows :—

"The rule concerning the extent of the "operation of a judgment in precluding "fresh litigation is thus laid down by great "authority :—

"The rule against re-agitating matter ad-"judicated is subject generally to this re-"striction—that, however, essential the estab-"lishment of particular facts may be to the "soundness of a judicial decision, however "it may proceed on them as established, "and however binding and conclusive the "decision may, as to its immediate and "direct object, be—those facts are not all "necessarily established conclusively be-"tween the parties, and that either may "again litigate them for any other purpose "as to which they may come in question, "provided the immediate subject of the "decision be not attempted to be withdrawn "from its operation, so as to defeat its direct "object. (See Barrs *versus* Jackson, I. Y. "and C. C. C. 585.)"

The first part of this sentence clearly lays down that, however essential it may be for the decision of a particular subject-matter to enquire into disputed questions of fact, any decision arrived at with reference to such questions is only conclusive as to the direct and immediate object of the suit in which that decision is pronounced.

The direct and immediate object of the former suit in the Collector's Court was to obtain a kubooleut for one year; and the decision passed by that Court on any collateral facts is no doubt final for the purposes of that suit only. The Civil Court, however, had to deal with a suit brought for a different object and for a different subject-matter; and the Collector's decision upon facts which were merely collateral for the purposes of the former suit was no way binding upon it.

Nor can it be said that the plaintiff in the present suit is "attempting to withdraw "from the operation of the decision in the "former suit the immediate subject of that "decision; nor that he is trying to defeat "the direct object of that suit." The direct object of that suit has been already fulfilled, and the kubooleut decreed therein is no longer in existence. The plaintiff is, therefore, entitled to an abatement of rent as laid down by the Privy Council in the case of Dhunput Singh *versus* Ghoman Singh,* wherein it was distinctly ruled that a talookdar is not to be assessed at the same rate as a ryot.

The 21st May 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Benamee ownership—Fraud of ostensible owner.

Case No. 2597 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 13th August 1867, affirming a decision passed by the Moonsiff of Hureepal, dated the 29th November 1866.

Brojonath Ghose (one of the Defendants), *Appellant,*

versus

Koylash Chunder Banerjee (Plaintiff), *Respondent.*

* *See* 9 W. R., Privy Council cases, p. 3.

Baboos Ashootosh Dhur and *Debendro Chunder Ghose* for Appellant.

Baboo Nursingh Chunder Mitter for Respondent.

Where property is held *benamee*, and the ostensible owner assents to its being disposed of to the prejudice of the real owner, the latter cannot be allowed to object, the fraud being a consequence of his own act.

Jackson, J.—THIS is a suit for reversal of a sale of 8 annas of three tanks. The suit has been decreed. The special appeal relates only to one of these tanks named Adduk. As to this, both Courts have held that 8 annas belong to plaintiff, and not to the judgment-debtor, Mothoor Mohun. They have admitted that this share, though belonging to plaintiff, was held in the name of one Greesh Chunder, and that Greesh Chunder assented as a witness to the mortgage of the share by Mothoor Mohun; but they state that Greesh Chunder's act in making the admission was a fraud, and therefore not binding on plaintiff. It is this portion of the judgment which is objected to on special appeal, and we think very reasonably. The property was held ostensibly in the name of Greesh Chunder. Greesh Chunder stands by while Mothoor Mohun mortgages the whole tank, and subscribes his name to the mortgage, thereby admitting that Mothoor Mohun was capable, as owner, of dealing with the whole property. The plaintiff is undoubtedly bound by his *benameedaree* acts. If he will put forward another person as the owner of his property, that person is to the rest of the world the real owner; and if the ostensible owner deals with the property, the plaintiff cannot be allowed to object. His own acts have led to the fraud.

We reverse the decision of the Lower Court as to 8 annas of Adduk, and dismiss this portion of the plaintiff's suit. The plaintiff will pay all the costs of this appeal.

The 22nd May 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Possession—Mesne-profits—Section 23, Act X., 1859.

Case No. 2567 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 13th July 1867, reversing a decision passed by the Moonsiff of that District, dated the 11th November 1867.

Dataram (Plaintiff), *Appellant,*

versus

Ram Kristo and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Moulvie Syud Murhummut Hossein for Respondents.

D sued *R* for an arrear of rent, but *R* denied his tenancy and *D's* title to the land, and was successful in that defence. *D* then sued in the Civil Court to recover possession with wassilat, which he estimated at the rate of the rent previously claimed, and obtained a decree for possession without wassilat.

Held that the second suit was not for the same thing as the first under a different name, and that plaintiff was entitled to wassilat as well as possession.

Jackson, J.—THE judgment of the Principal Sudder Ameen in this case is erroneous.

The plaintiff, it seems, had sued the defendant, describing him as a tenant, for an arrear of rent. The defendant denied his tenancy, and also denied the plaintiff's title to the land; and upon such defence, he was successful in the Revenue Court. The plaintiff, finding that the defendant repudiated his tenancy, sued him as a trespasser in the Civil Court to recover possession of the land with wassilat, and, with exemplary moderation, estimated wassilat only at the rate of the rent which he had claimed in the Revenue Court.

The Moonsiff gave the plaintiff a decree for possession of the land, but refused to give him wassilat; and, upon appeal to the Court above, the Principal Sudder Ameen laid it down that the plaintiff, having failed in a suit for rent, ought not to recover the same thing under a different name, and that a suit of this description is barred under Section 23, Act X. of 1859.

We called upon the respondent to support this judgment, and Moulvie Murhummut Hossein contends that his client, having obtained an advantage in the Revenue Court, is entitled to retain all the benefit of it, and that the suit was properly dismissed as to wassilat.

It is evident that the suit which the plaintiff has now brought was forced upon him by the dishonest plea raised by the

defendant in the revenue-suit. The defendant was not willing either to give up the land to which the plaintiff was entitled, or to retain it, paying a fair and reasonable rent for the same.

We cannot subscribe to the pleasant doctrine for defendants which Moulvie Murhummut Hossein has contended for. It is not true that the plaintiff, having sued for rent, is now seeking to obtain the same thing under a different name. In the first suit, he sued as landlord to recover rent. In the second suit, he sought to obtain the profits which he would have received if the defendant had not wrongfully and dishonestly retained the land.

The judgment of the Lower Appellate Court will be reversed with costs, and the proceedings will go back to that Court in order that the amount of wassilat may be assessed and awarded.

The 23rd May 1868.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Estoppel — Suit for kubooleut — Clause 6, Section 23, Act X., 1859.

Case No. 1905 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 16th May 1867, reversing a decision passed by the Deputy Collector of that District, dated the 29th January 1867.

Khoda Buksh (Plaintiff), *Appellant,*

versus

Akool Gazee (Defendant), *Respondent.*

Baboo Nuleet Chunder Sein for Appellant.

Baboo Bama Churn Banerjee for Respondent.

A suit for a kubooleut in which the rate of rent is the subject-matter, and the question of the right of occupancy is not the main point, is not an estoppel to a suit for re-possession, under Clause 6, Section 23, Act X., 1859.

Bayley, J.—In this case plaintiff sued in the Deputy Collector's Court for re-possession under Clause 6, Section 23, Act X. of 1859, alleging a right of occupancy and improper ejectment summarily by the assistance of the Collector, under Section 25, Act X. of 1859.

It may be here remarked that the present defendant had before sued the present plaintiff for a kubooleut. The right of occupancy of plaintiff was fixed as an issue in that case, and decided against plaintiff.

One of the pleas of defendant in the first Court was that the present suit could not lie, as it was based on a right of occupancy which was a matter already decided against plaintiff in the previous litigation.

The first Court overruled this plea, holding that the rate of rent was the subject-matter of the previous suit, and was then decided; and that the question of the right of occupancy was not the main point of the suit. The Deputy Collector further remarked that, as the High Court had ruled that a suit for a kubooleut could only lie against a ryot having a right of occupancy, this plea was of no avail to defendant; and that, in fact, the proceedings in the action which defendant then brought were null and void, and that thus defendant's (then plaintiff's) suit was substantially dismissed, and not decreed, as the record stated it was.

On the facts, the Deputy Collector held that of 25 kanees originally held by plaintiff, plaintiff was clearly proved to have *no* right of occupancy as to 2 kanees. As to 13½, the Deputy Collector held plaintiff to have had possession and right of occupancy for more than 17 years; and although the plaintiff held on leases of seven years, they were continuous, and so formed, in fact, *one* occupancy, and were, moreover, all in succession to a previous possession, and that this term of lease is a custom of that part of the country. The first Court gave plaintiff a decree accordingly.

The Lower Appellate Court reversed this decision, holding that the right of occupancy had been adjudicated against plaintiff in the previous suit for a kubooleut, and that, as this issue was raised then, and plaintiff did not produce any evidence to support his

case on it, plaintiff cannot again sue on that right of occupancy in this suit.

The Lower Appellate Court having dismissed plaintiff's case, he appeals specially, urging that the view of the law taken by the first Court is right, and that this suit is not barred as held by the Lower Appellate Court, and that it must decide as a fact whether plaintiff has proved in this case (as he has been found by the first Court to have proved) a right of occupancy, and that, if so, the Collector's proceeding under Section 25, Act X. of 1859, must be set aside, and plaintiff obtain a decree for possession.

I think this case must be remanded upon the above objection taken by the special appellant.

I am of opinion, on a reference to the proceedings, that the fair rate of rent on a suit for a kubooleut was the substantial matter decided in the previous suit, and that the right of occupancy was not legally adjudicated then. Further, I think that in this case we must follow the Full Bench Ruling of the High Court, now at the hearing of the case, a fixed precedent before us, *viz.*, that no suit for a kubooleut can be brought except as against a ryot with a right of occupancy. The defendant's previous suit was then, as shown by the facts of this case, illegally brought.

I would remand the case to be re-tried with reference to the above remarks. Costs of this appeal will be paid by the party who eventually has a decree given against him below.

Macpherson, J.—I agree in thinking that the plaintiff is not estopped by the proceedings in the suit for a kubooleut from now proving his right of occupancy, and I concur in the proposed order remanding the case to the Judge for trial on the merits.

The 23rd May 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Execution—Decree in another suit.

Case No. 135 of 1868.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Tirhoot, dated the 12th February 1868.

Bhugwan Dass (Judgment-debtor), *Appellant,*

versus

Baboo Gouree Sunkur and others (Decree-holders), *Respondents.*

Baboo Greeja Sunkur Mozoomdar for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

A decree in one suit in which no reference is made to the decree in another suit cannot be pleaded as any bar to the execution of such other decree.

Jackson, J.—We concur with the Lower Court that the judgment-debtor in this suit cannot plead a decree in another suit in which no reference is made to the decree in this suit as any bar to the execution of this decree. The decree which has been passed against the judgment-debtor must be executed. If the debtor can obtain orders setting aside that decree on review, then alone will the decree be stayed. As it is, there is no foundation whatever for staying the proceedings in execution against him.

Appeal dismissed with costs.

The 23rd May 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Ameen's report—Section 180, Act VIII., 1859.

Case No. 2419 of 1867.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 7th June 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 21st January 1867.

Umbica Churn Dey and others (Defendants), *Appellants,*

versus

Goluck Chunder Chuckerbutty (Plaintiff), *Respondent.*

Mr. G. C. Paul and *Baboo Boykuntnath Paul* for Appellants.

Mr. A. T. T. Peterson and *Baboos Nubo Kishen Mookerjee* and *Dwarkanath Sein* for Respondent.

A Civil Ameen's report, and the depositions of the parties and witnesses examined by him, must be considered, even though the Court exercised its discretion unwisely and wrongly in giving him too extensive powers.

Bayley, J.—We are of opinion that there is no valid ground of special appeal on the ground of limitation; the suit is brought for possession on the ground of the plaintiff's title—not merely to set aside the summary order passed on the application for execution.

We further do not think that the Judge was in error in rejecting the petition of 1864, for the Lower Appellate Court finds as a fact that there was no evidence of the plaintiff having caused it to be filed.

None of the other grounds urged in special appeal would have called for a remand, had it not been that the Lower Appellate Court ought not to have refused to consider in any way the Ameen's report and the evidence given by the witnesses examined by him, on the ground that, because the first Court had wrongly ordered the Ameen to enquire into matters of right (which belonged exclusively to the Court itself to decide), and the Ameen had obeyed the order, the report and proceedings of the Ameen were made without jurisdiction.

The words of Section 180 of Act VIII. of 1859 are: "The report and deposition shall be taken as evidence in the suit, and shall form part of the record." In the face of this provision of the law, it was incompetent to the Lower Appellate Court to refuse to consider the Ameen's report and the depositions of the parties and witnesses examined by him. Although the Court of first instance exercised its discretion unwisely and wrongly in giving the Ameen too extensive powers, the Court did not, in appointing the Ameen, act without jurisdiction; nor can the Ameen's proceeding be said to have been without jurisdiction.

We are not in a position to say that the omission may not have produced error or defect in the decision of the case upon the merits, and therefore we think the case must be remanded.

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The 23rd May 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Ex-parte judgment—Sections 116 and 119, Act VIII., 1859.

Case No. 112 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 20th January 1868, affirming an order passed by the Moonsiff of that District, dated the 3rd June 1867.

Sheelabutty Debia (Objector), *Appellant,*

versus

Tarinee Churn Chuckerbutty and others (Decree-holders), *Respondents.*

Baboo Poorno Chunder Shome for Appellant.

Baboos Hem Chunder Banerjee and *Tarucknath Dutt* for Respondents.

In a case in which one of many defendants, who was made a party to the suit, did not appear, and a decree for possession was passed without any such special orders regarding that defendant as might have been passed under Section 116, Act VIII., 1859—Held that no *ex-parte* judgment was passed against her, and she could not re-open the suit under Section 119, Code of Civil Procedure.

Jackson, J.—We think that the Judge's orders are correct, though we do not agree in the grounds upon which those orders were passed.

The appellant was made a party to the suit, but did not appear. She was not the sole defendant, but one out of many defendants. The case was, therefore, tried under Section 116, and a decree for possession was passed as against two special defendants. No special orders seem to have been passed as respects the present appellant, as might have been passed under the provisions of Section 116, Act VIII. of 1859. Under such circumstances, we are clearly of opinion that no *ex-parte* judgment was passed against the appellant, and therefore she cannot re-open the suit under Section 119 of the Act.

We dismiss the appeal with costs.

The 23rd May 1868.

Present:

Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Jurisdiction—Cause of action.

Case No. 2269 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 31st August 1867, affirming a decision passed by the Deputy Collector of that District, dated the 31st January 1867.

Chunder Koomar Mundul and others (Defendants), *Appellants,*

versus

Bakur Ali Khan (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *J. S. Rochfort* and *Baboos Mohendro Lall Shome, Gopeenath Mookerjee,* and *Roopnath Banerjee* for Appellants.

Mr. R. E. Twidale and *Baboo Romanath Bose* for Respondent.

The jurisdiction of a Court of justice as to a cause of action depends upon the nature of the claim put forward by the plaintiff, and the matter involved in it; not on what defendant may assert by way of defence.

Phear, J.—THE jurisdiction of a Court of justice to entertain and decide upon a cause of action depends upon the nature of the claim put forward by the plaintiff as his cause of action, and the matter involved in it; and does not depend upon what the defendant may please to assert by way of defence. It may, of course, turn out at a trial that the subject of contest between the plaintiff and the defendant is not properly represented by the form in which the plaintiff has chosen to put his claim, but the occurrence of that contingency would only render the plaintiff's suit liable to be dismissed as not proved. It would not affect the jurisdiction under which the suit, as brought by the plaintiff, fell. In this case, the plaintiff said that he was the tenant of the defendant under an instrument which he filed in Court, namely, a pottah in the usual form; that he had been in possession according to the terms of that pottah; that, whilst so in possession, he was illegally ejected by his landlord, the defendant, and upon that ground he brought the present suit to recover possession, in pursuance of the provisions of one of the Clauses of Section 23, Act X. of 1859. A case more clearly within the jurisdiction of the Revenue Courts to entertain, we cannot possibly conceive.

It is said that, because the defendant denied the allegations of the plaintiff, and said that he was a stranger altogether, therefore the cause of action is changed, the jurisdiction is shifted, and the only place where the case could be tried was the Civil Court. If this were so, an unfortunate plaintiff would never know whether he had brought the suit in the right Court or not until after the defendant had filed his written statement, if he did file one; or until he came to trial, in the alternative of the defendant not filing one. We need hardly say that the absurdity of the position is apparent upon the statement of it; and as the special appellant makes no other objection to the decision of the Lower Appellate Court than that the Court had no jurisdiction to try the case, and as we think that this is entirely without foundation, we dismiss the appeal with costs.

The 23rd May 1868.

Present:

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Hindoo widow—Reversioner—Manager.

Case No. 2250 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 26th July 1867, reversing a decision passed by the Deputy Collector of that District, dated the 1st January 1867.

Raie Churn Paul and others (Plaintiffs), *Appellants,*

versus

Suroop Chunder Mytee and others (Defendants), *Respondents.*

Baboo Ashootosh Chatterjee for Appellants.

Baboo Anund Gopal Paleet for Respondents.

Where the assignee of a reversionary heir to a Hindoo widow's estate obtained a decree against the widow for waste, and was appointed by a decree of Court manager of the estate for the widow, but did not enter upon his duties until six years had elapsed—HELD that a pottah granted in the meantime by the widow relative to the property was good and valid against her, and therefore against the manager.

Phear, J.—THE plaintiff in this case appears to be the assignee of the reversionary heir of a certain person deceased, whose widow is now in the enjoyment of the estate in the capacity of a Hindoo widow. As such assignee of the reversionary heir, he obtained in June 1860 a decree against the widow for waste, and, according to the terms of the decree, was appointed manager of the estate on behalf of the widow and for her benefit, upon giving security to the extent of 1,000 rupees, for the due performance of his duty as such manager. For some reason or another, which has not been explained to us, he did not undertake the duties of manager until six years afterwards, namely, in 1866; but a receipt filed on the record shows that he obtained charge from the Court in September 1866. On the 8th of December of the same year, he instituted the present suit against the first-named defendant, a ryot on the estate, seeking a kubooleut, as it is termed, at an enhanced rate of rent from him. Upon this, the second defendant intervened, in pursuance of the provisions of Section 77, Act X. of 1859, alleging that he was the person entitled to the rents and profits, and that he had actually, and in good faith, received the rents from the other defendant up to the date of filing the suit. The intervening defendant founded his title upon a lease for 25 years, which he stated that he had obtained from the widow in 1865, that is, after the present plaintiff had obtained the decree for waste against her, and had been appointed manager, but before he actually entered upon the duties of the office.

The first Court appears to have assumed as an admitted fact that the intervenor never had really received the rent from the other defendant, and the Lower Appellate Court, without expressing an opinion upon the point, appears also to have acted upon the same assumption. The first Court gave the plaintiff a decree, but the Lower Appellate Court reversed this decision, and dismissed the plaintiff's suit, on the ground that the lease set up by the intervenor was good and valid against the widow, and therefore against the plaintiff who had been appointed manager on her behalf.

The plaintiff now specially appeals upon four written grounds which I need not particularly specify at present. He has made the intervenor a respondent, as well as the ryot defendant; but it is clear from the course that the case has taken that this was needless and uncalled for, because the decision of both Lower Courts had virtually decided the only issue which could arise between the plaintiff and the intervenor in favor of the plaintiff, and against the intervenor. Consequently, the plaintiff in this special appeal has no ground of complaint, in regard to the decisions of the Lower Courts, so far as they concern him and the intervenor only.

Under these circumstances, it is only necessary to see how far the plaintiff is entitled on special appeal to object to the decision of the Lower Appellate Court as between him and the ryot-defendant. Virtually, as I understand the decree of the Lower Appellate Court, the Judge has come to the conclusion that the plaintiff has not made out that he is in the position of a landlord to the ryot defendant. Now, his own case is that he is a stranger to the original creation of the relation of landlord and tenant as regards the ryot-defendant; that he has never even *de facto* been the defendant's landlord, but that he has come by a certain succession into that position, following after the widow, because he has been appointed thereto by the decree of the competent Court passed in June 1860. But the Lower Appellate Court says, although your appointment may date from June 1860, you did not, in fact, assume the *status* and come into the position of the defendant's original landlord until 1866, and before that the actual landlord, that is, the widow, had assigned her landlord's rights as against the ryot defendant to the intervenor, by the grant of the pottah in 1865. I think, assuming this to be the reasoning of the Lower Appellate Court, that it is entirely correct. I think that the appointment of the plaintiff as manager in 1860 did not take away the rights of property of the widow, although it gave the plaintiff authority to manage the estate as against her, and without her consent, as soon as he thought proper to actually undertake the duties of the office. It is impossible, I think, to say that an act done by the widow herself relative to the property,

before she was, in fact, superseded in its management by the plaintiff, would not be binding against herself, and it is for her only that the plaintiff is managing, until her life-interest shall come to an end, although, no doubt, the cause of his so being appointed manager was that the estate should be preserved to the ultimate reversionary heirs. It seems to me that the Lower Appellate Court was quite right in holding that the grant of the pottah to the intervenor by the widow did pass away the landlord's rights and interests as regards the ryot-defendant to the intervenor, and that, consequently, when the plaintiff subsequently succeeded to the widow's position, he was not entitled to say that he thereby became the landlord of the ryot-defendant. On the whole, therefore, I think that the decision of the Lower Appellate Court is unimpeachable in special appeal, and I would dismiss the special appeal with costs.

Glover, J.—I also think that the special appeal should be dismissed, with costs, generally for the reasons assigned by Mr. Justice Phear.

The 27th May 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Illegal sale by Collector—Section 105, Act X., 1859—Jurisdiction.

Case No. 2629 of 1867.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 25th June 1867, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 15th September 1866.

Ala Buksh Shah and others (Plaintiffs), *Appellants,*

versus

Nubee Buksh and others (Defendants), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Mr. R. T. Allan, Moonshee Ameer Ali. and *Baboo Unnoda Pershad Banerjee* for Respondents.

In a suit to set aside a sale by a Collector under Act X. of 1859, on the allegations that, at the time of the sale, a warrant of execution previously obtained against the moveable property of the judgment-debtor still remained in force, and that the deposit on the purchase-money was not paid until 14 days had elapsed, it was held that such allegations, if proved, would amount to illegalities, and that a suit to declare such a sale null and void would lie in the Civil Court.

Kemp, J.—THIS was a suit to set aside a sale conducted under the provisions of Act X. of 1859.

The first Court held that the suit was cognizable by the Civil Court, but dismissed it on the merits.

The Judge held that, as no fraud was alleged, the suit would not lie in the Civil Court. In support of this finding, the ruling of the Full Bench, dated the 5th February 1866, was quoted.

In special appeal it is contended that, as the illegality of the sale and want of jurisdiction on the part of the Collector to hold the sale were distinctly alleged, the Judge ought to have tried the suit.

The illegalities complained of are—

1st.—That, at the time of the sale, a warrant of execution which had been previously issued against the moveable property of the judgment-debtor still remained in force, and that consequently the sale was illegal under Section 105, Act X. of 1859.

2nd.—That the deposit on the purchase-money was not paid in until after 14 days had elapsed, instead of 8 days, as required by the law.

3rd.—That the sale was conducted with reference to the provisions of Act XI. of 1859, and not of Act VIII. of 1835.

The *third* objection is untenable, for the sale, it appears, was conducted under the provisions of Act VIII. of 1835. Moreover, the special appellant in his petition to the Revenue Commissioner objected to the sale, because it was not conducted under the provisions of Act XI. of 1859.

The two first objections raise questions of illegality and want of jurisdiction, which, if established, would render the sale null and void, and the Judge ought to have tried the appeal.

The orders passed by the Collector and his proceedings in the matter of the sale, if the allegations of the special appellant be established, are clearly illegal, and the sale was not made according to law. A suit to declare such a sale null and void will lie in the Civil Court. (See decision published at page 6, Act X. Rulings, Weekly Reporter, Volume IV., and which has been followed by this Bench in other cases.)

Our attention has been called to a decision published at Volume IX., Weekly Reporter, page 80, which at first sight would seem to be opposed to the ruling quoted from Volume IV., page 6; but, on consulting our learned colleague, Mr. Justice Loch, who was one of the Judges who decided both cases, we are informed by him that in the latter case it was not the opinion of the Judges that a suit to set aside an illegal sale held under the provisions of Act X. of 1859 would not lie in the Civil Court, but that the irregularity complained of in that particular case did not amount to a defect of jurisdiction so as to render the sale null and void. In this case, the allegations, if proved clearly, amount to illegalities.

The case is remanded for trial with reference to these remarks.

The 27th May 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Evidence—Ameen's report as to possession—Section 180, Act VIII., 1859.

Case No. 2712 of 1867.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 1st August 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 24th September 1866.

Bhyrub Roy and another (Plaintiffs), *Appellants,*

versus

Nobin Roy and others (Defendants), *Respondents.*

Mr. J. S. Rochfort for Appellants.

Baboo Rash Beharee Ghose for Respondents.

Where an Ameen had been deputed by a Civil Court to enquire into a question of possession, his report and the evidence taken by him are admissible under Section 180, Act VIII. of 1859.

Kemp, J.—THIS case must go back. The plaintiff sued under a right of inheritance. The succession opened out to him on the death of Beelasmonee, the mother of Gopal Roy, whose estate is the subject of this suit.

The first Court found that it had been established by the evidence, including that of the Pooroheet of the family and of the defendants, that Gopal Roy was one of the members of a joint family, and that his share in the estate represented 8 annas: further, that a local enquiry and the evidence taken before the Ameen, together with that recorded in Court, established that Gopal Roy, and, after him, Beelasmonee, had been in possession. The Judge has dismissed the plaintiff's claim. He was of opinion that a local investigation was quite unnecessary, *as no evidence not taken by the Court could be reliable:* further, that, as the possession of Gopal Roy and Beelasmonee had not been proved by documentary evidence, plaintiff had not made out his title.

It may be that, speaking generally, the report of an Ameen is of little value in determining questions of possession, and that such questions may be more satisfactorily determined in Court. But that the report of an Ameen and the evidence taken by him is not reliable, simply because it is evidence not taken in Court, is a doctrine in which we cannot concur. Right or wrong, an Ameen had been deputed to enquire into the fact of the possession of Gopal Roy, and, after him, of Beelasmonee, which had been denied by the defendants. And the report of the Ameen and the evidence taken by him were admissible in evidence under Section 180, Act VIII. of 1859. The plaintiff was entitled to have an opinion upon the weight of that evidence. It could not be expected that the plaintiff, coming in as a reversioner, would be able to prove his case by documentary evidence. All that could be fairly expected of him was to prove the possession of the party through whom he claimed, and that that party was a member of the joint family, and what share he was entitled to. The case is remanded. The Judge will pass an opinion upon the report of the Ameen and the evidence taken by that officer, and decide the case.

The 28th May 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Object of Section 15, Act XIV., 1859—Possession—Presumption—Evidence.

Case No. 2375 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 22nd June 1867, affirming a decision passed by the Sudder Moonsiff of that District, dated the 27th July 1866.

Kalee Chunder Sein and others (Defendants), *Appellants,*

versus

Adoo Shaikh and others (Plaintiffs), *Respondents.*

Baboos Kalee Mohun Doss and *Greeja Sunkur Mojoomdar* for Appellants.

Baboo Romesh Chunder Mitter for Respondents.

Section 15, Act XIV. of 1859, does not affect the general law on the matters to which it relates, but provides a special remedy for a particular kind of grievance, *e. g.*, to re-place in possession a person who has been evicted by a wrongful act from landed property of which he had been in undisturbed possession, and to prevent a powerful person from thus shifting the evidence of proof from himself to another less able to support it.

Possession, except where it is of such a length and character as of itself to constitute title, is merely evidence of title, and is so only because undisturbed possession without anything more is presumed to be referable to rightful title and to absolute ownership: it is open to the other side to show that such *primâ facie* presumption is ill-founded.

Phear, J.—This suit was brought to obtain possession of one beegah and some odd cottahs of land, which the plaintiff alleges belonged to a certain howalah in Talook Kally Chunder Chuckerbutty, appertaining to a certain share of the zemindary of Pergunnah Selimabad. The plaintiff further alleges that he was ousted from the possession of this land in Bysack 1270 by the defendant. The suit was brought in March 1272. Both the Lower Courts have given the plaintiff a decree for possession, and this special appeal is brought upon two written grounds against the decision of the Lower Appellate Court.

The first observation that it occurs to us to make is, that, inasmuch as the ouster occurred to the plaintiff in 1270, while the present suit was not instituted till 1272, the plaintiff is not entitled to succeed on the reason prescribed (under certain circumstances) by Section 15, Act XIV. of 1859. He must succeed, if he succeeds at all, by proving that he has title to the land in suit, and, by reason of that title, has the right to eject the defendant from the possession of the land. As we have already mentioned, the specific title set up by the plaintiff was this, that the land in question belonged to a certain zemindary. He said that it had been let to him, or to a predecessor of his, and afterwards enjoyed by him under a pottah from the zemindar. The date of this pottah is not given in the pleadings, but it has been told to us that a renewal of it, or some confirmation of it, is dated in 1276.

The defence of the other side is that the land does not belong to the howalah, talook, and zemindary mentioned by the plaintiff; but, on the contrary, falls within another share of the zemindary of Pergunnah Selimabad, and belongs to the defendant; and that he (the defendant) has had joint possession for some time at least with the plaintiff of it. We are not immediately concerned with the finding of the Court of first instance.

The Lower Appellate Court seemed rightly enough to have directed its attention in the first place to the case set up by the plaintiff. It also seems to have considered the matter of title put forward by the defendant, and then it says: "This Court finds "there are no satisfactory proofs filed by "either party, from which it can be elicited "whether the lands belong to the one share "of the zemindary or to the other share "of the zemindary." We conclude from this expression that the Court has come to the conclusion, *first*, that the plaintiff has not made out the root of his title, namely, that the lands in question belong to the zemindary, from the zemindar of which he obtained the pottah, and in whose right he has enjoyed the lands; as he also further found, what seems at first sight unnecessary at this stage, that the defendant also generally failed to make out, to the satisfaction of the Lower Appellate Court, that the lands in question belong to the zemindary which he mentioned. Further, the Lower Appellate Court goes on to say that it agrees with the Court of first instance "in pre-

"ferring the plaintiff's proofs of possession to "those of the defendant's for the reasons de-"tailed in the judgment of the first Court, in-"asmuch as the plaintiff's pottah looks old "and insect-eaten, and is borne out by docu-"mentary and parol evidence under it." We understand the two portions of the judgment of the Lower Appellate Court, which we have just read, taken together, to amount to this, that, while the plaintiff has failed to make out the title of his lessors, he still has proved, to the satisfaction of the Lower Appellate Court, that he, for a long time, held possession of the land in question under a pottah from that lessor until he was ejected in the mode which we are now going to take from the judgment of the Lower Appellate Court. On this point, the Lower Appellate Court says that "the plaintiff was "violently ejected by the defendant when "ploughing his lands; and on the other "hand, as the basis of the defendant's "rights, that is, the proprietors and subor-"dinate holders, rest on the deed of sale of "23rd Assar 1267 B. S., this document, "to bring credit on it, ought to have been "duly registered," and so on; and, finally, the Court concludes that this document of title set up by the defendant has failed as entirely as the title which the plaintiff had set up for his zemindary: so that the judgment of the Lower Appellate Court, on the whole, comes to this, that the plaintiff was in undisturbed possession of this land for a considerable period under a show of title from a certain person, but that he cannot, in this suit, make out the title of that person, his lessor; and, on the other hand, that, while he was in that undisturbed possession, he was violently turned out by the defendants, who are equally unable to show any right or title to evict in that manner. Upon this finding of fact, the Lower Appellate Court has given a decree for possession to the plaintiff.

It is objected on special appeal (to go back to the grounds) that the plaintiff having instituted this action after the period allowed for possessory actions by Section 15, Act XIV. of 1859, is not entitled to get a decree for possession without proving his title. We do not say that the objection taken in this form is valid, for we are of opinion that the enactment to be found in Section 15, Act XIV. of 1859, does not in any way affect the general law on these matters. We think that it was intended by that Section solely to give a special remedy for a particular kind of grievance, supposing the party aggrieved chose to go into Court for the purpose within a very limited time, namely, six months. Were it not for the advantages given by that Act, it might happen that a person in undisturbed possession of landed property might be turned out by a stranger, and might not be able to get back again without invoking the assistance of a Court of Law; but, if he did come into Court for the purpose of seeking to recover possession, inasmuch as he, by the very facts of the case, is out of possession, and his object is to eject one who has possession, by the general rules of procedure, the burden would be placed upon him to prove a *primâ facie* title, before the defendants can be called upon to say anything in defence of his own case; whereas, had it not been for the high-handed act of violence, which had turned the plaintiff out of possession, the defendant could not have obtained the lands in question, except upon the same condition, namely, of his discharging the *onus* of showing a *primâ facie* title; and we imagine that the Legislature considered it advisable to do away with the opportunity thus lying open to powerful persons of shifting, by wrongful act, the burden of proof from their own shoulders to those of persons presumably less able to support it; and that it did so by providing that the person aggrieved, on coming into Court within the short period of six months, might be re-placed in possession, with all the advantages incidental thereto, merely by showing that he had been in possession until he was evicted. I am reminded by Mr. Justice Hobhouse, in confirmation of the remark which I have just made, that the Madras High Court has in a decision reported in the Madras Reports, Volume II., page 313, expressed a like view of this Section. If this view be correct, it is obvious, as we have already said, that the fact of the plaintiff in the case not having within the period of six months taken the necessary steps to secure to himself the advantages which attach to the position of being the defendant in occupation of the land sued for cannot possibly complain that the ordinary rules of procedure applies to him as a plaintiff out of possession seeking to take the property from the hands of the defendant; and that, therefore, the burden of making out *primâ facie* title rests upon his shoulders. It seems to us, therefore, that the first ground of appeal does not, in fact, raise any objection to the decision of the Court below.

The *second* of the written grounds of special appeal is expressed somewhat vaguely, and is perhaps not altogether pertinent to the

case of the special appellant. The argument which has been based upon it, and has been met at some length by the other side, amounts to this, that the Lower Appellate Court was wrong in giving a decision in favor of the plaintiff, as it appears to have done, judging from the terms of its judgment, based simply upon the mere fact of possession. It has occurred to us during the argument before us of this case, and, indeed, on other occasions, that the fact of possession, as an ingredient in the contest between the parties, whether coming in on the one side or the other, has not been dealt with in its proper character by the Advocates who have argued before us. Indeed, there are some cases, as it seems to us, in our books of Reports, which attach a greater virtue to a possession of land than we can at all see, really belongs to it. In matters of this kind, possession, excepting in some few instances—and they are few, indeed, where it is of such a length, and of such a character, as of itself to constitute title—is but evidence of title, and we believe that it is evidence of title for one reason only, namely, that undisturbed possession without any thing more is presumed to be referable to rightful title, and to absolute ownership. To that extent we are of opinion that in all cases undisturbed possession, if not further explained, is evidence of title: but even then it is only evidence of title, and it may be shewn by the other side interested in the matter that the possession relied upon was not, in fact, referable to a title such as would enable the party who adduced it to succeed in the suit. In the present case, as far as we can understand the judgment of the Lower Appellate Court, that Court came to the conclusion that the plaintiffs had enjoyed possession of the property, which is the subject of suit, for a considerable time; and, although it does not say it in so many words, yet it says enough to show that the possession it speaks of was an undisturbed possession—a possession as of right. If, then, this stood entirely alone, it would, we think, be very strong evidence of title and rightful ownership on the part of the person who had possession, and accordingly he would have a right to succeed upon that evidence alone, supposing the other side did not bring forward evidence of a better or prior title, or something which should explain the possession, and show that the presumption which *primâ facie* arises from the mere possession itself is ill-founded. Of course, we need hardly add that, when we say it seems to us that undisturbed possession is evidence of a rightful ownership, we mean that it is evidence of rightful ownership at the time of the possession. Obviously some one other than the party so possessed may perfectly well and rightly become owner after him, or some other person may have been rightful owner before him.

But to return to the particular facts of this case. While the Lower Appellate Court seems to find that the plaintiff had for a long period had undisturbed possession until he was violently ejected by the defendant, that Court also explains the possession by saying that it was possession under the pottah to which we have before referred, and, therefore, *ex necessitate*, that could not indicate a higher title than the title of the person who granted the pottah. The Court, however, had previously said that it was not satisfied as to the title of the person who granted the pottah; not that it expressed itself in so many words, but it said that there were no satisfactory proofs that the land in question fell within the zemindary of the zemindar whom the plaintiff alleged had granted him the pottah. It seems to me, therefore, that, on the finding of the Lower Appellate Court, the plaintiff was not entitled to succeed. We think that the Court had, taking its judgment as a whole, in effect come to the conclusion that the plaintiff had failed to make out his title to the land in question, and consequently we think that the Lower Appellate Court ought not to have given a decree to the plaintiff, admittedly out of possession as he was, which should oust the defendant from the possession which he certainly had enjoyed for the last two years, and which, therefore, was not in any sense a nominal possession, but was a substantive possession, in succession though it might be to that of the plaintiff.

There is, to our mind, a great distinction between the case where one who is not in the possession and enjoyment of property seeks to wrest such possession and enjoyment from the defendant, and the case where one who is in actual possession of the property sues for damages consequential on an alleged tortuous act done by another during his (the plaintiff's) possession. In the first case, the plaintiff cannot succeed, unless he shows such a title to the property as entitles him to immediate possession. In the second case, actual possession, even without title to the property, confers on the possession a right of action against any person who interferes with his

quiet enjoyment, unless that person be the real owner. And this distinction in the nature of the two causes of action accounts for the occurrence of the phrase "simple possession is conclusive evidence as against a wrong-doer," which has been appealed to by the Advocate for the respondent. The rule embodied in this is not applicable when *title*, and not mere *possession*, is necessary to complete the plaintiff's right to sue; and in such a case possession is only *evidence* of title, and it is so simply so far as no further than it affords ground for the presumption that it is referable to title. We think, therefore, that the appeal should be decreed, and that the plaintiff's suit should be dismissed with costs in all Courts.

The 30th May 1868.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Jurisdiction—Section 16, Act X., 1859—Presumption—Uniform rent from Decennial Settlement.

Case No. 1940 of 1867.

Special Appeal from a decision passed by the Judicial Commissionor of Chota Nagpore, dated the 9th May 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 28th August 1866.

Nil Monee Sing Deo (Plaintiff), *Appellant,*

versus

Ramessur Dobey and others (Defendants), *Respondents.*

Baboos Bama Churn Banerjee and *Umbika Churn Banerjee* for Appellant.

No one for Respondents.

In a civil suit by a zemindar to get possession of a holding, on the ground that defendant, who paid a varying rent, refused to come to terms with his landlord, and claimed to hold from before the Decennial Settlement at a fixed quit-rent, it was held that the question between the parties was for the Revenue Courts, under Section 16, Act X., 1859, and that the presumption arising from the payment of a uniform rent cannot be applied by the Civil Courts, which have no jurisdiction in such cases.

Glover, J.—I do not understand how this suit was brought in the Civil Court, nor under what Regulation it can come.

The plaintiff, who is the zemindar of Pachete, sued to get possession of a certain holding, on the ground that the defendant, who paid a varying rate of rent, refused to come to terms with his landlord, or to agree to an enhancement, and that therefore the zemindar was entitled to take the land away from him. The defendant claimed the land as his separate tenure, held from before the Decennial Settlement, at a fixed quit-rent of 2 rupees 8 annas.

The Lower Courts have treated the suit as one by a zemindar seeking to resume invalid lakheraj, and I suppose, therefore, as one coming under Regulation XIX. of 1793.

But it is quite clear from the plaint that the land is nowhere said to be lakheraj; nor does the defendant deny that some rent is paid by him for it. His objection is that his rent is fixed, and not, as the plaintiff states, variable.

It is admitted on all hands that the defendant has been for many years in possession of the land; and it seems, therefore, clear that the only remedy left to the zemindar was to bring a suit under Act X. of 1859 for enhancement, on the ground that the rent was not fixed, but variable.

The Court of first instance has found that the defendant held the land at one rent for 31 years, and that his tenure was, therefore, mokurruree. The Principal Sudder Ameen then proceeded to quote Act X., and gave the defendant the benefit of the presumptions arising under Sections 4 and 15.

The Judicial Commissioner quotes the decision of this Court in the case of Khelal Chunder Ghose *versus* Poorno Chunder Roy, 2 Weekly Reporter 259, and considers that, in accordance with it, the plaintiff was bound to prove that the land he wished to

resume was *mal* land at the time of the Decennial Settlement. He finds that the plaintiff failed to do this, whilst the defendant, having proved possession at one rate of rent for 30 years, was entitled to the presumption that the same rent had been paid from the settlement. I suppose by this the Judicial Commissioner meant the presumption afforded by Act X. of 1859, but I do not see how that presumption can arise in cases not brought under Act X. for enhancement, nor how it can be applied to a suit for resumption brought in the Civil Court.

The case of Khelal Chunder Ghose has no application to suits of this nature, where the question is not "lakheraj or *mal*," but "fixed or varying rates of rent."

It appears to me, therefore, that both Lower Courts have taken a wrong view of this matter; and that, as the plaintiff drew up his case, his suit ought to have been at once dismissed, and himself referred to a suit under Act X. of 1859, and I would therefore reverse, with costs, the Principal Sudder Ameen's and the Judicial Commissioner's orders as being passed without jurisdiction.

Loch, J.—I concur with my colleague in thinking that this suit should not have been heard by the Civil Court. The land is admittedly "*mal*," for which the occupant pays a small quit-rent, fixed, as he asserts, before the Permanent Settlement. He is in the position of a dependent talookdar, or other person possessing a permanent transferable interest in land, and the question between the parties is whether the rent can or cannot be raised. This was a question for the Revenue Courts under Section 16, Act X. of 1859, and not for the Civil Courts. The presumption arising from the payment of a uniform rate of rent cannot be applied by the Civil Courts which have no jurisdiction in such cases as the present. I would reverse the order of both the Lower Courts, and dismiss the suit with all costs.

The 30th May 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Under-tenures—Partition—Section 27, Act X., 1859.

Case No. 1776 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Manbhoom, dated the 26th April 1867, affirming a decision passed by the Moonsiff of that District, dated the 26th January 1867.

Ishur Chunder Ghosal (Defendant), *Appellant,*

versus

Mooktaram Panda (Plaintiff), *Respondent.*

Baboo Kalee Prosunno Dutt for Appellant.
Baboo Nil Monee Sein for Respondent.

A co-sharer in an under-tenure cannot claim separate payment of his share of the rent without the written consent of the zemindar; and, if the zemindar refuses to make a division of the property, application should be made to the Collector under Section 27, Act X., 1859.

Loch, J.—In this case the plaintiff, a co-sharer in an under-tenure, sues his putneedar for a partition of the tenure and separate payment of his share of the rent. The first Court gave a decree for separation by payment of rent separately from the other shareholders, and this judgment was confirmed in appeal by the Principal Sudder Ameen. There are two reasons why this finding of the Courts below must be set aside: *first*, that, if the zemindar refused to make or register any separation or division of the property, application should have been made to the Collector under the provisions of Section 27, Act X. of 1859; and, *second*, no zemindar can be required to admit to registry, or give effect to any division or distribution of rent payable on account of any such tenure, nor will any division or distribution of rent be valid and binding without the consent, in writing, of the zemindar. (Section 27, last part.) As, therefore, the plaintiff has not any written consent from the zemindar, his case must fail. The orders of the Lower Courts are reversed, and the suit is dismissed with costs in all the Courts.

The 21st December 1867.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Criminal Trespass—Section 441, Penal Code.

Reference under Section 404, Code of Criminal Procedure, from the Sessions Judge of 24-Pergunnahs, in the case of Kalinauth Nag Chowdhry.

In order to convict of criminal trespass under Section 441 of the Penal Code, it must be proved that the property was in the possession of the prosecutor, and that the entry was made with intent to "commit an offence, or to intimidate, insult, or annoy any person in possession of the property."

Mitter, J.—This case has been before us under the provisions of Section 404 of the Criminal Procedure Code. The prisoner has been sentenced to a fine of 50 rupees by the Deputy Magistrate of Busseerhaut on a charge of criminal trespass. On looking to Section 441, we find that it is necessary to prove two things before a charge of criminal trespass can be sustained. The property must be proved to have been in the possession of the prosecutor, and there must be evidence to show that the entry was made with intent to "commit an offence, or to intimidate, insult, or annoy any person in possession of the property." In the present case, there is no evidence to prove either of these two facts. The result of the local investigation made by the Deputy Magistrate, even if it were admissible in evidence against the prisoner, does not show that the prosecutor was in possession of the land, nor is there any legal evidence to prove that the entry was made with a criminal intent. We do not see how the erection of a fence within the hollow of a drain could have intimidated, insulted, or annoyed the prosecutor. At any rate, there is nothing to show that the prisoner had acted otherwise than *bonâ fide* in believing that the drain appertained to the land purchased by himself. We reverse the sentence passed by the Deputy Magistrate, and direct the refund of the 50 rupees fine which has been imposed upon the prisoner.

The 21st December 1867.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Maintenance—Section 317, Code of Criminal Procedure.

Reference under Section 434, Code of Criminal Procedure, and Circular Order No. 18, dated 15th July 1863, from the Sessions Judge of East Burdwan.

Goyamoney Surinee *versus* Mohesh Chunder Shaha.

The proceedings of a Magistrate awarding the payment of a certain sum of money per mensem for maintenance with reference to the means of the husband were held to be legal. If the husband is aggrieved, he ought to apply to the Magistrate under Section 317, Code of Criminal Procedure.

Kemp, J.—READ a letter from the Sessions Judge of East Burdwan, dated the 5th December 1867, submitting the proceedings in the case of Goyamoney *versus* Mohesh Chunder Shaha.

The case was one of maintenance. The Magistrate fixed the rate payable by the husband at 10 rupees per mensem. This sum appeared to the Magistrate to be reasonable with reference to the means of the husband. If the husband is aggrieved by this order, he ought to apply to the Magistrate under Section 317 of the Code of Criminal Procedure.

The proceedings of the Magistrate appear to us to have been perfectly legal, and we are of opinion that the Sessions Judge ought not to have troubled the Court with this reference.

The 3rd January 1867.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges,*

Dying declaration—Record.

Queen *versus* Soyumber Singh and Soroop Bagdi.

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of murder.

The dying declaration of a deceased should form part of the Sessions record.

Kemp, J.—THESE two prisoners have been convicted of murder, and sentenced to be hanged, subject to the confirmation of this Court.

The prisoners with two others committed a robbery in the house of the deceased, a spirit vendor. They were well-known to the deceased and his wife. It appears that the deceased, after giving up his money, denounced the prisoners telling them that he recognized them. Upon this, the prisoner Soyumber Singh directed the prisoner Soroop to kill the deceased to prevent his giving information against them. The prisoner Soroop, receiving a knife from the prisoner Soyumber, stabbed the deceased in the abdomen, and this wound was the cause of death.

The dying declaration of the deceased has been given in evidence: it would have been more regular had this declaration formed part of the Sessions record, but it was relied upon by the prosecution, and is mentioned in the Calendar of commitment.

The deceased knew himself to be in danger of death, for he told the neighbours that, if he did not survive, they were to tell the Hâkim, and further he was warned that he was not likely to live previous to making his declaration. The declaration is corroborated by the evidence of the wife, and the defence set up by the prisoners has not been established.

They were recognized in the act of committing a robbery which nothing but the want of a fifth man prevented from being a dacoity. They deliberately murdered the deceased to prevent him from giving information against them; and, seeing no extenuating circumstances in the case, we confirm the sentence of death passed against the prisoners. The case of the prisoners Shumboo and Hara is not now before us.

The 6th January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Summons to witness—Section 186, Code of Criminal Procedure—Chapters XII. and XV., Code of Criminal Procedure.

Section 186 of the Code of Criminal Procedure refers to cases under Chapter XII., which are triable by the Court of Session, and not to cases under Chapter XV., which are triable by a Magistrate.

Kemp, J.—READ a letter from the Sessions Judge of Rungpore, dated 12th December 1867, submitting the proceedings of the Officiating Joint Magistrate of that District, in the case of Boiddonauth Bania *versus* Bheedoo Dass.

It appears that the complainant in the case brought a charge which comes under Chapter XV. of the Code of Criminal Procedure, that is to say, it was a case triable by the Magistrate, and an offence punishable with imprisonment for a period not exceeding six months. The Section quoted by the Sessions Judge, *viz*, Section 186, Code of Criminal Procedure, refers to cases falling under Chapter XII., which are triable by the Court of Session, and is therefore not applicable to the case under consideration.

The complainant petitioned the Joint Magistrate to summon his witnesses. The order on this was "*shamili nauthi.*" The accused was a police-constable, and in such a case it is not at all improbable that the witnesses for the prosecution would not voluntarily appear. It was just such a case in which the Magistrate should have exercised the discretion vested in him by Section 262 of the Code of Criminal Procedure, instead of passing what is really no order in the case, *viz.*, "Let petition remain on the record." The Court, therefore, direct the Joint Magistrate to proceed under Section 262, and to decide the case.

The 6th January 1868.

Present:

The Hon'ble F. B Kemp and E. Jackson, *Judges.*

Preliminary enquiry—Section 171, Code of Criminal Procedure—Civil Court—Section 147, Act X. of 1859.

It is not necessary that the preliminary enquiry contemplated by Section 171 of the Code of Criminal Procedure should be conducted in the presence of the accused. All the Court (Revenue in this case) making the enquiry has to do is to satisfy itself that there are *primâ facie* grounds for sending the case for investigation to a Magistrate, and the Collector is not bound to dispose of a case of contempt of the lawful authority of a public servant, under Section 147, Act X. of 1859, but it is discretionary with him to proceed under Section 171 of the Code of Criminal Procedure.

Kemp, J.—READ a letter from the Sessions Judge of Hooghly, submitting a letter from the Magistrate of Howrah, with reference to the proceedings in the case of Chota Sadoo Peadah *versus* Bhoobun Chuckerbutty and others.

The offence of which the defendants were accused falls under Chapter X. of the Penal Code, being a contempt of the lawful authority of a public servant. The rules connected with the prosecution of such a case are to be found in Chapter XI. of the Code of Criminal Procedure.

In the present case, a peon of the Deputy Collector, in the discharge of his public functions, was voluntarily obstructed by the defendants. The Deputy Collector made such preliminary enquiry into the matter as was necessary to enable him to arrive at an opinion whether there was sufficient ground for investigating the charge; and, finding after taking the evidence of the peon and the decree-holder that there was, he sent the case, not for trial as the Deputy Magistrate supposes, but for investigation under Section 171 of the Code of Criminal Procedure. The Court are of opinion that it is unnecessary that the preliminary enquiry contemplated by Section 171 should be conducted in the presence of the accused. All the Court making the enquiry has to do is to satisfy itself that there are *primâ facie* grounds for sending the case for investigation to a Magistrate.

The Deputy Magistrate was therefore clearly wrong in refusing to try the case on the ground stated by him, *viz.*, that the investigation by the Deputy Collector was an *ex parte* one, &c.

The Deputy Magistrate further holds that the Deputy Collector ought not to have sent the case to the Magistrate for investigation at all, but ought to have disposed of it under the provisions of Section 147, Act X. of 1859. In this opinion the Court think he is also wrong. That Section enacts that any resistance or opposition to the lawful powers of a Collector under the Act *may* be punished by the Collector according to the provisions of the law for the time being in force for the punishment of resistance of, or opposition to, the processes of the Courts of Civil Judicature. The Deputy Magistrate has not stated what law is in force for the punishment of such cases, and the Court know of no such law. But, be this as it may, the Section quoted by the Deputy Magistrate leaves it in the discretion of the Collector to proceed according to any law for the time being in force or not. In this case, the Deputy Collector chose to proceed under Section 171 of the Code of Criminal Procedure, and he was fully competent to do so. The case is returned to be tried, and the Court direct the Magistrate to take it up himself, or to send it to some other Deputy Magistrate for trial.

The 13th January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Escheat of Security—Notice.

Reference under Section 434, Code of Criminal Procedure, from the Sessions Judge of Beerbhoom.

Queen *versus* Jeebun Sheikh.

A notice must be served on a surety calling upon him to pay the amount of his security-bond, or to show cause why he should not pay the same, before an order can be made to levy the sum from him.

Jackson, J.—The Magistrate is quite right. The Deputy Magistrate's summary orders to recover the amount of the security-bond from the surety, without serving upon him any notice to pay the same, or to shew cause why it should not be paid, are set aside. The Magisterial authorities, in deciding whether the amount of the security-bond is to be levied or not, will proceed according to Section 220 of the Criminal Procedure Code.

The 13th January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Magistrate's duty—Theft—Lurking house-trespass—Sections 380, 458, and 459, Penal Code.

Reference under Section 434, Code of Criminal Procedure, from the Officiating Sessions Judge of Patna.

Puran Telee *versus* Bhuttoo Dome.

A Deputy Magistrate has no power to convict of theft (Section 380, Penal Code), where the offence charged is lurking house-trespass by night with aggravating circumstances (Sections 458 and 459, Penal Code), but must commit on the latter charge.

Jackson, J.—It is evident that the crime deposed to by the injured party in this case was not theft (Section 380, Indian Penal Code), but lurking house-trespass by night with aggravating circumstances (Sections 458 and 459, Indian Penal Code). In such a case the Deputy Magistrate had no authority to convict the prisoner of theft, but the prisoner should have been committed for trial to the Sessions Judge. The Deputy Magistrate's orders are reversed, and the case is remanded to be dealt with according to law.

The 13th January 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Sessions Judge's duty—Reference to High Court.

Reference under Section 434 of the Code of Criminal Procedure from the Officiating Sessions Judge of Patna.

Sreekissen *versus* Juglal and others.

A Sessions Judge ought not to refer to the High Court, under Section 434 of the Code of Criminal Procedure, the case of a prisoner who has appealed to him, but should decide it himself.

Jackson, J.—It appears to us that the Sessions Judge might have passed orders on this case without any reference to the High Court. The case was regularly before him on the appeal of the prisoner, and he was at liberty to form his own opinion on the facts and the law as laid down by the Magistrate. It certainly does seem unnecessary to punish a prisoner under both Section 144 and Section 148 of the Indian Penal Code, as the offence under Section 144 is almost merged in the offence under Section 148. There is, however, nothing actually illegal in sentencing for both offences; and the real question before the Sessions Judge is what he considered to be a proper sentence for the prisoner's offence.

The Sessions Judge will pass his own orders on the appeal of the prisoner on the return of the record.

The 14th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, the Hon'ble W. S. Seton-Karr, L. S. Jackson, A. G. Macpherson, and C. Hobhouse, *Judges.*

Imprisonment—Transportation—Act XV. of 1862.

Revision of proceedings under Section 405 of the Code of Criminal Procedure in the case of Boodhooa, prisoner.

This case was referred to the Full Bench under the following orders:—

HELD (*Jackson, J., dissenting*) that an officer exercising the powers described in Section 1, Act XV. of 1862, is competent, under the provisions of Section 59 of the Penal Code, to pass a sentence of transportation for seven years instead of awarding sentence of imprisonment.

Jackson, J.—THE Judicial Commissioner appears to have advised his subordinate that he was competent to pass the sentence of transportation.

It seems to me that an officer exercising the powers described in Section 1, Act XV. of 1862, is not competent to pass such sentence, not having been expressly authorised by the Act to do so.

It is said that Section 59 of the Penal Code gives the power. I should understand that Section to be subject to the terms of Section 22 of the Code of Criminal Procedure, which defines and limits the powers of the Courts, and with which the enactment first quoted must be read.

If the power is given by the words "competent to the Court which sentences such offender," then it must be given to Magistrates when sentencing offenders under Sections 451, 457, 404, 393, 380, 325, and others, which all relate to offences punishable with 7 years' imprisonment, and over which the Magistrates have concurrent jurisdiction with the Courts of Session; for there are no words in Section 59 which limit the power to Courts which are competent to pass sentence of 7 years' imprisonment, or more.

Act XV. is to be read with the Code of Criminal Procedure, and I think it must be read in this way—*first*, that the officers referred to are inserted in Section 22 between the Court of Session and the Assistant Sessions Judges in Bombay, with the powers stated; *second*, that the 7th column of the Schedule is modified by inserting those officers against all cases, not capital, triable by the Court of Session, the result of which would be that the offender would be liable to a sentence of transportation, but that he would not be so sentenced, by reason of want of power in the particular Court which tried him to pass such sentence.

It appears to me that the question ought to be referred to a Full Bench.

Dwarkanath Mitter, J.—I concur.

The opinions of the Full Bench were delivered as follows:—

Hobhouse, J.—THE question before us is this: The Deputy Commissioner of Lohardugga is an officer invested under Section 1, Act XV. of 1862, with power to try certain offences, and under the provisions of the Code of Criminal Procedure to pass sentence of imprisonment of either description for a term not exceeding seven years. This being so, the Deputy Commissioner tried a person under the provisions of Section 459 of the Penal Code, and having sentenced that person to seven years' imprisonment, commuted that sentence, under Section 59 of the same Code, to transportation for a like term. The question is, whether the Deputy Commissioner having, under the words of the said Act XV. of 1862, only power to pass a sentence of imprisonment, was competent, under Section 59 of the Penal Code, to commute that sentence of imprisonment into one of transportation.

It seems to me that he was competent. It is very true that the Deputy Commissioner, being a person who is the chief officer charged with the executive administration of the district in criminal matters, is not a person whose jurisdiction is specially provided for under Section 22 of the Code of Criminal Procedure. But Act XV. of 1862, Section 3, must be taken and read as part of the Code of Criminal Procedure. Then, under the Code of Criminal Procedure and that Act read together, the Deputy Commissioner was competent to punish the offender in question under the provisions of the Penal Code. Section 59 of that Code runs in this way: "In every case in which an offender

"is punishable with imprisonment for a term "of seven years or upwards, it shall be "competent to the Court which sentences "such offender, instead of awarding sentence "of imprisonment, to sentence the offender "to transportation for a term not less than "seven years, and not exceeding the term "for which by this Code such offender is "liable to imprisonment." If, therefore, the Code of Criminal Procedure and the other Act, read together, do not expressly give jurisdiction to the Deputy Commissioner, I am still of opinion that Section 59 does, in so many words, give that jurisdiction, because it says that the Court which sentences, that is, which under any law is competent to sentence such offender, shall be competent to award a sentence of transportation instead of a sentence of imprisonment.

I would, therefore, send the proceedings back to the Judicial Commissioner, with instructions that the Deputy Commissioner had power to pass the sentence.

Macpherson, J.—I am of the same opinion. Section 1 of Act XV. of 1862 vests the officer who tried this case with power to try all offences not punishable with death, and, under the provisions of the Code of Criminal Procedure, to pass sentence of imprisonment for a term not exceeding seven years. Section 59 of the Penal Code says: "In every case in which "an offender is punishable with imprison-"ment for a term of seven years or upwards, "it shall be competent to the Court which "sentences such offender, instead of award-"ing sentence of imprisonment, to sentence "the offender to transportation for a term "not less than seven years and not exceed-"ing the term for which by this Code such "offender is liable to imprisonment." It appears to me, reading these two Sections together, that the officer who has tried this case, having power to pass a sentence of seven years, had equally power to pass a sentence of transportation for seven years. The words of Section 59 are distinct, and in my opinion say clearly that in *every* case in which a Court has jurisdiction to try the case and to sentence to seven years' imprisonment, the Court may in its discretion give seven years' transportation instead of imprisonment.

It is said in the order referring the case to this Bench, that "if the power is given by "the words 'competent to the Court which "sentences such offender,' then it must be "given to Magistrates when sentencing "offenders under Sections 451, 457, 404, 393, "380, 325, and others, which all relate to "offences punishable with seven years' im-"prisonment, and over which the Magistrates "have concurrent jurisdiction with the "Court of Session, for there are no words "in Section 59 which limit the power to "Courts which are competent to pass "sentence of seven years' imprisonment or "more." But it appears to me that there is no substantial foundation for this argument, if a natural and reasonable interpretation is put upon the words of Section 59. Magistrates trying offences under the powers given to them by the Code of Criminal Procedure (apart from the special provisions of Act XV. of 1862) have undoubtedly jurisdiction to sentence offenders to imprisonment for no longer period than two years. In the case of a Magistrate exercising only such powers, there is nothing in Section 59 which would warrant an offender being sentenced to transportation. Section 59 applies exclusively to cases in which the offender may legally be sentenced by the Court trying him to imprisonment for seven years; therefore, a Magistrate, who can imprison for only two years, has certainly no power to transport at all.

A further argument in favor of the contention that a sentence of transportation cannot be givin in this case, has been drawn from the fact that, in Section 22 of the Criminal Procedure Code, a distinction is made between the powers of "the Court of Session" and of the "Assistant Sessions Judge" in Bombay—the Court of Session being declared competent to pass sentence of "death, *transportation*, imprisonment of "either description for a period not exceed-"ing fourteen years," &c., while the Assistant Sessions Judge in Bombay is limited in his powers to "imprisonment of either description for a term not exceeding seven years," &c. It is argued that, because in the case of a Court of Session, the word "transportation" heads the list of punishments which may be inflicted by the Court, and as the word "transportation" is omitted in the case of an Assistant Sessions Judge, therefore, sentences of transportation cannot be substituted by the latter class of Judges for sentences of imprisonment. But, in my opinion, the deduction thus made from the omission, in the second instance of the word "transportation," is not correct. For, a very sufficient reason for its omission is to be found in the fact that there are

certain offences under the Penal Code for which transportation is either *the only* punishment which can be inflicted short of death, or for which transportation is a substantive punishment in itself, and not merely one convertible with or to be awarded in lieu of imprisonment. When the offence committed is murder, for instance, the sentence *must* be either death or transportation for life. There are many Sections of the Penal Code in which transportation for life is mentioned either as the only punishment, or as one of the punishments which may be awarded. Sections 450, 459, and 468, are instances of Sections which give the power of imprisoning only for ten years, but at the same time authorize a substantive sentence of transportation for life. Therefore, it seems to me that there is a very sufficient reason (quite independently of any intention to prevent the Assistant Sessions Judges from sentencing to transportation in *lieu* of imprisonment) why Section 22 of the Code of Criminal Procedure should specifically name transportation as one of the sentences which Courts of Session are competent to pass. I see no reason to suppose it was intended that the power of sentencing to transportation *in lieu of imprisonment* for a term not exceeding seven years should not, under the provisions of Section 59 of the Penal Code, be exercised by Assistant Judges in Bombay.

In my opinion, in every case in which the Court passing sentence has jurisdiction to sentence to imprisonment for seven years, the Court has also jurisdiction under Section 59, in its discretion, to pass a sentence of transportation for seven years.

Jackson, J.—I am still of the opinion that I expressed in referring this case for the consideration of a Full Bench, and in which my learned colleague Baboo Dwarkanath Mitter agreed.

My opinion is based chiefly upon the position that the Indian Penal Code is one that deals with the award of punishment, and the liability of the offenders to such punishment, while the Criminal Procedure Code is the one which indicates the Courts which are to apply these provisions, and to award the several degrees of punishment. I am not aware that any Section of the Indian Penal Code expressly defines, or in any way declares, what the powers of any particular Court shall be. Section 53 details the several punishments to which offenders are liable under the provisions of the Code, and they are specified (1) as death, (2) transportation, (3) penal servitude, (4) imprisonment, which is of two descriptions, rigorous and simple, (5 and 6) forfeiture and fine. Section 59 declares that "in every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years," that is, to transportation not less than seven years, and not exceeding the term which by this Code such offender is liable to imprisonment. I do not understand by that Section that the transportation to be awarded in lieu of imprisonment was to be given precisely year for year, but there were certain limits fixed, namely, that transportation was to be for a term not less than seven years, and not exceeding the term for which the offender could be imprisoned.

It is useful in considering the effect of this Section, perhaps, to refer to the Sections of the original Penal Code prepared by the Indian Law Commissioners. By Section 43 of that Code, the Court had not the power to commute or to pass sentence of transportation in lieu of imprisonment, but the power was given to the Government of the Presidency. The words are, "In every "case in which sentence of imprisonment "for a term of seven years or upwards has "been passed, or any offender who is not "both of Asiatic birth and of Asiatic "blood, it shall be lawful for the Govern-"ment of the Presidency within which the "offender has been sentenced, at any time "within two years after the passing of "such sentence, to commute the remaining "imprisonment, without the consent of the "offender, for transportation for a term not "exceeding the unexpired term of im-"prisonment, to which may be added pun-"ishment for life, or for any term, from the "territories of the East India Company." Apparently, in the long consideration which the Indian Penal Code underwent before it passsd into law, it was considered that it would be more convenient to vest the power of passing sentence of transportation in the Court which tried the prisoner, instead of in the local Government. However, I do not understand that change in the provision of the law as in any respect importing any power as granted to the several Courts, or to any of the Courts, which they did not possess under the law which

expressly regulated those powers. I am willing to construe Section 59 either strictly according to its words, or by what appears to me to be a reasonable construction.

It seems to me that, if that Section is to be construed strictly by its own words, as I have stated in my minute referring this case to the Full Bench, there is nothing whatever to prevent a Magistrate in those cases where he has concurrent jurisdiction over an offence with the Court of Session, and where an offender might be punished with imprisonment to the extent of seven years, from passing under this Section a sentence of transportation. Nor, of course, is there anything to prevent an Assistant Sessions Judge in Bombay from passing a like sentence. This consequence is avoided in the opinion of my learned brothers by stating that the Magistrate has no authority to pass sentence of imprisonment to the extent of seven years; but then, as I have already stated, it appears to me that transportation is not to be given in lieu of imprisonment year for year, but the law distinctly says that, whenever an offender is punished with imprisonment of seven years or upwards, it shall be competent to the Court which sentences such offender, whether that be a Court capable of awarding seven years' imprisonment or not, to sentence that offender to transportation for a term of not less than seven years.

Section 59 is a portion of the Indian Penal Code, which is otherwise called Act XLV. of 1860. The Criminal Procedure Code was passed in the year 1861. It may, therefore, be looked upon as an expression of the later opinion of the Legislature; and, if the provisions of these two laws in any respect conflict, I presume that the provisions of the later law must prevail. Now, Act XV. of 1862, by Section 3, is to be taken and read as part of the Code of Criminal Procedure. I understand the meaning of that to be that the several parts of the Act XV. of 1862 are to be taken and inserted in their appropriate place in the Code of Criminal Procedure, that is to say, that the definition of the status and powers of the officer described in Section 1 of that Act is to be put in its appropriate place in the 22nd Section of the Procedure Code. He would then probably take place after the Court of Assistant Sessions Judge in Bombay. Reading, then, the Courts referred to in that Section in the order in which they come, we find, first, the Court of Session; next, the Assistant Sessions Judges of the Presidency of Bombay; thirdly, the chief officer charged with the executive administration of a district in criminal matters in what may be called extra-Regulation Provinces.

Section 22 says: "The offences mentioned in the Schedule annexed to this Act shall, subject to the provision contained in the third explanatory note prefixed to the said schedule, be triable by the Courts specified in column 7 of the said schedule, and such Courts shall be competent to pass sentence in respect of such offences within the following limits." That I understand to be a declaration of the powers of the several Courts, implying that the Courts specified in that Section are to be restricted within the limits therein prescribed.

A difficulty arises in respect of certain cases which are not offences under the Indian Penal Code, but which are constituted and rendered punishable by later Acts, or by special or local laws. That difficulty does not occur in the present instance, as we are dealing with a case which is comprised in the schedule annexed to the Code of Criminal Procedure, and is, therefore, governed by that Section.

And then I understand that in column 7 of the said Schedule, the Court of the officer described in Act XV. is to be inserted in every place where a Court of Session is now to be found, except in cases where the offence is punishable with death. The effect of that would be, I think, that in all cases the particular offences would be punishable by that Court, and that the limits of the powers of that Court to pass sentence would be imprisonment of either description for a term not exceeding seven years, including such solitary confinement as is authorized by law, or fine, or both. I find myself unable to understand the arguments which propose to do away with the effect of the word "transportation" as used in the 22nd Section in speaking of the powers of the Court of Session. Transportation, it appears to me, cannot be too often stated, is a separate description of punishment within the competency of one Court, and one Court alone, to award, namely, the Court of Session, and that Court is, it seems to me, alone authorized by law to award that particular punishment, and, therefore, although, under Section 59 of the Indian Penal Code, particular offenders are made

liable to transportation, that must be governed by the Section of the Criminal Procedure Code which limits the power of the Courts. It appears to me, then, that, taking the Penal Code together with the Code of Criminal Procedure, it must be presupposed that the Court which sentences is one which is by law enabled to pass the sentence of transportation.

I, therefore, think the Court of the Deputy Commissioner was not competent to sentence the prisoner to transportation, and that the sentence is not legal.

Seton-Karr, J.—I concur with my brothers Hobhouse and Macpherson.

The position and duties of officers in Non-Regulation Provinces, vested with powers under Act XV. of 1862, may, no doubt, occasionally appear somewhat anomalous, and it may be necessary to look closely, as in this instance, into the extent of the powers with which they are vested by law. But, when I see that, by Act XV. of 1862, the Deputy Commissioner is empowered to pass a sentence of imprisonment for a term not exceeding seven years, and when I consider that the punishments which he must award must be substantially the punishments of the Penal Code which he administers, I can come to no other conclusion than that, under Section 59 of that same Penal Code, he is empowered to pass sentences of transportation where he is empowered, as he undoubtedly is, to pass a sentence of imprisonment.

In this view I have only to say that I think the sentence passed by the Deputy Commissioner of Lohardugga of transportation is legal.

Peacock, C. J.—I concur with the majority of my honorable colleagues in thinking that the Deputy Commissioner in this case had power to pass sentence of seven years' transportation. His powers were derived, not under the provisions of Section 22 of the Code of Criminal Procedure, but under Section 1 of Act XV. of 1862. The substance of that Section is that, whenever under the provisions of Section 445 of the Code of Criminal Procedure the Code has been or shall be extended to any part of the territories not subject to the general regulations, it shall be lawful for the Governor-General in Council, or for the Local Government of such territory, to vest the chief officer charged with the executive administration of a district in criminal matters, by whatever designation such officer is called, with power to try all offences not punishable with death, and, under the provisions of the said Code, to pass sentence of imprisonment of either description for a term not exceeding seven years, including such solitary confinement as is authorized by law, or fine, or both. And by Section 3—"This Act shall be taken and read as part of the Code of Criminal Procedure."

I assume that, under the provisions of this Act, the Deputy Commissioner of Lohardugga was vested with the power to pass sentence of imprisonment of either description for a term not exceeding seven years. Having that power, it appears to me that Section 59 of the Penal Code gave him the power, instead of passing sentence of imprisonment for seven years, to pass sentence of transportation for a term not less than seven years, and not exceeding the term for which the prisoner was liable to imprisonment. The Penal Code in that Section not only enacted what was the amount of punishment for particular offences, but it vested the Court, which should sentence the offender, with power to award transportation of not less than seven years, instead of awarding sentence of imprisonment. It went out of the ordinary course adopted in other parts of the Code, and, instead of defining the punishment, gave a certain power to the Court, which should pass the sentence, to award a different kind of punishment from that specified in the Code.

My honorable colleague, Mr. Justice Louis Jackson, has referred to the Penal Code as it was originally prepared by the Law Commissioners for the purpose of showing that, under that Code as it was prepared, the Court had not the power to commute or to pass sentence of transportation in lieu of imprisonment, but that the power was given only to the Government of the Presidency. He points that out to show that, under the Penal Code as originally prepared, the power of passing sentence of transportation instead of imprisonment was vested in the Government, and not in the Courts. There was a very good reason for that, and for the alteration which took place in the Penal Code when it was finally settled. At the time when the Penal Code was prepared by the Indian Law Commissioners, it was a rule of the Court of Directors of the East India Company that no native should be sentenced to transportation for a period less than for life, it be-

ing the opinion at that time that a native of India, if once transported, should never be allowed to return to this country. The Indian Penal Code, as prepared by the Law Commissioners, did not provide transportation as a punishment for any period short of life, and it did not give power to the Government to commute a sentence of imprisonment for seven years into transportation, except in cases where the prisoner was not of Asiatic blood and of Asiatic birth. But, when the Penal Code came to be altered, a different rule was thought necessary. It was thought reasonable that natives of India as well as Europeans and others should be sentenced to transportation for periods less than for life, and that the reason for not allowing a native, who had once been transported, to return to India, no longer held good, and therefore, as the Penal Code as prepared by the Indian Law Commissioners did not provide transportation as a punishment for any less period than for life, it was thought advisable, when the Code was altered, to enact by a general Clause that in all cases in which an offender should be punishable with imprisonment for seven years or upwards, the Court should have power to sentence him to transportation instead of imprisonment, provided the term should not be less than seven years, and should not exceed the term for which the offender should be liable to imprisonment. That is the reason why Section 59 was introduced. It necessarily gave power to a Court which could sentence a prisoner to seven years' imprisonment to sentence him to seven years' transportation in lieu of it; but it never intended to give power to a Court which could not sentence to imprisonment for more that two years to transport for seven.

It appears to me to follow that, as the Deputy Commissioner is a Court which has the power of sentencing to imprisonment for seven years, he has power to sentence to transportation for a period not less than seven years.

It is said that, if this construction be put upon Section 59, then in every case in which a Magistrate tries an offence punishable with seven years' imprisonment, although that Magistrate could not sentence to the full extent of imprisonment, he would have the power, instead of sentencing him to two years' imprisonment, to sentence him to transportation for not less than seven years. It appears to me that that would be a most unreasonable and forced construction of Section 59, and that such a construction ought not to be put upon it. If a man is convicted before a Magistrate of an offence which is made punishable by the Penal Code with seven years' imprisonment, the offender is not punishable with imprisonment for seven years; because upon that conviction there is no one competent to punish him with seven years' imprisonment, a Magistrate not having power to imprison for more than two years. The words of Section 59 are "every case in which an offender is punishable," &c., not every person convicted of an offence which by this Code is punishable, &c.

The meaning of the Section clearly is that, where the prisoner is punishable with an imprisonment for a term of seven years, it shall be competent to the Court, which has power to sentence him to that punishment, to sentence him to transportation instead of imprisonment.

In this view of the case, a Magistrate would not have power to transport. It never could have been intended to give power to a Court which has not power to sentence to imprisonment for more than two years to transport for seven.

It would not lie within either the words or the spirit of the Section.

Under these circumstances, it appears to me that the Deputy Commissioner had the power to pass sentence of transportation for seven years; that the Judicial Commissioner came to a right conclusion in telling him that he had that power; and that he was right in passing that sentence. Consequently, the sentence must be affirmed.

The 18th January 1868.

Present:

The Hon'ble A. G. Macpherson and Dwarkanath Mitter, *Judges.*

Cumulative Sentences.

Queen *versus* Radhakanth Paul and Rambehary Dass Mohunt.

Committed by the Deputy Magistrate, and tried by the Officiating Sessions Judge of Midnapore, on a charge of false evidence.

Where substantially only one offence has been committed, and the acts which are the basis of a prisoner's conviction on one charge are the same as the acts which are the basis of his conviction in another charge, cumulative sentences upon each charge should not be passed.

Macpherson, J.—We think that, as substantially but one offence was committed, that is to say, as the acts which are the basis of his conviction on the first count are the same as the acts which are the basis of his conviction on the second count, but one sentence should have been passed upon the prisoner Rambehary. We therefore set aside the sentence of 3 years' rigorous imprisonment on the second count, affirming the sentence of 7 years' rigorous imprisonment upon the first count.

The appeal of the prisoner Radhakant is dismissed. We do not think the sentence of 7 years' rigorous imprisonment upon each of the prisoners by any means too severe, considering the nature of the offence.

The 3rd February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Breach of Contract—Section 490, Penal Code.

Criminal Revisional Jurisdiction.

Reference to the High Court under Section 434, Code of Criminal Procedure, by the Sessions Judge of West Burdwan.

Mr. Sage *versus* Nirunjun Chatterjee.

Quære, whether the words "during a voyage or journey" in Section 490 of the Penal Code do not limit the offences made under that Section to offences against travellers.

That Section, however, does not apply to a contract to place the defendant's carts at the complainant's disposal for a specified time to convey a thing from where he pleases to where he pleases.

Jackson, J.—We have great doubts whether the words "during a voyage or journey" do not limit the offences made punishable under Section 490 of the Indian Penal Code to offences against travellers. Even, however, allowing that the first Clause of the Section admits of a wider construction, we think that the contract now under reference does not come within it. This contract is not only to convey the complainant's coal from one place to another place, but to place the defendant's carts at the disposal of the complainant for two years to convey his coal from where he pleases to where he pleases. There are two places mentioned in the contract as those from which the carters are to convey the coal, and to which they are to take it; but the carters also state that they will, when necessary, convey it from any other place to any other place. We have great doubts also whether personal service is the issue of this contract, as the carters do not agree personally to convey the coal, but to "cause" it to be conveyed.

We think we ought not, therefore, to interfere in this case.

The 3rd February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Magistrate—Collector—Offence against Public Servant—Section 168, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Revision of Proceedings under Sections 404 and 405, Code of Criminal Procedure.

Nehal Mahtee, *Prisoner.*

A Collector, who entertains a charge under Section 168 of the Code of Criminal Procedure of an offence against any Court or public servant, should not try the case himself as Magistrate, nor, unless under very exceptional cases, give evidence as a witness before himself as Magistrate.

Kemp, J.—We think that, as a general rule, it is very objectionable for the same officer who entertains a charge, under Section 168 of the Code of Criminal Procedure, of an offence against any Court or public servant, to make over such case for trial to himself as Magistrate. There may be cases in which such a course of procedure could not be avoided. We have not been shewn that, in this instance, there was not "any Magistrate" having power to try the case under Section 171.

We also think it was very objectionable in the Magistrate, in his capacity of Collector, giving his evidence as a witness before himself as Magistrate. There might be exceptional cases in which such a procedure would be necessary, but they must be of very rare occurrence.

We think there was nothing illegal in the proceedings of the Magistrate, though we are clearly of opinion that he did not act discreetly.

The prisoner we hold to have been acquitted by the Judge, and we, therefore, cannot interfere further in the case.

The 3rd February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Magistrate's duty—Confiscation—Sections 131 & 132, Act XXV. of 1861.

Reference to the High Court under Section 434 of the Code of Criminal Procedure.

Behary Shaha *versus* Nubby Khan and others.

The procedure prescribed in Sections 131 & 132 of Act XXV. of 1861 must be followed before an order confiscating property is made.

Case.—The petitioner brought a charge of the theft of tobacco, &c., against the defendant Nubby Khan and others. The police reported that they found in the possession of the latter a few bundles of tobacco and certain other articles, and forwarded the same as stolen property to the Deputy Magistrate of Perozepore. In course of the trial of the case the Deputy Magistrate, Moulvy Abdool Kurreem, considered that the charge was not satisfactorily proved. He discharged the defendants, released and returned to them a portion of the property, and ordered the confiscation of the remainder.

It appears that the order of confiscation was irregular, inasmuch as the Procedure prescribed in Sections 131 and 132 of Act XXV. of 1861 was not adopted, and I think it should be reversed.

The Deputy Magistrate was called upon for an explanation. He has merely in reply stated that it was not established to his satisfaction that the property belonged to the plaintiff; that the defendants laid no claim to the same; and that he, therefore, at once ordered its confiscation.

Judgment of the High Court.

Kemp, J.—We think that the view taken by the Sessions Judge is correct. The order of the Deputy Magistrate of Perozepore, confiscating the property, is reversed. He will proceed under Sections 131 and 132 of the Code of Criminal Procedure.

The 8th February 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Charge—Amendment—False Evidence.

Criminal Appellate Jurisdiction.

Queen *versus* Feojdar Roy, *Appellant.*

Committed by the Joint Magistrate, and tried by the Sessions Judge of Sarun, on a charge of giving false evidence in a judicial proceeding.

In framing a charge for giving false evidence under Section 193 of the Penal Code, the charge should be precise, and where the accused is charged with giving false evidence on three different occasions, each occasion should form the subject of a distinct head in the charge.

Amendments in a charge ought to be made formally, and should appear on the face of the record.

Macpherson, J.—We think that this conviction ought to be quashed, by reason of the inaccurate and careless manner in which the proceedings against the prisoner have been conducted.

The prisoner was committed by the Officiating Joint Magistrate for trial at the Sessions upon the following charge:—

"That he on or about the { 28th August 1867, 14th January 1859, 2nd February 1867, "at Chupra, intentionally gave false evi- "dence in a stage of a judicial proceeding, "before a Deputy Collector or Collector, "—for that he deposed: (1) that he held "certain 18 beegahs of land from the time "of his ancestors by jumma-bundee papers, "and not on a lease for a term; (2) that he "held by a lease on unstamped paper *Sal* "*ba Sal*; (3) that he held the land by "lease of 1265, of Jenayut Lal and others. "dated 26th Bhadur 1265 F., the truth be- "ing that he held by a lease of Bhadur "1265 F, for a term of 9 years, and that "he has thereby committed an offence "punishable under Section 193, Indian "Penal Code, and within the cognizance of "a Court of Session."

This charge is manifestly insufficient, and not in accordance with the provisions of Chapter XIII. of the Criminal Procedure Code, on account of its vagueness. Three distinct offences, falling within Section 193 of the Penal Code, are apparently intended to be charged. Each head of charge ought to have been complete in itself, and ought to have stated in the course of what judicial proceeding, and on or about what date, and in what manner, the false evidence was given. It is manifestly unfair to a prisoner to charge him with giving false evidence in one or other of three ways on the 28th of August 1867, *or* the 24th of January 1859, *or* the 2nd February 1867, and in the course of "a judicial proceeding before a Deputy Collector, *or* a Collector." A prisoner is entitled to be told with reasonable precision what it is that is alleged by the prosecution to constitute the offence with which he is charged.

In the calendar of prisoners committed for trial at the Sessions, under the heading, "Abstract of charge, offence charged, and "date of occurrence," is the following "entry: Intentionally giving false evidence "in a stage of a judicial proceeding, 10th "September 1867."

This date, it is to be observed, is neither the "date of the occurrence," nor is it the date of the commitment, nor is it, so far as we know, any other date in any way material or relating to the case. It is evidently a wrong entry.

We then find that immediately below the date "10th September 1867," is written the following: "In a suit under Act X. of 1859, "for ejectment of Foujdar from 18 beegahs, "he denied that he held the same by a lease "for a term of 9 years only, although it is "well proved that he did so hold the land by "such lease as aforesaid. The several "documents filed show that it was not till "the term of the lease was expiring that he "began to make his various statements to "the effct that he had held from the time "of his ancestors, and that he had two "leases without any express term—both of "which he states are lost. The 9 years' "lease is proved by the witnesses, and it is "proved by the documents filed that he "admitted on two occasions holding by a "lease of 1265."

On the margin of this entry the Judge has written with his own hand—"The "Court, concurring with the Assessors, finds "the prisoner guilty, and directs that he "be," &c.

At the commencement of his record of the proceedings at the trial, the Judge simply records that the crime charged is "giving false evidence in a stage of a judi- "cial proceeding, Section 193, Indian Penal

"Code," and the same words are used by him in his formal finding.

From these proceedings it is quite impossible to say on what particular charge the prisoner was tried, and of what particular offence he has been convicted. The charge on which he was committed by the Magistrate contained three distinct heads. If the prisoner was tried on that charge, the trial should have been conducted with reference to the several heads of the charge, and each head should have been disposed of by itself. If, on the other hand, the prisoner was tried on an amended charge, the amendment ought to have been made formally, and should appear upon the face of the record.

It is clear to us from the Judge's own judgment that he dealt with the case in the most vague and indefinite manner, and quite lost sight of the specific charges upon which the prisoner was being tried. We are of opinion that the prisoner had not a fair and proper trial; that he has been prejudiced by the defective manner in which the case has been conducted; and that the conviction should be quashed, and the prisoner released.

The 11th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Trial—Magistrate's Duty—Section 250 and Chapter XIV., Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Moorshedabad.

Goonath Mundle

versus

Troylocko Chuckerbutty and others.

A Deputy Magistrate has no authority to acquit a prisoner of an offence under Chapter XIV. of the Code of Criminal Procedure for which he had not regularly put him upon his trial. He must proceed agreeably to Section 250 of that Code.

Case.—CERTAIN residents of Koyah complained before the Deputy Magistrate, Mr. Cosserat, that some villagers of Poch-Kamani had cut and carried off crops which they (the complainants) had shown.

The Deputy Magistrate having taken the evidence of the complainants, and without going further into the case, or framing any charge against the villagers of Poch-Kamani, recorded the following order: "This is a specific charge against the defendants of unlawful assembly under Section 144, but the evidence, so far as it has been taken, is clearly against such a conclusion. I cannot credit that there was any unlawful assembly. The fact that the dhan has been cut away may or may not be true, but with that fact alone the Court has nothing to do, when the specific charge is unfounded. There might be circumstances under which defendants believed themselves entitled to the dhans, and various other questions might arise. At most under the circumstances a charge of criminal trespass might be brought and proved, but the petition presented, with the purport of the evidence given by the prosecutor, makes it unfair to the defendants that the Court should frame this charge of its own accord. I, therefore, dismiss the case of unlawful assembly, and acquit the prisoner on this count."

When this order was first brought to my notice, desiring to avoid the necessity for a reference to the High Court, I informed the pleader for the complainants that, as the case fell under Chapter XIV. of the Code of Criminal Procedure, and there had been no acquittal of the accused, since no charge had been drawn up, he might obtain what he sought for—a fresh trial—if he moved the Joint Magistrate to re-open and hear his complaint.

The Joint Magistrate, though he disapproves of the Deputy Magistrate's order and proceedings, considered that, without an order from the High Court reversing the Deputy Magistrate's order, no further proceedings could be taken by him.

I submit that the Deputy Magistrate's order is contrary to law, because it is not for a Magistrate to consider what specific charge may or may not be made by an ignorant person seeking redress in the

Criminal Courts. It is rather for a Magistrate in a case tried under Chapter XIV. to take the evidence of the complainant and his witnesses, and, if necessary, to examine the accused, and then, applying the law to the criminal acts of the commission of which he may find that there is *primâ facie* evidence, to frame charges, and to call upon the accused to plead thereto, and to enter into a defence. This seems to me to be the meaning of Section 250 of the Code of Criminal Procedure.

I submit, further, that the Joint Magistrate is in error, because there has been no formal acquittal, since the accused has not pleaded to any charge drawn up under Section 205, and that, therefore, he was competent to hold the trial (*see* 3 W. R. 23, Criminal Letters, and the case of Reg. *versus* R. Sheriff, 6 Weekly Reporter 13).

Judgment of the High Court.

Jackson, J.—The Deputy Magistrate had no authority to acquit prisoners of any offence for which he had not regularly put them upon their trial. His order of acquittal is therefore illegal, and must be set aside.

As the charge has been renewed before the Joint Magistrate, that officer will take it up, and proceed to the trial of it.

The 11th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Security to keep the peace—Magistrate's Duty.

Reference to the High Court by the Sessions Judge of Dinagepore under Section 434 of the Code of Criminal Procedure.

Kalipershad Sirdar, on behalf of Moharanee Sham Mohinee, *versus* Futteh Chund Dass and others, on the part of Puddomonee and Juggadumba Dasse.

Notice to show cause why security should not be demanded must be served before a Magistrate can pass orders requiring security to keep the peace.

Jackson, J.—THE Magistrate's order directing Ranee Sham Mohinee to find security to keep the peace, to the amount of 500 rupees, for one year, is, as the Sessions Judge states, illegal, as no notice was previously served upon her to appear and shew case why security should not be demanded from her.

The Magistrate's order must be reversed. He is at liberty to take further proceedings in the matter if he desires.

The 12th February 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Evidence—Admission—Persuasion—Police—Section 412, Penal Code—Sections 146 and 150, Code of Criminal Procedure.

Bishoo Manjee, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of dishonestly retaining stolen property with guilty knowledge.

An admission obtained from a prisoner by *persuasion* and *promises* of immunity by the Police ought not to be received in evidence, as being in direct contravention of Section 146, Code of Criminal Procedure.

The deposition of the Police Officer, moreover, should be taken before the admission can at all be used against the prisoner, under Section 150, Code of Criminal Procedure.

It must be proved that the prisoner received or retained plundered property knowing it to be plundered property, before he can be convicted under Section 412 of the Penal Code.

Mitter, J.—I AM of opinion that the conviction in this case cannot stand. The only evidence against the prisoner consists of the depositions of Jogeshur Bhuttacharjee, witness No. 4 for the prosecution. This witness deposes that, after the arrest of the prisoner by the Police, the Moonshee or Sub-Inspector "persuaded him to confess, till midnight, telling him there was no fear, and

that he would get him off if he did confess;" that thereupon the prisoner took the Moonshee out to a jungle about 4 or 500 hats off, and gave up from below the earth "certain articles that have been proved to be the property of the prosecutor Ram Gobind;" that the prisoner said that "Tara Noina, Khetra, Judisteer, had smoked at his house after having committed a dacoity, and had said, 'It is morning, we cannot take away this property, let us bury it here, and we will take it away the next day'" Now, it is clear that the Sub-Inspector had acted contrary to the provisions of Section 146 of the Code of Criminal Procedure in *persuading* the prisoner to make any such disclosure; and it is, therefore, a matter for serious consideration whether the statement made by the prisoner before that officer can be received as evidence against him. It is also to be regretted that the Court below did not examine the Sub-Inspector himself, so as to enable this Court to ascertain how far the disclosures made by the prisoner could be used as evidence against him, under the provisions of Section 150 of the Criminal Procedure Code. But, even if all these objections were waived, I am of opinion that the depositions of the above-named witness were not sufficient to warrant the conviction complained of by the prisoner.

The statement made by the prisoner before the Sub-Inspector must be taken in its integrity. That the prisoner was acquainted with the place where the plundered articles were buried might be conceded; but it must also be borne in mind that he qualified his admission of that knowledge by stating that they were buried there by Tara and three other persons, who had obtained those articles by dacoity, and who intended to remove them for their own use afterwards at their own convenience. Such being the case, there is no evidence to prove that the prisoner "received" or "retained" the plundered articles so as to be guilty of the offence described in Section 412 of the Indian Penal Code, of which he has been convicted by the Court below. The Sessions Judge has merely confined himself to the question of guilty knowledge; but there was another question, and a preliminary one, namely, whether there was such a *receipt* or *retention* of the plundered articles by the prisoner as would constitute the criminal act itself to which the guilty knowledge was to be attached. The prisoner might have known that the articles in question were obtained by dacoity, but there is literally nothing to show that *he* had concealed them on the spot where they were discovered, or that he had dealt with them in any other manner. The mere fact that those articles were kept concealed in a jungle adjacent to his house is not sufficient to fix him with the act of that concealment; and, if his own statement regarding his knowledge of that concealment is to be used against him, the whole of that statement must be taken together, and the Court cannot, therefore, overlook either the mode in which that knowledge was alleged to have been acquired by him, or the allegation that the concealment itself was the act of other persons who had as much access to the jungle as the prisoner or any body else. For these reasons, and there being no other evidence to support the prosecution, I would acquit the prisoner. The case must be laid before a second Judge.

Jackson, J.—I concur in thinking that the conviction must be set aside.

Section 150, Code of Criminal Procedure, declares that, when any fact is deposed to *by a Police Officer* as *discovered by him* in consequence of information received from a person accused of any offence, so much of such information as relates distinctly to the fact discovered by it may be received in evidence.

This provision would not render admissible in evidence any statement made to a Police Officer by a person accused otherwise than as connected with a fact deposed to by the Police Officer himself.

In this case it appears that the Police Officer, to whom the statement was made, was not examined at all; and, therefore, it seems that the admission, so far as it was an admission, is not taken out of the general terms of Section 148, which exclude such admissions generally.

But I also think that the admission ought not to have been received in consequence of its appearing to have been obtained by the Police Officer by persuasion and promises of immunity in direct contravention of Section 146, Code of Criminal Procedure. I think the promise that "he would get the prisoner off" is clearly a promise and an inducement of the kind contemplated by the Section.

This being so, there remains no evidence against the prisoner, and I think the conviction must be reversed, and he must be released.

The 17th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Procedure—Breach of the peace—Appeal.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Rajshahye.

Emam Ali *versus* Sudderuddeen and others.

That a Magistrate has acted without proper discretion in ordering a prosecution is no ground for reversing his order.

Where a Magistrate thinks that the acts of the accused are likely to lead to a breach of the peace, and their statements as to possession of land are false, he may proceed to try whether the accused should not be charged with unlawful assembly.

The directions of the law as to appeals from orders and appeals from sentences are distinct.

Jackson, J.—We have perused the Sessions Judge's letter of reference and the records of the case, and have heard counsel on behalf of the parties sentenced by the Magistrate. The conclusion we have arrived at is, that the sentence and order passed by the Magistrate on each defendant is not in any way illegal. The Sessions Judge considers that the Magistrate acted without proper discretion in directing a prosecution. This, however, would be no ground for reversing his orders. It would not make the orders illegal. In reality there is a difference of opinion between the Sessions Judge and the Magistrate, as to whether the offence of the prisoner was a light matter or a very serious one. The Magistrate thought that the acts of the accused were such as might have led to very serious breach of the peace, and he had ascertained, on the most satisfactory evidence, that the statements of the accused as to their possession of the land were utterly false. We do not no agree with the Sessions Judge that, under such circumstances, the Magistrate should have taken measures to decide, under Section 318 of the Criminal Procedure Code, which party was in possession, and not have proceeded to try whether the accused should not be charged with illegal assembly. The Magistrate had ground for proceeding with the trial of that charge, and there is evidence to support the conviction, both under the offence of illegal assembly and criminal trespass. There is sufficient ground also for the orders passed by the Magistrate under Sections 280 and 287 of the Criminal Procedure Code. We are inclined also to agree with the Magistrate that the acts of the accused were of a more serious criminal nature than the Sessions Judge appears to hold, and that their acts, if opposed by the opposite side, might have led to violent affrays, and possibly loss of life.

It has been further argued before us that the prisoners in this case had a right of appeal to the Sessions Judge, because there was an order for recognizances and security added on to the sentence of one month's imprisonment. But we think the appeal cannot be allowed, as there is no appeal from the orders, and no appeal from the sentence, and the directions of the law as to appeals from orders and appeals from sentences are quite distinct.

On the whole, we think, we ought not to interfere with the sentence and orders passed by the Magistrate.

The 17th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Act XXVII. of 1860—Certificate—Title—Section 319, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Obilashery Debia and another, *Petitioners.*

A certificate under Act XXVII. of 1860 simply empowers the person to whom it is granted to demand and receive the debts due to the deceased, and is in no way a determination of a competent Civil Court of the right of such person to possession of land under attachment under Section 319 of the Code of Criminal Procedure.

Jackson, J.—We have heard the pleader for the applicant, and are of opinion that the order of the Deputy Magistrate is illegal and must be set aside.

The property in dispute was attached under the provisions of Section 319 of the Code of Criminal Procedure, the Magistrate not being able to satisfy himself as to which person was in possession of the subject of dispute. The parties were referred to the Civil Court for the determination of their rights, that is to say, who "ought to be in possession"?

Subsequently, one of the contending parties produced a certificate under the provisions of Act XXVII. of 1860, and, on the strength of this, the Deputy Magistrate withdrew the attachment, and made over the property to the party filing the certificate. We may observe that the said certificate has subsequently been suspended by the decision of this Court in appeals Nos. 294 and 296 of 1867, dated 23rd August 1867. Act XXVII. of 1860 was passed to consolidate and amend certain Acts then in force, which provided for the greater security of persons paying to the representatives of deceased parties debts payable in respect of the estates of those deceased parties. The Act simply enacts that the party receiving the certificate has a legal title to demand and receive such debts.

The certificate in no way is a determination of a competent Civil Court of the rights of the parties to possession.

The order of the Deputy Magistrate is quashed. The attachment will revive, and the property remain under attachment until the rights of the parties are determined, under the provisions of Section 319 of the Code of Criminal Procedure.

The 29th February 1868.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Copies of judgments for prisoners who appeal.

Ram Chunder Mundle, *Appellant.*

Committed by the Magistrate, and tried by the Sessions Judge of Nuddea, on a charge of intentionally giving false evidence.

Copies of judgments should be made out at once without waiting for *written* application from persons under sentence.

THIS is an appeal in a case tried with a Jury.

No defect in law is alleged by the petitioner, nor do I see any reason to think there is any such defect in the proceedings.

The appeal has been presented after time; but there seems to have been a very undue delay in furnishing the prisoner with a copy of the judgment.

These should be made out at once without waiting for written applications from persons under sentence.

The 20th February 1868.

Present:

The Hon'ble W. S. Seton-Karr and W. Markby, *Judges.*

Unlawful assembly—Section 141, Penal Code.

Revision of proceedings under Section 404 of the Code of Criminal Procedure.

The Queen *versus* Dinobundo Rai and others.

In order to convict of the offence of being members of an unlawful assembly, it must be shown that the accused were actuated by a common object, and that the acts done by them were of such a nature as to make them guilty under Section 141 of the Penal Code.

Seton-Karr, J.—THIS case has been referred to us by the Sessions Judge, apparently under Section 434 of the Criminal Procedure Code. We deal with it under Section 404.

After hearing Mr. Piffard, Counsel for the defendants, and after considering the judgment of the Magistrate and the evidence on which he relies, we hold that there was no evidence to bring home to the defendants the offence of being members of an unlawful assembly, as defined in the Penal Code.

Looking to that portion of the evidence which the Magistrate credits, and on which he bases his judgment, it does not seem to us that the mere act of one or two persons, by which certain bags of rice belonging to the complainant were thrown on the ground, and were prevented from being removed, does convert the assembly, which was not unlawful in its origin, into an unlawful

assembly. There is nothing to show that the defendants were actuated by a *common* object in this, or that any act done by any one of them, whereby the bags were thrown down, would make them guilty under Section 141.

The Sessions Judge appears to think that the finding of the Assistant Magistrate is not contrary to law, and he has referred the case to us, in order that we may mitigate the punishment of one month's rigorous imprisonment to which the Assistant Magistrate has sentenced the defendants. But this is not the way in which we propose to deal with the case.

We hold that there is no evidence to support the particular offence of which these eight prisoners have been found guilty, and their conviction consequently is marked by an error on a point of law. In this view, under Section 404, we quash the conviction, and direct that the eight prisoners, mentioned in the Sessions Judge's letter, be forthwith released.

The 20th February 1868.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Making a false document—Section 464, Penal Code.

Criminal Revisional Jurisdiction.

The Queen *versus* Nujeebutoollah.

It must be proved that the accused practised deception so as to prevent a person from knowing the nature of the document before the accused can be found guilty under Section 464 of the Penal Code of making a false document.

THE Court, having referred to the proceedings in this case, is not surprised that the prisoner was acquitted.

If the evidence had been thoroughly satisfactory, it is very doubtful whether the offence of forgery could have been established.

It seems that the writing of the heads of the order was not counterfeited, and the signature of Mr. Cockburn, the District Superintendent of Police, appended to it, is his genuine signature in initials.

But the belief is that the paper in question was inserted in a heap of papers placed before him for signature.

Supposing this to be true, it is very doubtful whether such an act would come within the third mode of making a false document set forth in Section 464 of the Indian Penal Code, at least in such a manner as to implicate a person afterwards using such a paper.

For it does not seem that any sort of deception was practised on Mr. Cockburn, so as to prevent him from knowing the nature of the document.

But the Court is also bound to say, on looking at the evidence, that a Jury would have been justified in acquitting the prisoner independently of the point of law.

The 20th February 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

General powers—Land disputes—Section 318, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

The Queen *versus* Hemendronath Tagore.

There are no "general powers" in any law which authorize a Magistrate to issue orders, directing that a party shall be kept in peaceable possession of land. Such orders were therefore cancelled as without warrant of law, the procedure prescribed in Section 318 of the Code of Criminal Procedure not having been observed.

Hobhouse, J.—THE material facts of this case are as follows: Messrs. Gilmore Mackilligan applied to the Magistrate of Pubna, alleging that Hemendronath Tagore, the applicant before us, was seeking to dispossess them of certain lands secured to them by a decree under Act IV. of 1840, and prayed that the Magistrate would send for the record in the above case, and prevent the attempted dispossession.

On the 14th August 1867, the Magistrate directed the police to maintain Messrs.

Gilmore in possession, saving any objections that might thereafter be made by the present applicant; and again, on the 22nd August 1867, the Magistrate, having compared a certain Civil Court decree with the Act IV. award, in the presence of both parties, directed the police to maintain Messrs. Gilmore in peaceable possession of a certain plot of beegahs 7-8 of lands.

It is objected to us that these orders of the Magistrate are without warrant of law, and we are asked, under Section 404, Code of Criminal Procedure, to set them aside. The Magistrate states that, in passing these orders, he acted, not under the provisions of Section 318, Code of Criminal Procedure, or any other "specific provisions of any laws, but under certain 'general powers';" but he does not refer us to any law conferring any such powers, neither can the pleader for Messrs. Gilmore do so, and we ourselves are not acquainted with any law authorising the Magistrate to issue the orders referred to in the summary manner described. We direct, therefore, that the orders of the Magistrate above referred to be set aside.

The 24th February 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Procedure—Police-report—Civil Court.

Reference to the High Court under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Jessore.

Borodakant Mookerjee *versus* Kali Bhuttacharjee and others.

Where there is a *primâ facie* case (of abduction in this instance) made out, a Magistrate should send for the witnesses, and form his opinion on the evidence, and not, merely on the strength of the police-report, reject the complainant's petition, and refer him to the Civil Court.

Case.—One Borodakant Mookerjee complained to the police that Kali Bhuttacharjee and Tincouri Bhuttacharjee and Mohun Day had abducted his sister from his house, and that she had been married to Koonjobehari Bhuttacharjee.

The police investigated the case, and reported that, when the father of the girl was alive, he agreed that Tincouri should take the girl, and give her in exchange for another, whom he (Tincouri) was to marry, and that, as Borodakant wanted to make an arrangement of this kind for himself, he had brought this charge against Tincouri and others.

Upon this report being submitted, Borodakant presented a petition to the Deputy Magistrate of Narail, asking him to call for the witnesses and decide the case. The Deputy Magistrate, however, only called for the police-record, and then rejected Borodakant's petition, on the ground that the case was one for the Civil Courts.

It appears to have been undisputed that the girl in question was living in the house of Borodakant under his protection and that of her mother, and that she was taken away from them without their consent.

There was thus certainly a *primâ facie* case for the Deputy Magistrate to enquire into, and I think the complainant had a right to demand that his witnesses should be sent for and examined.

The Deputy Magistrate, however, merely on the strength of the police-report, which is no evidence at all, dismissed complainant's case, and referred him to the Civil Court; and it appears to me that his order should be reversed, and that the Deputy Magistrate should be directed to examine the complainant and his witnesses, and then pass such orders as appear to him right and proper.

I therefore refer the matter for the orders of the High Court.

Judgment of the High Court.

Jackson, J.—I think the Sessions Judge is right. The Deputy Magistrate should send for the witnesses, and form his own opinion on the evidence, and not act solely on the police-report.

The case should, I think, be returned to the Deputy Magistrate to be proceeded with according to law.

Kemp, J.—I concur.

The 29th February 1868.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Civil proceedings.

Reference to the High Court under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Moorshedabad.

Madhub Kyburtho *versus* Keshub Sing and others.

Civil proceedings do not constitue a bar to a prosecution in a Criminal Court.

Macpherson, J.—We think that the Deputy Magistrate is wrong in saying that, as a matter of law, this prosecution cannot be entertained. The civil proceedings do not constitute a bar to the prosecution in the Criminal Court.

The Deputy Magistrate's order, dismissing the prosecutor's complaint, is set aside. The Deputy Magistrate must take the case up, and decide it upon the evidence. In making this order, we do not express any opinion as to whether there is or is not evidence of dishonest intention on the part of the persons accused. That is a point which must be carefully considered by the Deputy Magistrate when he has gone fully into the evidence. Of course, unless the Deputy Magistrate is satisfied that the accused did act with a dishonest intention, it will be impossible for him to find the accused guilty of them, even though there may be no doubt as to the mere fact of their having carried off certain property, which they ought not to have carried off.

The 2nd March 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Forged document—Knowledge.

Criminal Appellate Jurisdiction.

Queen *versus* Hemoruddi Mundul.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of dishonestly using as genuine a forged document with guilty knowledge.

In a case in which the accused was charged with dishonestly using as genuine a pottah which he knew to be forged, and in which there was a fraudulent insertion, it was held that it was not necessary to prove that he personally inserted the word, but it was sufficient if it was inserted with his knowledge.

Jackson, J.—The prisoner has been sentenced to 2 years' imprisonment, under Section 471 of the Penal Code, for dishonestly using, as genuine, a document which he knew to be forged. The document is a pottah under which the prisoner in a civil suit claimed a *julkur*, and the *pahar* or bank surrounding the *julkar* or tank.

The charge against the prisoner is, that the word *pahar* has been fraudulently inserted in the pottah, and the Jury have found that it was so fraudulently inserted. The prisoner's vakeel argues that there is no evidence to prove that the prisoner inserted the word. It is not material that the prisoner should have personally inserted the word. It is sufficient that it was inserted with his knowledge. It is said that the pottah is an old document, and was once before put into Court by prisoner's father, and that the father may have altered the document. The question as to who altered the pottah may be inferred from the other facts proved in the case. It does not appear that the father laid any claim to the *pahar* of the tank. If the prisoner could have shewn that he had done so, that fact would have gone far to exculpate the prisoner. But, on the other hand, it is proved that the prisoner in the civil suit, out of which this charge originated, did lay claim to the land surrounding the tank, on the allegation that it was included in the *pahar* mentioned in the pottah. Now, it is

proved that there is no *pahar* to the tank, and that the land around the tank is field land. Then the very appearance of the word in the pottah is strong evidence that it was entered there subsequent to the rest of the pottah, and there has been a portion of the pottah burnt, *viz.*, that which stated the area of the holding, by which it could have been distinctly ascertained whether the pottah was for the tank only, or for the bank also.

Looking to this evidence, there was sufficient to put before the Jury; and, if the Jury have found the prisoner guilty, we cannot interfere. The sentence is not excessive.

The 2nd March 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Lunatic prisoner—Charge—Evidence—Sections 388—395 of Act XXV. of 1861.

Criminal Appellate Jurisdiction.

Queen *versus* Ram Rutton Doss.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Tipperah.

A Magistrate rightly commits for trial at the Sessions a prisoner charged with murder, whom he finds to be sane at the time of the preliminary investigation, although he was insane when he committed the act.

A Sessions Judge has no power to try a prisoner who has been committed for trial on no specific charge.

When a prisoner is found to be insane at the time of his trial, the proper procedure applicable to his case is that prescribed by Sections 391 and 392 of the Code of Criminal Procedure.

A mere written certificate of a medical officer that a prisoner is of unsound mind, and incapable of making his defence, is not sufficient evidence of the prisoner's insanity. The medical officer should be called as a witness, and be personally and carefully examined.

Macpherson, J.—In this case the proceedings, both of the Deputy Magistrate who committed the prisoner for trial, and of the Sessions Judge who tried him, have been irregular in the extreme.

The prisoner was arrested on a charge of murder. The Deputy Magistrate says: "When put upon his defence, he was found to be of unsound mind, and, therefore, incapable of making a defence. A few days after, he was sent to the Sudder Jail, and placed under the observation of Dr. Greene, the Medical Officer, who having then found him sane, he was sent back here for trial." The Deputy Magistrate then states the effect of the evidence of the witnesses who were examined by him as to the mode in which the act was done, which was the basis of the charge of murder, and then he continues: "From the enquiries held by the police and by myself, I feel myself convinced that the prisoner did strike the deceased a blow on the head; that the blow was the cause of death; and that he was insane at the time of striking the blow. * * * * Under the above circumstances, I am of opinion that the act of the prisoner, under Section 84 of the Indian Penal Code, does not amount to an offence, and. agreeably to High Court's Circular No. 7, dated 18th July 1867, beg to commit him to the Sessions Court for trial."

The Deputy Magistrate, in fact, in the first instance proceeded under Section 388 of the Criminal Procedure Code, but, coming subsequently to the conclusion, on the evidence of the Medical Officer, Dr. Greene, that the prisoner was then (at the time of his being before the Deputy Magistrate) of sound mind, although he had been insane at the time he committed the act which was charged as murder, he committed him for trial at the Sessions.

In so doing, he acted in accordance with the Circular to which he refers: and so far the Deputy Magistrate was right.

But, strange to say, the Deputy Magistrate wholly neglected to comply with the provisions of Sections 233 and 247 of the Criminal Procedure Code. He drew up no charge—no written instrument declaring with what offence the accused person was charged—and he did not direct the Sessions Court on what charge the prisoner was to be tried. He simply committed him *generally* for trial at the Sessions, leaving it to the prisoner and to the Sessions Judge to find out, as best they might, on what charge the trial was to take place. Any thing more grossly irregular than this cannot well be conceived, and the Sessions Judge ought not to have tried the case when the prisoner had not been committed on any charge.

The Sessions Judge in his judgment says: "The Deputy Magistrate has sent up this case for trial without a specifically drawn-up charge, but quoting Sections 302 and 84, Indian Penal Code." It does not appear by what authority the Sessions Judge proceeded to try a prisoner who had not been committed to take his trial upon any particular charge. He did, however, proceed so to try him: and he did so, without himself even drawing up any formal instrument of charge, but simply entering at the commencement of his record of the trial that the charge was "murder under Sections 302 and 84, Indian Penal Code"—an entry as to which it is to be remarked that the charge of murder could only lie under Section 302, and not in any possible degree under Section 84.

The Sessions Judge took up the case on the 2nd of October, and examined the witnesses for the prosecution. Being of opinion, from the evidence given by those witnesses, and also from what he himself saw of the prisoner, that the prisoner was then (at the time of trial) of unsound mind and incapable of making his defence, the Judge properly postponed the trial for one month, and directed that during the interval the prisoner should be carefully watched by the medical officer of the station.

At the end of the month (on the 1st November) the medical officer (the same Dr. Greene who had been examined by the Deputy Magistrate) wrote to the Sessions Judge a letter, in which he says: "After having had Ram Ruttun (the prisoner) under my observation for one month, I am of opinion that he is of unsound mind."

On the 21st of November, the case came on again before the Sessions Judge, who finally disposed of it on that day.

In his judgment, after referring to his having postponed the trial on the 2nd October, he says: "The medical officer on the 1st November reported that the prisoner was of unsound mind. This case having been taken up again this day, he is quite incapable of making a defence, talking nonsense at one time, and remaining perfectly silent again." The Judge then, with the concurrence of the Assessors, finds that the prisoner did kill one Bhurrut by striking him on the head with a stick, "but that by reason of unsoundness of mind he was incapable of knowing that he was doing an act which was wrong or contrary to law, and that therefore" he was not guilty of the offence of murder. The Judge continues: "And the Court directs that the said Ram Ruttun (the prisoner) be acquitted, and that, under the provisions of Section 394 of the Code, the said Ram Ruttun be kept in safe custody in the Dacca Lunatic Asylum pending the orders of the Local Government."

In acting thus, the Sessions Judge was entirely wrong. He proceeded under Sections 393 and 394. But these Sections apply only to the case of a person who, *though in a fit state of mind to make his defence at the time he is tried,* was of unsound mind at the time he did the act which, but for the unsoundness of his mind, would have amounted to a criminal offence. Sections 393 and 394 do not apply to such a case as the present, where the prisoner is found to have been insane, not only at the time he struck the blow which caused death, *but also at the time he was being tried.* The Sessions Judge acted rightly when the case was first before him. Believing the prisoner to be then of unsound mind and incapable of making his defence, he acted under Section 389, and postponed the trial. The course which he ought subsequently to have pursued is that prescribed in Sections 391 and 392.

Section 391 enacts that—"Whenever any investigation or trial of a case is postponed under Section 388 or Section 389 of this Act, the Magistrate or Court of Session, as the case mny be, may at any time resume the investigation or trial, and require the accused person, if detained in custody, to be brought before such Magistrate or Court. * * * Until such investigation or trial is completed, the case shall be considered as pending before the Magistrate or Court of Session," &c. Section 392 says: "If, when the accused person appears, or is again brought before the Magistrate or the Court of Session, as the case may be, it shall appear to such Magistrate or Court that the accused person is in a fit state of mind to make his defence, the investigation shall proceed, or the accused person shall be put on his trial, as the case may require. *If it shall appear that the accused person is still of unsound mind and incapable of making his defence, the Magistrate or Court of Session shall again act according to the provisions of Section 388 or Section 389 of this Act.*" It is quite clear that the matter fell within the last Clause of this Section, and that the Judge should have

acted as therein directed. It appeared to the Court of Session, after the first postponement, that the accused person was still of unsound mind and incapable of making his defence, and thereupon the Judge ought to have proceeded under Section 389.

Even if there be practically little doubt that the prisoner is really insane, the Court ought not to have rested satisfied with the letter of Dr. Greene of the 1st of November. It may be that the certificate of the Doctor that the prisoner *was capable of making his defence* (if that had been its purport) would, under Clause 2 of Section 395, have been evidence of the fact. But that Section does not enact that a mere certificate is to be sufficient evidence of the prisoner being *of unsound mind and incapable of making his defence.* On the 22nd of July Dr. Greene had been examined by the Deputy Magistrate, and had given it as his opinion that the prisoner was perfectly sane and capable of making his defence; and it would have been far more satisfactory if Dr. Greene had been personally examined by the Sessions Judge as to the reasons which induced him to give an opinion on the 1st of November so directly opposed to that given by him in July.

It appears to us that, under the circumstances, there is no alternative for us, sitting as a Court of Revision, but to set aside the whole proceedings as irregular, and to direct the Deputy Magistrate to take up the case *de novo*, and deal with it strictly as the law directs.

If, when the prisoner is again placed before the Magistrate, he shall appear to the Magistrate to be of unsound mind and incapable, in consequence, of making a defence, the Magistrate will act in accordance with the provisions of Sections 388, 390, 391, and 392 of the Criminal Procedure Code.

The 2nd March 1868.

Present:

The Hon'ble A. G. Macpherson and E. Jackson, *Judges.*

False Evidence—Charge—Section 193, Penal Code.

Criminal Appellate Jurisdiction.

Queen *versus* Soonder Mohooree.

Committed by the Joint Magistrate of Balasore, and tried by the Sessions Judge of Cuttack, on a charge of false evidence.

In a case of giving false evidence, the charge should show the particular matter in respect of which the accused is put upon his trial; and only so much of the prisoner's statements ought to be set out as is necessary in order to show the particular false statements relied on by the prosecution.

The mere fact that a person has made a statement which contradicts a previous statement is not itself necessarily sufficient to bring him within Section 193, Penal Code. The circumstances under which, and the intention with which, the particular statement relied on by the prosecution is made, must in each case be considered before it can be held that the offence has been committed.

Macpherson, J.—THE prisoner has been convicted of giving false evidence in the course of a judicial proceeding. The case for the prosecution is that the prisoner, being examined on oath before a Joint Magistrate, on the 10th of August last, made certain statements, and that, on being again examined on oath by the same Magistrate, on the 24th of the same month, he directly contradicted those former statements.

The following is the charge upon which he was committed, and on which he was tried by the Sessions Judge and found guilty:—

"I declare that there is hereby made "against the defendant Soonder Mohooree "the charge that he, either upon the 10th "of August last, by using words to this "effect: 'about five gurrees or so of the night "'I was coming from Noorsahi village "'to my house when I saw Koti Dulai, "'Sobhi Dulai, and some eight or ten other "'people sitting in some jungle at a distance "'of less than an arrow shot from the path "'through Kumari village, and about 1½ "'bow shot from prosecutrix's house. I "'remained there some two hours sitting. "'The men all got up and went to the "'house of the prosecutrix, and afterwards "'they came out again; but who brought "'what, I really do not know. After they "'had been an hour in the house of pro-"'secutrix, these persons came out again to "'where we were; but who brought what "'property, I did not see,' or a portion of "them, or upon the 26th August last, by "using words to this effect: 'I have no "'recollection of what I said in Court upon "'the last occasion. I was drunk, made "'so by the Police Darogah. I did not see "'the defendant Sobhi Dulai upon the "'night of the theft at all. We live some "'distance from my house, and where should "'I see him? I did not see either Koti "'Dulai or Baidul upon the night of the "'robbery. I saw nothing whatever of the "'theft, and was at home from one gurree "'of the night. I did not go to or through

"'Kumari village that night,' or a portion "of them, in the Court of the Joint Magis- "trate of Balasore, intentionally gave false "evidence in a stage of a judicial proceed- "ing, and that he has thereby committed "an offence punishable under Section 193 "of the Penal Code, within the cognizance," &c.

This is no proper charge upon which to put a man on his trial for giving false evidence. In all such cases, the charge should shew on the face of it the particular matter in respect of which the charge is made.* No doubt, it has been decided by a Full Bench of the Court (in the case of Mussamut Zumeerun, 6 W. R. 65, Crim.) that there may be an alternative conviction in a case in which the evidence proves the commission of one of two offences falling within the same Section of the Penal Code, and it is doubtful which of such offences has been proved; but that case does not decide that a man can be put on his trial on a charge containing only one head, but framed in the alternative—nor that a man is in any case properly tried upon a charge which merely sets out two long depositions made by him, which are in some respects contradictory of each other, leaving the person charged to find out for himself in respect of which particular contradiction it is that he is said to have committed the offence of giving false evidence. In the present instance the charge ought to have contained several heads, as provided for in Section 242 of the Criminal Procedure Code; and no more of the prisoner's depositions ought to have been set out, or referred to, than was necessary in order to shew the particular contradictions or false statements in respect to which the offence of giving false evidence was charged.

* *See* Circular Order No. 3 of 1866—5 W. R., p. 2, Crim. Circ.

Under the first head, the accused might have been charged with giving false evidence in the Court of the Joint Magistrate on the 10th August 1867, in saying, "About five gurrees or so of the night "(thereby meaning the night of, &c.) I was "coming from Noorsahi village to my house "when I saw Koti Dulai, Sobhi Dulai, and "others sitting in some jungle at a distance "of less than an arrow shot from the path "through Kumari village: they all went "to the house of the prosecutrix (thereby "meaning, &c.), and afterwards they came "out again."

Then, under each of the other heads he should have been charged in respect of some one particular contradiction or false statement, thus—under the *second head*, in respect of the statement made by him before the Joint Magistrate on the 24th of August 1867, to the effect, "I did not see "Sobhi Dulai on the night of the theft (there- "by meaning the said night of, &c.) at all;" —under the *third head*, in respect of his statement on the 24th August 1867, to the effect, "I did not see Koti Dulai upon "the night of the robbery (thereby meaning "the said night of, &c);"—and under the *fourth head*, in respect of his statement on the 24th August, to the effect, "I was at "home from one gurree of the night (there- "by meaning, &c.)"

These four heads would all have related merely to the contradictions appearing on the face of the prisoner's two depositions. And a charge properly drawn up, on the principle I have indicated, would have called the prisoner's attention to the points relied on against him, and would have enabled him to prepare his defence accordingly.

If it was deemed necessary, a fifth head might have been added with respect to what the prisoner said on his second examination as to his having been intoxicated when first examined. But this would have been a distinct and substantive head of charge, not arising out of any contradiction, but arising out of a statement made by the prisoner, the falseness of which would have had to be proved as a fact by the prosecution. For, for all that appears to the contrary in the first deposition, what he on the second examination said as to his being intoxicated may be perfectly true; and if this part of his deposition was to be set out in the charge at all, it should have appeared as a distinct charge or head by itself.

It by no means necessarily follows that, because a statement made by a person contradicts a previous statement which he has made, he has therefore committed a criminal offence within the meaning of Section 193. The circumstances under which, and the intention with which, the particular statement relied on by the prosecution is made, must in each case be carefully considered before it can be held that the prisoner is guilty. In the present instance, supposing the prisoner to have made the various statements which he is said to have made, I should still hesitate to say he has committed the offence of giving false

evidence when I consider the very peculiar circumstances under which, as appears from the judgment of the Judge, the statements were made. The prisoner and others were arrested on a charge of dacoity. He was offered a conditional pardon under Section 209 of the Criminal Procedure Code, and thereupon made the statements which are recorded in the deposition of the 10th August. After that, the offer of pardon was withdrawn; but the prisoner was subsequently discharged from custody. The Magistrate, however, again had him brought before him as a witness in the matter of same dacoity, and thereupon the prisoner made the statements which are recorded in the deposition of the 24th of August. I should need much clearer and fuller evidence than that which is to be found in the record before me (the mere depositions of the 10th and 24th August, and the statement of the Mohurir of the Joint-Magistrate's Court, that the prisoner did not appear to be intoxicated when examined on the first occasion) before I should be satisfied of the prisoner's guilt under Section 193. Indeed, I have great doubts, whether, under the circumstances, the prisoner ought to have been committed for trial at all by the Joint-Magistrate, the regularity of whose proceedings in the dacoity case, with reference to the prisoner, seems very questionable.

When a person is put upon his trial on such a loose charge as the charge in this case, and when he is convicted in such a loose and general way as the prisoner has been convicted, it is quite impossible to say that he has really had a fair trial, or that he has not been materially prejudiced by the irregular mode in which the trial has been conducted. I would therefore set aside the conviction and sentence, and direct the discharge of the prisoner.

Jackson, J.—I also think that the prisoner should be released. He appears to have been sent in by the police as a prisoner charged with the offence of dacoity. The record of the dacoity case is not before the Court. But the Sessions Judge in his decision states that the prisoner accepted an offer of pardon, and at once gave a deposition entering into details of the crime. This deposition was made before the Deputy Magistrate, and in it the prisoner stated that he had seen certain individuals commit dacoity. A few days after, he was again called up to be further examined regarding the dacoity, and he then stated that he knew nothing about the dacoity; that he had been intoxicated with drugs by the police, and, while in that state, had given his former deposition; and that he had not seen the persons whom he had previously named commit the crime.

There is certainly no proof that he was drunk or drugged when he gave his first deposition. But, looking to all the facts of the case, my impression is, that the prisoner was, as he states, at first induced to make a false statement, but that he took the first opportunity which he obtained afterwards to speak the truth. There is no direct evidence to show which of his statements is false, and which is the true statement; and therefore we ought to take the case in the light most favorable to the prisoner, and that view of the case to my mind reduces his offence to a minimum. I concur in acquitting the prisoner.

I concur also in Mr. Justice Macpherson's remarks as to the loose manner in which this charge of giving false evidence was drawn up. Those special words upon which the accused is said to have committed the offence should be entered in the charge, and those words alone, and not the whole of the accused's depositions.

The 3rd March 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Accused who has absconded—Attachment—Forfeiture of property—Section 184, Code of Criminal Procedure.

Revision of proceedings in the case of Madhasurun Sing, *Petitioner.*

The property of an accused, who had absconded, having been attached after the usual proclamation, and made over to Government, it was held that, under the circumstances of this case, it was not necessary, when the accused returned and applied for the property, that the Government should adduce evidence to prove that the accused had absconded, or that the legal formalities of the proclamation had been duly attended to, as the accused did not deny the attempt to arrest him or the issue of the proclamation.

Jackson, J.—THE property of this accused was attached and subsequently declared to be at the disposal of Government, and portions of it sold after warrant and proclamation for his arrest had been effectually issued. Subsequently, within two years after the attachment, the accused surrendered himself, and adduced evidence to prove that he had been absent at Muttra, and did not

made away with it, Mohendro Haldar's offence will have been committed wholly in the French jurisdiction. I think that the enquiry into the case should be proceeded with, and that Mohendro Haldar should be put upon his defence on the charge of abetting theft or criminal breach of trust, and obtaining possession of stolen property.

Kemp, J.—I concur.

The 10th March 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Criminal intimidation—Sentence.

Criminal Revisional Jurisdiction.

Reference to the High Court by the Sessions Judge of Rajshahye in the case of Goolzar Khan, Petitioner.

An accused, who threatened three witnesses, was convicted and sentenced to four months' imprisonment for the threat to each witness—in all to one year.

It was held that, if a person at one time criminally intimidates three different persons, and each of those persons brings a separate charge against him, the accused may be convicted for an offence as against each person, and be punished separately for each offence. The facts and evidence in this case, however, were considered insufficient to support the sentence, which was reversed as extremely harsh and unjust.

Jackson, J.—THIS prisoner has been convicted of the offence of criminal intimidation—Section 506, Penal Code.

It appears that he had suffered a sentence of whipping for stealing cabbages from the Jail garden. The same evening, when he returned to his house, he used vague threats against the witnesses upon whose evidence he had been convicted of theft. These witnesses complained against him that he had threatened to murder them and burn their houses; and before the Deputy Magistrate, Baboo Tarinee Churn Mitter, the prisoner was put again upon his trial, and again convicted of criminal intimidation. The Deputy Magistrate considered the threat as against each witness to be a separate offence, and on conviction of each offence against the three witnesses passed a sentence of four months' imprisonment. The prisoner, therefore, was, on the whole, sentenced to a year's imprisonment. The prisoner appealed to the Magistrate, and his petition of appeal was rejected as having been presented after one month had elapsed from the date of the sentence. The Sessions Judge, in the course of a visit to the Jail, hearing of these facts from the prisoner, sent for the record of the case; and he then found that the petition of appeal was within time, and the Magistrate had wrongly rejected it. The Sessions Judge has now submitted the record to this Court on the ground that the sentence and conviction of the three distinct offences by the Deputy Magistrate is illegal.

We think that it would have been better if the Sessions Judge had, on finding out that the Magistrate had erroneously rejected the petition of appeal, at once directed the Magistrate to take up and try that appeal. It is probable that, if he had done this, the Magistrate would have, on consideration of the question of fact, released the prisoner from any further imprisonment. It is evident, on the face of these proceedings, that the sentence passed by the Deputy Magistrate is a harsh and unjust sentence, and quite out of proportion to the offence committed, even if it amounted to an offence. We are unable to hold with the Sessions Judge that, if a person at one time criminally intimidates three different people, and each person brings a separate charge against him, there has not been an offence committed as against each person, and that the accused would not be liable to conviction and sentence on each offence. But we think that the evidence on the record is not legally sufficient to support the conviction of the prisoner Goolzar Khan. In the first place, every witness tells a different story as to what the accused did say, and all their accounts differ from the statements of the parties who complained. The examination of the witnesses was conducted by the Deputy Magistrate in a very short and careless style—not as if he was anxious to ascertain what the accused really did say and intend, but as if he had made up his mind on the guilt of the accused. On the evidence as recorded, we think the prisoner's conviction is illegal; and we therefore reverse the Deputy Magistrate's conviction and sentence, and direct that the prisoner be released.

We think the Magistrate is deserving of censure—not so much for the mistake which he made in wrongly rejecting the petition of appeal, as he may have been misled into that error by his subordinates, but for not having read the petition of appeal, and observed on the face of it the extremely harsh and unjust nature of the conviction and sentence, which should have caused him to send for the proceedings in the case, and which would, in all probability, have in the end led to the discovery of his previous error.

The 10th March 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Defamation—Contempt—Public servant—Permission to institute a charge—Section 182 and Chapter X., Penal Code.

Revision of proceedings in the case of Moulvy Abdool Luteef, Petitioner.

A person against whom information has been falsely given with a view to his injury has a right to bring a civil action for damages with or without the consent of the public servant against whom the offence was committed, but he cannot bring a criminal charge under Section 189 or any other Section of Chapter X. of the Penal Code, without the permission of such public servant, the law looking upon the conduct of the person who gives the false information as an offence, not against the individual charged, but against the public servant to whom the false information was given.

To constitute an offence under Section 182, Penal Code, the information given must be information which the informer knew or believed to be false, and it must be proved that he gave it with such knowledge.

Loch, J.—It appears that a man named Ameer Hossein was employed in the Moonsiff's Court as a Mohurir from time to time. On his discharge, the Moonsiff gave him a certificate of good conduct, and Ameer Hossein subsequently obtained a situation in the police. On the 15th August 1857, the petitioner, who was then the Moonsiff of Hazareebaugh, sent a proceeding to the District Superintendent of Police, to the effect that he had heard from certain police-officers that Ameer Hossein had formerly been head constable in the Bhaugulpore Police, and that he had been dismissed for disgraceful conduct which rendered him unfit to be again employed in the police. The Moonsiff further requested that enquiry might be made in regard to Ameer Hossein, and that the certificate he had given him might be returned in order that it might be destroyed. Inquiry was made, and the statement of the Moonsiff was found to be altogether untrue.

Ameer Hossein then brought a charge of defamation against the Moonsiff. The Magistrate held that he had committed an offence under Section 182 of the Penal Code, and sentenced the accused to a fine of Rupees 200.

Two objections have been raised to the proceedings in the Criminal Court and to the sentence passed by the Magistrate :—

1st.—That the proceedings were wholly illegal, having been commenced and carried on without the sanction of the complainant's official superior, the District Superintendent of Police, as required by Section 168 of the Criminal Procedure Code.

2nd.—That, however foolish and unguarded the Moonsiff was in making such a statement, there is nothing in the record to show that he was actuated by any malicious intention to injure the complainant, or that he knew or believed the information to be false.

On the record we find a letter from the District Superintendent of Police, dated 17th September 1867, informing the Magistrate that Ameer Hossein had not obtained his permission to institute the charge. By a subsequent communication he informed the Magistrate that the Assistant Superintendent had given permission, while in charge of the office of District Superintendent. This letter, however, it is urged, is not evidence, and cannot be admitted to prove that permission was granted.

I do not think that the first objection taken by the appellant arises in this case, at least not in the form he has put it. Chapter X. of the Penal Code treats of contempts to the lawful authority of public servants; and, among other offences mentioned in this chapter, it is considered to be an offence against a public servant, if a man, with the object of doing some other person injury, gives to such public servant information which the informant knows or believes to be false, intending thereby to cause such public servant to use his lawful power to the injury of the person informed against. It must be borne in mind that the law does not in this chapter look upon the conduct of the informer as an offence against the individual charged, but as against the public officer to whom the charge is preferred. Then comes the question—how is such an offence to be dealt with? Who is to prosecute? Section 168 of the Criminal Procedure Code lays down the rule, which is, that a charge of this kind shall not be entertained against the party giving false information,

except with the sanction or on the complaint of the public officer to whom the false information was given, and against whom the offence was committed.

If that public officer should be an inferior ministerial officer, his consent to a criminal charge being brought would not be sufficient, but the complainant must get the sanction of the official superior of such public servant to enable him to bring his charge against the informer.

In the present case, what are the facts? The offence specified in Section 182, Chapter X. of Penal Code, was committed against the District Superintendent of Police, to whom the Moonsiff of Hazareebaugh gave false information regarding his subordinate officer Ameer Hossein with the view of obtaining the dismissal of the latter. As the offence was not committed against an inferior ministerial officer, but against the District Superintendent of Police, we have nothing to do with the words in the latter part of Section 168, Criminal Procedure Code, and may leave them out of consideration, as they only tend to complicate a simple question. Ameer Hossein, the party accused, might have brought a civil action for damages against the informer without the consent of the public servant against whom the offence was committed, but he could not bring a criminal charge, under Section 189, or any other Section of Chapter X. of the Penal Code, without the permission of the public servant against whom the offence was committed. His inability to do so did not arise, as supposed by the pleader, from his holding the position of a subordinate officer, for that circumstance did not put him in a worse position than any other party not holding office under Government, but because the law says that no party so accused shall bring a criminal charge against the informer without the sanction of the public servant to whom the information has been given, for it is against such public servant that the offence was committed. Was, then, permission given to Ameer Hossein to bring the criminal charge? The District Superintendent of Police gave no permission, but in a letter from him to the Magistrate he says that the Assistant Superintendent of Police, while in charge of the office of District Superintendent, gave the permission. This letter cannot, as it appears to me, be treated as evidence of permission. It might be sufficient warrant to the Magistrate to admit the charge; but, when the fact of permission has been distinctly challenged by the defendant, it was for the complainant to prove that such permission was given. Now, though the Assistant Superintendent was examined by the Magistrate, not a question on this point was put to him or to the complainant, and the letter from the District Superintendent of Police was not received till after the case had been gone into, so that the Magistrate had no authority for admitting the complaint, nor can that letter, in my opinion, be used as evidence of such permission.

With regard to the second point, I think, looking at what is stated in the complainant's deposition, that the Moonsiff was instigated by malice when he made this representation to the District Superintendent of Police against Ameer Hossein, though there is nothing to prove that information to be false.

The Moonsiff has acted throughout in a manner most unbecoming his position as a judicial officer. Ameer Hossein appears to have presented a petition to the Deputy Commissioner, complaining of certain acts done by the Moonsiff in his official capacity. While this case was pending, the Moonsiff, taking advantage of some gossip that he heard from officers of the police force at Hazareebaugh, and without taking the trouble to inquire whether there was any foundation for the statements he heard from them, sent to the District Superintendent of Police a proceeding written in his official capacity to the effect that Ameer Hossein had, he heard, been dismissed from the Bhaugulpore Police Force for gross misconduct. Though I do not concur with the Lower Court in convicting the Moonsiff of the offence specified in Section 182 of the Penal Code, I must record my opinion that I think his conduct highly reprehensible; and, had he not been removed from his appointment on other grounds, I should have thought it necessary to bring his conduct in this case to the notice of the High Court.

The order of the Lower Court imposing a fine on the appellant of Rupees 200 will be reversed.

Hobhouse, J.—The facts of this case are as follows:—

One Ameer Hossein was at one time engaged as a Mohurir in the Court of the Moonsiff of Hazareebaugh, the petitioner Moulvy Abdool Luteef.

When this Ameer Hossein quitted his post as Mohurir, the Moonsiff gave him testi-

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monials of good character of the highest description ; and on the strength of them Ameer Hossein was appointed an Inspector of Police in the Hazareebaugh District.

Subsequently, however, this Ameer Hossein had a difference with the Moonsiff, and made a complaint against him before the Deputy Commissioner of Hazareebaugh.

Thereupon the Moonsiff, as Moonsiff, sent a robookaree out of his Court to the address of the Superintendent of Police of Hazareebaugh, stating that he had heard from two certain persons, whom he named, that Ameer Hossein had been dismissed from the Police Force in the district of Bhaugulpore for misconduct, and requesting that, after enquiry made, the District Superintendent of Police would re-call the testimonials that he (the Moonsiff) had given to Ameer Hossein, and would also pass any other orders that he thought fit.

The District Superintendent held an enquiry into the conduct of Ameer Hossein, and found the misconduct laid against him to have no foundation in fact, and thereupon Ameer Hossein charged the Moonsiff with an offence under Section 182, Indian Penal Code ; and the Courts below have found the Moonsiff guilty, and have sentenced him to pay a fine of Rupees 200.

The Moonsiff now comes before us under Section 404, Code of Criminal Procedure, and asks us to quash the above conviction, *first*, because the complaint was entertained without the authority of the District Superintendent of Police of Hazareebaugh ; and, *secondly*, because the conviction is otherwise also bad in law.

I think that on both points the petitioner must succeed.

I observe on the first point that there is nothing on the record to show that, before the investigation was commenced, or even at any time during its pendency, it had the sanction (such formal sanction as the law requires) of the District Superintendent of Police, the officer whose sanction was under Section 168 necessary.

And, on the second point, I think that there was no offence committed within the meaning of Section 182.

To constitute an offence under Section 182, the information given should have been "information" which the Moonsiff knew or "believed to be false," and it should have been proved that he gave it with such knowledge.

It is clear that there is no evidence of this knowledge or belief, and that, on the contrary, though the Moonsiff acted on the merest hearsay, and, therefore, with a haste and indiscretion evidencing him to be unfit for the office of a Judge, yet that he did not report to the District Superintendent against Ameer Hossein any thing more than had been told to him deliberately by others. I question, too, whether the robookaree of the Moonsiff was not a privileged communication, and I doubt, at least, if it is politic that such communication from one public officer in his administrative capacity to another should, even if they can legally, be made the foundation for a criminal charge against such officer.

I agree, therefore, with my brother Loch, that this conviction must be set aside, and the fine refunded to the Moonsiff.

The 14th March 1868.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Cumulative sentences—Charge—Sections 234 and 237, Code of Criminal Procedure—Sections 148 and 324, Penal Code.

Criminal Appellate Jurisdiction.

Queen *versus* Durzoolla and others.

Where prisoners are charged both with rioting, being armed with deadly weapons, and with causing hurt by shooting, and their conviction of the latter offence rests solely on the fact of their belonging to a party by one of whom (not one of the prisoners) fire-arms were used, it is wrong to pass a cumulative sentence, and to punish the prisoner *both* for the rioting and for the causing hurt. The punishment should be for either one or other of those offences.

A charge should be so framed as to refer to the Section of the Penal Code under which the offence charged is punishable, as required by Sections 234 and 237 of the Code of Criminal Procedure.

Where there is a riot and fight between two factions, the members of each party should be committed for trial *separately*, and not all together.

Seton-Karr, J.—In these three cases, fourteen people have been convicted, and they appeal in three separate batches.

The case is correctly described by the Sessions Judge as one in which a dispute existed about land between Sheedam Meah, the zemindar or talookdar, and Chundro Coomar, an ousut talookdar, and in which the parties had a fight, in which guns were discharged on both sides. Several persons were wounded, and one Sona Khan, said to be a ryot of Sheedam and a servant of Chundro Coomar, has disappeared, and has not since been heard of.

Seven people have been convicted, and appeal on the side of Chundro Coomar; and four prisoners in one batch and three in another appeal separately, being of the party of Sheedam Meah. There seems to have been some difficulty in ascertaining which party fired the first shot. But the Sessions Judge is of opinion that the party of Chundro Coomar went armed from the kutchery and began the riot, and that the other party, nothing loath, and apparently ready for a fight, as disputes had been going on previously, responded in a similar manner.

There can be no doubt whatever that a very grave offence was committed in open daylight, and that Sona Khan has since disappeared; and the only question in appeal is, whether all the parties convicted have been properly identified, and whether the amount of punishment in each case is legal and proper.

I would take first the party of Chundro Coomar. The appellants are Nitianund, Roopkhan, Omedoollah, Naimooddeen, Donai, Salemuddin, and Jan Mahomed. It is distinctly sworn to by some of the witnesses that Nitianund, Omedoollah, and Roopkhan on Chundro Coomar's side, had guns in their hands, and that shots were fired. The pleader for these appellants urges that the identification is neither complete nor sufficient. But on looking carefully at the deposition, I am unable to see that there is any defect of identification as regards these prisoners. They have been found guilty of rioting armed with deadly weapons, and also of grievous hurt, and have been punished with three years for the first offence, and two years for the second. I think it would have been better if the Sessions Judge had punished them under one head; but, as he has not exceeded the maximum punishment which he could give under Section 326, and as the offence is one which deserves severe punishment, looking to Section 426 of the Criminal Procedure Code, I see no reason for any interference in the case of these prisoners, and their appeal is consequently rejected.

I will take next the appeal of the four prisoners on the side of Sheedam—namely, Durbaree, Durastoollah, Roheemoollah, and Manoollah. It is distinctly sworn to that Durbaree, Roheemoollah, and Sona, who has disappeared, had guns in their hands. Durastoollah and Manoollah are merely spoken of as being present and taking part in the riot on the side of Sheedam. These prisoners have been found guilty under Section 148, and of causing hurt (not grievous hurt) under Section 324, and have been punished with three years' imprisonment for the first offence, and two years' for the second offence. I have great doubts whether this punishment is strictly correct, and whether, looking to the facts proved, and to the law, these four prisoners could have had, under either Section, a heavier punishment than three years' rigorous imprisonment. I do not think that it can be properly said that the prisoners committed two offences, although, no doubt, they might have been charged with either offence, and been found guilty and punished under either head. I think that the punishment that should have been awarded to them should have been three years' rigorous imprisonment, and I refer their case accordingly to the opinion of a second Judge.

Lastly, there remains the case of Monohur, Chokur, Malkhan, and Shaheerooddeen, also found to be on the side of Sheedam Meah.

It is objected against their conviction that several witnesses do not mention their names at all; that none of them say that they were armed with guns, or that they took any active part in the riot; and that complete dependence ought not to be placed on the identification of them by those witnesses who speak to their presence.

On reading the evidence, I take it to show that these three appellants, although not mentioned by all the witnesses, are yet shown to have gone out on the side of Sheedam Meah, and to have lent their countenance and aid to the others who were carrying guns. This being so, I find it difficult to get over the evidence of their presence, and, consequently, of their taking part in the riot; and I reject their appeal on the

facts. But I think their sentence should be reduced to three years' rigorous imprisonment.

Macpherson, J.—The prisoners, who are appellants in the appeals numbered 18 and 19 respectively (which alone are now before me), although they have presented two separate petitions of appeal, were all tried together on a charge of rioting, being armed with deadly weapons, and of causing hurt to one Nitianund by means of instruments for shooting. They have all been convicted both of rioting and causing hurt, and have been sentenced to three years' imprisonment each for the rioting, and to an additional period of one year's imprisonment for the hurt. Against this conviction and sentence they appeal.

Appellants in Appeal No. 19.: Durastoollah, Durbaree, Roheemoollah, Manoollah,

Appellants in Appeal No. 18.: Monohur Chokur, Malkhan, Shaheerooddeen,

I think the conviction is right, inasmuch as there is evidence to prove (as it seems to me quite satisfactorily) that the prisoners were present and took part in the riot, and inasmuch as there is some evidence (although of a less satisfactory kind) that the man Nitianund received a slight gun-shot wound in the course of the riot. But I think that the cumulative sentence is wrong, and that the proper punishment to inflict was either the punishment for rioting, being armed with deadly weapons, or the punishment for causing hurt by shooting—not the punishment for both these offences. I would reduce the sentence to one of three years' rigorous imprisonment on each prisoner, being the maximum of imprisonment which can be awarded under either Section 148 or under Section 324.

I may add a further reason why I think the sentence on these prisoners should be reduced. It appears from the record that another set of prisoners (appellants in the appeal number 27) were tried along with the appellants in Nos. 18 and 19 on the same charge of riot, but (at the same time) on a separate charge of causing grievous hurt. These other prisoners have been convicted and been sentenced, like the appellants before me, to two periods of imprisonment for three years and two years respectively. These prisoners were of the party who attacked the appellants; they were clearly the aggressors, and commenced the attack (whether the appellants were rightly on the disputed ground or not). Moreover, Sona Khan, who belonged to the party of the appellants, was shot and carried off by the other party, and has never since been seen or accounted for in any way. Under these circumstances, the offence of the other prisoners seems to me much more heinous than that of these appellants; and, if the other prisoners are sufficiently punished by a sentence of imprisonment for five years, these appellants will be sufficiently punished by imprisonment for three.

I have to remark that the charge in this case was not framed as directed by Sections 234 and 239 of the Criminal Procedure Code, inasmuch as it does not refer to any one of the Sections of the Penal Code under which the offence charged was punishable.

Further, these appellants ought not to have been put on their trial along with the prisoners belonging to the opposite party. In the case of the Queen *versus* Sheikh Baza (8 W. R., p. 47, Criminal), it was held by a Full Bench that, when there has been a riot and fight between two factions (as in the present instance), the proper course is that the members of each party should be committed for trial *separately*, and that it is wrong to commit the members of both parties for trial all together, upon joint charges, as if they had had one common object.

The sentence upon each of the appellants will be reduced to three years' rigorous imprisonment in the whole.

The 23rd March 1868.

Present:

The Hon'ble G. Loch and C. Hobhouse, *Judges.*

Special Law—Sessions Judge—Magistrate—Section 29, Act V. of 1861.

Criminal Revisional Jurisdiction.

Bhoobun Singh, *Prisoner.*

Where an accused was charged before the Sessions Judge under both Section 409, Penal Code, and under the Special Law, Section 29, Act V. of 1862, and was acquitted under the former Section, it was held that the Sessions Judge could not convict under the latter law, as the Magistrate alone has jurisdiction to convict under that law.

Hobhouse, J.—THE facts of this case are as follow :—

The prisoners were police-officers, and were in this capacity entrusted with certain property for conveyance to a certain place.

On being called on to deliver up that property at that place, a part of it—apparently a valuable part—was found missing, and, on being questioned, each prisoner accused the other, and all gave a very unsatisfactory account of their movements whilst in charge of the property, and did not even attempt to account for its disappearance.

The prisoners were then charged under Section 409, Indian Penal Code, with criminal breach of trust as public servants, and under Section 29, Act V. of 1861, with neglect of duty, and were committed to the Sessions.

The Sessions Judge acquitted them of any offence under Section 404, Indian Penal Code, but sentenced them to three months' imprisonment under Section 29, Act V. of 1861.

I say nothing of the acquittal under Section 409, but I am of opinion that the conviction under Section 29, Act V. of 1861, must be set aside, as I think that it is the Magistrate, as defined in Sections 1 and 29, Act V. of 1861, who alone has jurisdiction to punish under Section 29.

Loch, J.—I concur with my colleague in considering that the Sessions Judge had no authority to sentence the prisoner under Act V. of 1861, Section 29, for the offence was not punishable under the Penal Code, but by a special enactment, which gave authority to the Magistrate to punish offences of this kind.

The 24th March 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Surety—Bail-bond—Forfeiture.

Criminal Revisional Jurisdiction.

Kurremuddeen and another, *Petitioners.*

A bail-bond by which the sureties bind themselves to be responsible for the appearance of the accused during the preliminary investigation cannot be forfeited if the accused abscond after the preliminary enquiry and during the trial at the Sessions Court.

Kemp, J.—THE bail-bond has been submitted for our inspection. It is addressed to the Magistrate alone. The terms of it are to the effect that the sureties will be responsible for the attendance of the accused before the Magistrate during the enquiry before that officer. It is clear that a preliminary enquiry was made by the Magistrate during that enquiry, and up to its close the accused was present: he also appeared before the Court of Session, and took his trial, but absconded before sentence was passed.

The bond does not condition that the sureties were to be responsible for the accused's attendance after the preliminary enquiry before the Magistrate was closed, and for the appearance of the accused in the Court of Session. We are, therefore, of opinion that the recognizance cannot be legally held to be forfeited.

The amount deposited in Court must be refunded to the petitioner.

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The 26th March 1868.

Present:

The Hon'ble F. B. Kemp, E. Jackson, and Dwarkanath Mitter, *Judges.*

Criminal breach of trust—Partner—Master and servant.

Revision of Proceedings in the case of Lall Chand Roy, Petitioner.

The accused was convicted of criminal breach of trust in respect of the value of goods which had been entrusted to him to sell. It was urged before the High Court that the conviction could not be sustained, as the accused was a partner with the prosecutor.

HELD by *Jackson, J.*, that the finding of the Magistrate and Sessions Judge on the evidence was to the effect that the prisoner was not a partner but a servant; that such finding could not be interfered with by the High Court as a Court of Revision, unless there was a mistake in law; that the finding was correct in law; that the defence of the prisoner could not be taken to mean to say that he was a partner, but merely that he claimed a small share in the profits; and that such claim did not make him a partner, an agent's remuneration being a share in the profits not constituting the agent a partner.

HELD by *Kemp* and *Mitter, JJ.* (releasing the prisoner) that, though the allowance of a portion of the profits or goods does not destroy the relation of master and servant, the accused in this case distinctly pleaded he was a partner, and not only that he was entitled to a share in the profits; that the Lower Courts did not specifically decide that the accused was a servant; and that the prosecutor's remedy was a civil suit for an account.

Jackson, J.—THIS case has come before us on an application made by the prisoner's vakeel, under Section 434 of the Criminal Procedure Code. The prisoner has been sentenced to fine and imprisonment for the offence of criminal breach of trust. It was argued at the first hearing of the application that the facts found by the Lower Court did not amount to the offence which it had been held was proved against the prisoner, because the prisoner was a partner with the prosecutor.

The deposition of Brindabun Chunder Roy, the prosecutor, is as follows: "On the 21st Assar, I sent Lall Chand Roy, my servant, to Bhairoh Bazar, with 75 bags of sugar and 160 maunds or thereabouts of *suparee*, valued at Rupees 1,670, to be sold on my account, and the proceeds remitted in cash. He has remitted Rupees 250 in cash and Rupees 292 in goods. A balance of Rupees 872 is due, which defendant says he has not got." The prisoner in his defence says: "Plaintiff gave me 75 bundles of sugar and 160 maunds of *suparee* valued at Rupees 1,670. Of the price I remitted Rupees 256 in cash, and purchased grain of various kinds for Rupees 214. I have since paid the entire amount. The charge is made because I claim to have a share of one anna in the profits."

Of the witnesses for the prosecution, witness No. 1, Gridhar Lala, deposes: "Plaintiff gave prisoner 1,670 rupees worth of sugar and *suparee* to be taken to Bharioh Bazar. When prisoner returned, he gave over in money and goods Rupees 700 odd." Witness No. 2, Ramdyal Pyne, deposes that "the 1,670 rupees worth of sugar and *suparee* were despatched with Lall Chand Roy to Bhairoh Bazar to be sold, and the proceeds remitted by hoondee. Defendant remitted in cash and in grain about Rupees 798, leaving a balance of Rupees 872. Lall Chand said he had brought the money, but could not tell what had become of it. Lall Chand is plaintiff's servant." Witness No. 3, Alikchunder Dutt, deposes: "On the 3rd Kartick, having gone to Brindabun Roy's house, I found him and Lall Chand settling accounts. The former demanded Rupees 872 from the latter, who said he had brought the money in his boat, but could not tell what had become

of it. Witness No. 4, Issur Chunder Sircar, deposes: "On the 25th Assar plaintiff made over 1,670 rupees worth of sugar and *suparee* to defendant to sell in Bhairoh Bazar, and to remit the proceeds in hoondee. On the 2nd Kartick defendant returned, and plaintiff asked him for his accounts. He said he had remitted Rupees 798 in cash, and that he had brought the rest in his boat, and could not say what had become of it." Witness No. 5, Goluck Chunder Shah, deposed that "the plaintiff gave defendant 1,670 rupees worth of sugar to sell and remit the proceeds. Defendant returned on the 1st Kartick, and said that he had remitted Rupees 798, and that the rest had been stolen from his boat. He made off on the night of the 2nd."

Of the witnesses for the defence, witness No. 1, Bykunt Churn Doss, deposes: "In Assin last, accused gave plaintiff Rupees 1,047 in silver, and Rupees 135 in grain. I heard of the payment. Accused is partner of plaintiff. Plaintiff said so always. I saw the money paid. The payment was made at *Juttha*, where I had gone on business. It was defendant who stated the amount. Plaintiff said nothing." Witness No. 2, Chunder Madhub Ghose, deposes: "I saw defendant give plaintiff Rupees 1,047 in cash, and Rupees 135 in grain. I know that defendant is a partner, because I and he load in the same mart. The payment was at Brindabun. I had gone there, hearing there was a row between plaintiff and defendant." Witness No. 3, Komul Kisto Samaldar, deposes: "Defendant paid plaintiff Rupees 1,045 in silver, and Rupees 135 in grain at the Lukhee-poojah in Assin. They are partners. Issur Chunder Shaha is my relation. That is how I happened to be on the spot." Witness No. 4, Petumber, deposes that he also saw the payments. "Accused and complainant were partners. On that day I heard Brindabun say that Lall Chand was his partner."

The Magistrate upon this evidence records a long judgment. The material parts are these: "Admitting for the sake of argument that the partnership is a fact, I cannot admit that the argument for the defence is correct, which asserts that in such a case the Criminal Courts have no jurisdiction. * * * In this instance, the case is stronger, for whereas accused only pretends to a one-anna share in the partnership the sum said to have been misappropriated amounts to Rupees 872, whereas his sixteenth of the whole consignment amounts to about Rupees 100. Even were he at liberty to help himself, this is all he would be entitled to. It may be remarked that this sum of Rupees 100 is very suspiciously near the Rupees 100 stated by the complainant to be the annual pay of the accused. Payment by percentage does not transfer a servant into a partner. * * * I hold that, if the evidence for the prosecution be worthy of credit, and that for the defence be not so, the offence of criminal misappropriation stands proved against the accused." The Magistrate then carefully goes through each witness's deposition both for the prosecution and the defence, and, after giving his reasons for crediting the witnesses for the prosecution, and disbelieving those for the defence, decides: "I can't think the payment proved." He adds, admitting it proved, accused is not in his opinion entitled to an acquittal, and he goes on to give his reasons for this, and ends by finding the prisoner guilty, and sentencing him to one year's rigorous imprisonment, and a fine of Rupees 872, or in default further imprisonment and a fine of Rupees 872, or in default further imprisonment for eight months.

The case was then taken before the Sessions Judge on appeal. He states: "With-

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out the admission made by the appellant of his having received certain property from the plaintiff, I should have looked upon the truth of the charge with suspicion. I observe that no enquiry has been made by the Magistrate, as to the connection which existed between the parties, whether he was a partner as alleged, and claimed a share, or whether he was servant. The admission, however, clears up doubts upon this point; and it cannot be disputed that the appellant was entrusted with property to the amount of Rupees 1,670. The only question, therefore, calling for a decision is whether he has re-paid the money to the plaintiff as the value realized by the sale of the property with which he had been entrusted, or had misappropriated it. I consider it immaterial whether he was acting in the capacity of a servant or a partner. The evidence, it may be noticed, tends to show he was acting in the capacity of a servant." The Sessions Judge then goes on to allude to the evidence for the prosecution and for the defence. He says he considers that the Magistrate was right in his finding upon the evidence; and, though discrepancies exist in the evidence of the plaintiff, they are not such as to vitiate the truth of the charges, and are certainly not so detrimental as those brought forward in the evidence for the accused:" and the Sessions Judge concludes: "On the whole, I am of opinion that the charge against the appellant was clearly proved, and that he was justly convicted."

The question raised before us is on a point of law. We have no authority in revising the proceedings of the Lower Court in this case to interfere, except there has been some mistake in law. It is said that both Courts held that it was immaterial to find whether the accused was a servant of a partner of the plaintiff, and that, if he was a partner, he cannot be held guilty of criminal misappropriation of what, in fact, belonged to himself. In my opinion, both the Magistrate and the Sessions Judge, though they have held that the accused was guilty, whether he was a servant or a partner, have at the same time distinctly found that he was not a partner, but a servant. Both Courts, observing the discrepancies in the depositions of the witnesses on the point, still held that the defence of the accused of itself was evidence that he was a servant. If that decision is not founded on any mistake in law, it is final, and not open to revision. But it has been argued that the accused's statement does not admit that he was a servant, if it is taken as a whole. I agree with the Lower Courts that, even taking the whole of it, the accused admits that he was bound to account to the plaintiff for the consignment which was made over to him, but that he claimed a one-anna share of the profits. This claim of his, though it may not make him a servant, does not, to my mind, make him a partner: and the accused did not even allege that he was a partner. An agent's remuneration being a share in the profits does not thereby constitute the agent a partner. The accused does not anywhere say that he is a partner; and we never hear of this defence until the witnesses for the accused are examined. The statement of the accused is that he has not misappropriated the plaintiff's money, but that he has accounted to him for the whole of it; and his witnesses also depose that he did account to the plaintiff as alleged. The whole question before the Lower Court was one of fact whether the accused came back with the false story that he did not know what had become of the money. The decision of the Magistrate and the Sessions Judge on this question of fact against accused is final. I cannot see that it is in any way vitiated by being wrong in law. I am rather inclined to think that there might be circumstances

of any other punishment. It is as follows: "Whoever commits any of the following "offences may be punished with whipping "in lieu of any punishment to which he "may for such offence be liable under the "Indian Penal Code, that is to say," &c. The effect of these words I understand to be that the Sections mentioned in this 2nd Section are to be read respectively as if words to this effect had been added to each—"or "in lieu of such punishment (or punishments). "the offender may be punished with whip-"ping."

It is argued that, as this 2nd Section says that whipping is to be in lieu of any punishment to which the convict may be liable under the Indian Penal Code. it is clear that the whipping itself cannot be under the Indian Penal Code. But it appears to me that "any punishment" must be read as "any *other* punishment:" and that this was the intention of the framers of the Act is shown by Section 3, in which, under precisely similar circumstances, the word "other" occurs. Moreover, I have said that I consider that, by reason of the preamble and the first Section, all whipping under Act VI. of 1864 is to be deemed to be whipping under the Penal Code; and, if I am right in that opinion, then the whipping under Section 4, as well as under the other Sections of the Act, must be deemed to be under the provisions of the Penal Code.

On the whole, I think that whipping is one of the penalties prescribed by the Penal Code within the meaning of Section 46 of the Criminal Procedure Code.

Then is it a punishment which a Magistrate is competent to inflict? At first I had doubts on this point, the powers of a Magistrate being defined in Section 22, and whipping not being one of the punishments there mentioned. But it appears from Section 8 of Act VI. of 1864 that a Magistrate of a District has the power to punish with whipping: for, unless a Magistrate was intended to have that power, it would have been quite unnecessary to enact that "no sentence of "whipping shall be passed by any officer in-"ferior to a Subordinate Magistrate of the "first class, unless he shall have been express "ly empowered by the Local Government to "pass sentences of whipping." The exclusion of inferior Magistrates from the exercise of the power would seem to import the possession of the power by superior Magistrates.

As a Magistrate may pass a sentence of whipping, and as a sentence of whipping under Act VI. of 1864 is to be deemed a sentence passed under the provisions of the Penal Code, I think further that whipping is a punishment which a Magistrate is (in the words of Section 46), "by his ordinary jurisdiction, competent to inflict;" that is to say, I think that a Magistrate is, by his ordinary jurisdiction, competent to sentence, not only to the punishments mentioned in Section 22 of the Criminal Procedure Code, but also to whipping, either as the only punishment, or as an additional punishment, as provided in Act VI. of 1864.

What, then, is the greatest amount of punishment which a Magistrate can award without exceeding "twice the extent of "punishment which he is, by his ordinary "jurisdiction, competent to inflict"?

There is no doubt that in cases of conviction, at the same time, of two or more offences punishable by imprisonment and fine, the Magistrate has power to sentence, on the whole, to four years' imprisonment and fine, with one year's additional imprisonment if the fines are not paid. But it is more difficult to say what is the limit in cases in which whipping has been awarded.

According to the literal interpretation of Section 46 of the Criminal Procedure Code, a Magistrate (in the view I take of his powers) might sentence, upon several convictions at the same time, to four years' imprisonment with fine, and another year's imprisonment in lieu of payment, and two whippings; for Section 46 says only that "the punishment shall not in the aggregrate "exceed twice the extent of punishment "which such Magistrate is by his ordinary "jurisdiction competent to inflict." But these words of Section 46 must be read with the provisions of Act VI. of 1864; and under that Act it appears to me that in no case can more than one sentence of whipping be passed. Such a thing as double whipping is not contemplated by Act VI. of 1864. This appears to me from the general tenor of the whole Act, and is shewn more especially by the 9th 10th, and 11th Sections, which provide that, when whipping is awarded in addition to imprisonment, *the whipping shall be inflicted immediately on the expiry of fifteen days* from the date of the sentence, or (in the case of an appeal having been made) immediately on the receipt of the order of the High Court confirming the sentence—that "*in no case*, if the "cat-o-nine-tails be the instrument employed, "*shall the punishment of whipping exceed*

"*one hundred and fifty lashes, or, if the* "*rattan be employed, shall the punishment* "*exceed thirty stripes*"—and that "no sen- "tence shall be executed by instalments."

With these provisions in the Act, and in the absence of any indication of an intention that a man should be liable to be sentenced at one time to more than one whipping, I am of opinion that under Section 46 only one whipping can be awarded.

But, although I think a Magistrate would be acting within the letter of the law in passing a sentence, amounting in all to four years' imprisonment with whipping, and a fine of 1,000 rupees, or an additional period of imprisonment for one year, in my opinion he would not exercise his discretion wisely in passing such a sentence on any person who had not previously been convicted of the like offence. For it may be very much doubted whether it was the intention of the Legislature to authorize whipping in the case of a second offence, except when the ordinary punishment for a first offence had been tried and failed; or in the case of a first offence, if whipping was to be accompanied by imprisonment under a simultaneous sentence. The punishment of whipping for a first offence is one which recommends itself, not only from its deterrent qualities, but from this that it does not expose the offender to the risk of contamination and demoralization which he necessarily incurs if sent to prison. The latter object is defeated, if one who has not previously been convicted (using the term in the sense of being convicted before the commission of the offence for which he is about to be punished) is sentenced to imprisonment as well as whipping.

The Whipping Act is one in the construction and carrying out of which very many difficult questions arise. And it is impossible to warn Magistrates and other officers sufficiently strongly to be cautious and moderate in acting under it. In no case can a Magistrate be justified in passing a sentence of whipping if he has any doubt as to his legal competency to do so.

The answer which I would give to the question put to us is: A Magistrate is competent to sentence a person convicted, at one time, of two or more offences punishable under the same or different Sections of the Indian Penal Code, to imprisonment for four years with whipping, and to fine amounting to 1,000 rupees, or, in default of payment, to a further period of imprisonment not exceeding one year. This would be the maximum aggregate punishment which any Magistrate could pass under Section 46 of the Criminal Procedure Code.

Phear, J.—The punishment of whipping is given by Act VI. of 1864. It seems to me, upon consideration of the preamble and the words of the 1st Section, that the Legislature in passing that Act intended to make the punishment of whipping to be read thenceforth as if it had been included among the punishments prescribed by the Indian Penal Code.

The preamble is in these words: "Whereas it is expedient that in certain cases offenders should be liable, under the provisions of the Indian Penal Code, to the punishment of whipping; it is enacted as follows:"

Section 1 enacted that, "in addition to the punishments described in Section 53 of the Indian Penal Code, offenders are also liable to whipping under the provisions of the said Code."

Section 8 of the same Act also seems to me by implication to give power to a Magistrate to pass sentences of whipping. No sentence of whipping, it says, shall be passed by any officer inferior to a Magistrate of the first class, unless he shall have been expressly empowered by the Local Government to pass sentences of whipping. I cannot escape from the conclusion that Act VI. of 1864 intends to insert in the Penal Code, among the punishments therein prescribed, the punishment of whipping, and also to empower a Magistrate to pass sentence of whipping.

But this Act does not authorize a Magistrate to pass, simultaneously, several sentences which shall take effect in succession to one another. That provision is given solely by the Code of Criminal Procedure.

The 46th Section of that Act says: "When a person shall be convicted at one time of two or more offences punishable under the same or different Sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by the said Code, which such Court is competent to inflict; such penalties, when consisting of imprisonment, to commence the one after the expiration of the other. It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the pun-

ishment which such Court is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court. Provided that in no case shall the person be sentenced to imprisonment for a longer period than fourteen years; and provided also that, if the case be tried by a Magistrate, the punishment shall not in the aggregate exceed twice the extent of punishment which such Magistrate is by his ordinary jurisdiction competent to inflict."

I think that a Magistrate has no power to inflict a succession of punishments except under the provisions of this Section 46 of the Code of Criminal Procedure. It is, therefore, necessary to consider what are the sentences which that Section authorizes a Magistrate to pass, to take effect in succession.

It is clear that, unless this Act has been altered by subsequent legislation, the different penalties of the Indian Penal Code to which this Section refers are the penalties prescribed by that Code at the time that the Criminal Procedure Act was passed. It is also clear that the proviso at the end of the Section, unless similarly altered by subsequent legislation, means now, as it meant when it was passed, in referring to the ordinary jurisdiction of the Magistrate, the ordinary jurisdiction such as it then existed.

I believe there is no contention but that the ordinary jurisdiction of the Magistrate, as it then existed, is that which is mentioned in Section 22 of the Code of Criminal Procedure, *viz.*, that he may inflict imprisonment up to a term of 2 years with a fine commutable to imprisonment for 6 months; so that it appears to me, unless Section 46 of this Act has been altered by subsequent legislation, the Magistrate, while he has power of passing sentences simultaneously to take effect in succession the one to the other, can only, in such accumulated sentences, give the penalties which were prescribed by the Penal Code, as it existed at the time of the passing of the Criminal Procedure Act; and that he was then limited in the aggregate to a term of 4 years' imprisonment, with two fines commutable into 6 months' imprisonment each, or 12 months in the whole. Now, it is not suggested that Section 46 of the Criminal Procedure has been changed by the Legislature otherwise than by the passing of the Whipping Act, as it is termed, or Act VI. of 1864. But I am unable to find anything in Act VI. which goes the length of effecting such a change. When the Legislature by that Act inserted the punishment of whipping into the Penal Code for the general purposes of that Code, it did not, as it seems to me, intend to alter the meaning or scope of any other existing Act of Legislature. No doubt this Act gave powers which no previous Act gave, but, excepting the Penal Code, it did not make any other Act utter language which it did not utter before. If it had, when passing it, intended to do this, it could have done so expressly. It clearly, to my mind, has not expressly done it, and I do not think that there is any such necessity arising out of the provisions of Act VI. of 1864, remembering that it is a penal Act, as to make us come to the conclusion that such a change was effected by implication.

On the whole, therefore, it seems to me that, if a Magistrate exercises the powers which are given to him by Section 46 of the Criminal Procedure Code, and passes an accumulated sentence, he must confine himself to the penalties prescribed by the Penal Code, before it was altered by Act VI. of 1864. He cannot include in that sentence the punishment of whipping, and he cannot exceed in total twice the extent of his ordinary jurisdiction, as defined by Section 22 of the Criminal Procedure Code.

Jackson, J.—I have arrived at the same conclusion as my brother Macpherson, and generally for the same reasons.

It is remarkable enough that Act VI. of 1864, which legalizes the punishment of whipping, is expressly designed by its terms to become, I may say, a portion of the Indian Penal Code, but contains no reference whatever, from first to last, to the Code of Criminal Procedure. If the result of that omission were that neither the Criminal Procedure Code, nor any other Act, except the Indian Penal Code, were altered or affected by the provisions of Act VI. of 1864, it seems to me that the result would be that no officer or any Court whatever would be competent to inflict the punishment of whipping: because, if Section 22 of the Criminal Procedure Code were unaffected by the terms of Act VI. of 1864, the several Courts and officers therein enumerated would still be bound by the limits of punishment laid down in that Section, and would have no authority to go beyond those limits by awarding a sentence of whipping.

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But, looking to the terms of Section 8 of Act VI. of 1864, it appears to me that the Legislature intended to invest, and did invest, all officers not inferior to a subordinate Magistrate of the first class, with the power of passing sentences of whipping, and that it reserved to the Local Government the power of authorizing inferior Magistrates also to exercise the like power. The result, therefore, of the amalgamation, so to say, of the Whipping Act with the Indian Penal Code, and of the operation of that Act upon the Code of Criminal Procedure, will be, in my opinion, to insert in Section 53 the punishment of whipping as one of those to which offenders are liable, under the provisions of the Code; to insert in the several Sections of the Penal Code enumerated in Sections 2, 3, and 4 of the Whipping Act, the punishment of whipping as a punishment to which a person committing the offences described in the respective Sections will be liable, either in lieu of another punishment, or in addition to the other punishment, as the case may be; also to add to Section 22 of the Code of Criminal Procedure the punishment of whipping as included within the ordinary jurisdiction of the Court of Session, of the Magistrate of the District, and of subordinate Magistrates of the first class without condition, and subordinate Magistrates of the second class, when expressly empowered by the Local Government, as punishments each was competent to inflict; and, lastly, to introduce into the Schedule annexed to the Code of Criminal Procedure, in the column of punishments, that of whipping in the several cases and under the respective conditions which are prescribed by the Whipping Act. That being so, and the limit of the ordinary jurisdiction of the Magistrate being enlarged to the extent I have said, it seems to me to follow that in the case of more than two convictions of the offences specified in Section 2 of the Whipping Act, a Magistrate would be within the strict letter of the law, if he passed sentence of punishment, not exceeding four years' imprisonment, with fine, as permitted by Section 22, and whipping not exceeding thirty stripes, if inflicted with the rattan; for it appears to me that, in that respect also, there is a modification of Section 46 of the Code of Criminal Procedure in respect of this, that it would not be lawful for the Magistrate or for any Court to sentence an offender, no matter how many offences he might be convicted of, to more than thirty stripes, if the rattan be the instrument of punishment.. This is the conclusion at which I have arrived after careful consideration of the subject; and I only add that I entirely concur in the observations of my brother Macpherson both as to the very numerous and difficult questions of construction presented by the Whipping Act, and also as to the extreme caution which it behoves Magistrates and Courts of Justice to employ when putting in force the provisions of that Act.

Selon-Karr, J.—There is no doubt, as has been very justly remarked by my learned brethren who have preceded me, that there are several questions of nicety and difficulty arising in the construction of what is known as the Whipping Act.

On the whole, I am inclined, substantially, to agree with the conclusions arrived at by Mr. Justice Campbell,* to be found in the printed papers furnished to us for this reference, which conclusions are dated the 24th of September 1866. The judgment is quoted in the margin.

But, of course, it becomes necessary for me to state more particularly what my conclusions are. I deem it unnecessary to set out at length the various Sections which have been already quoted by my learned colleagues.

The first conclusion at which I have arrived is, that by Section 1 of Act VI. of 1854 whipping is added to Section 53 of the Indian Penal Code, and that it thereby becomes a seventh punishment, which officers dealing with that Code are empowered to administer.

Then comes the difficulty which has been already pointed out, *viz.*, that the Whipping Act contains no reference to, or mention whatever of, the Code of Criminal Procedure, and yet that the Magistrate ought to be held to administer the Code of Criminal Procedure

* I think there is not the least doubt that a Magistrate can sentence for offences so punishable to two years' imprisonment and fine, or six months in default of payment, total 2½ years; and in case of two or more offences, up to four years and fine, and one year's imprisonment in default, total five years.

Flogging cannot be inflicted in lieu of any part of the punishment, or punishments, which can be inflicted for any one offence. When flogging is inflicted in lieu of ony other punishment, no other punishment can be inflicted for that offence. And, when a Magistrate has punished otherwise for two offences, I think that he cannot flog for a third offence. But, in cases in which flogging can be awarded *in addition* to other punishment, it seems to me that the Magistrate having jurisdiction to try the case can inflict it in addition to the full measure of his ordinary powers, *e. g.*, to two years and six months, and to stripes in addition, or to five years and stripes in addition, and the maximum number of stripes cannot be doubled.

when he administers the Whipping Act. I cannot myself doubt that, when a Magistrate administers any of the punishments defined in the Penal Code, with the Whipping Act added to it, he does at the same time administer, and is bound by, the Code of Criminal Procedure. I do not think that he administers whipping under Act VI. of 1864 alone, and not under the Criminal Procedure Code.

But, when we come to look at Section 46 of that Code, which is a very important Section, altering, as I believe it does, the old Criminal Law of the country as formerly administered, and empowering Magistrates, in certain cases and with certain restrictions, to give cumulative punishment, I do not think that we are justified in applying that particular Section to the punishment of whipping, which can or may be administered by Act VI. of 1864. I think that an express mention of this Section 46 would be necessary in Act VI. of 1846 to enable a Magistrate to make whipping cumulative for first offences; and, without such a distinct proviso, I shrink from holding that offenders can be whipped and imprisoned for such first offences.

I do not lose sight of the difficulty which arises if we lay it down that the Magistrate does administer the Criminal Procedure Code in all cases, and yet that he is shut out from one particular Section of it, in some cases; but I am bound to look at the intention of the Legislature in making whipping a legal punishment at all.

Looking to the objects of the Whipping Act, it is quite clear to me that that Act empowered Magistrates to administer the punishment of whipping to two broad and distinct classes of offenders: *firstly*, offenders whom it was thought necessary to punish with whipping *in lieu* of other punishments; and, *secondly*, more hardened offenders who, on conviction of certain specified offences, were thought fit subjects for whipping *in addition* to other punishments. But I am unable to come to the conclusion that Act VI. of 1864 contemplated that whipping should be cumulative, except in the case of hardened offenders.

For instance, a man, not being an old offender, is arraigned, tried, and convicted on three distinct thefts. It appears to me that it would be competent for a Magistrate to inflict on him 2 years and 6 months for one theft, and 2 years and six months for a second, and not more than this for three or four sentences of theft tried together. I do not think that it could have been the intention of the Legislature, and it certainly is nowhere so expressly provided by Act VI. of 1864, that a Magistrate, having given the maximum of imprisonment for two offences of theft, could flog for a third offence; or that, having given a sufficient amount of punishment for one offence, he could, *in addition to imprisonment*, inflict a whipping for a second.

I am quite clear, on the other hand, that, in the case of hardened offenders contemplated by Section 4, he might give the maximum of imprisonment which he was competent to award, and might give a whipping of thirty stripes in addition, because I think that the law itself expressly provides for this. Further, I do not think that in any case, looking to the provisions of Section 10 of the Act, he could give cumulative whippings, that is to say, he could not give thirty stripes *plus* thirty stripes.

These are the conclusions at which I have arrived, after some discussion and a full consideration of this question; and it appears to me that my conclusions do not substantially differ from the practical effect of those arrived at by Mr. Justice Phear, except in the instances of offenders previously convicted, and I may not take exactly the same view of every portion of the Act, or of all the nice questions which have arisen out of it.

Peacock, C. J.—There are two questions which have been submitted for our opinion: *1st*, what is the limit of jurisdiction of a Magistrate with full powers in respect to imprisonment under Section 46 of the Criminal Procedure Code?

There seems to have been no difference of opinion upon this point. A Magistrate with full powers upon convicting a prisoner at the same time of several offences may sentence him to twice the amount of punishment which such Magistrate is by his ordinary jurisdiction competent to inflict, that is to say, to punishment not exceeding in the aggregate 4 years' imprisonment, and fines not exceeding 2,000 rupees, the ordinary limit of his jurisdiction being 2 years' imprisonment and fine not exceeding 1,000 rupees. (See Section 22, Code of Criminal Procedure.)

I am speaking merely of the extent of the jurisdiction of the Magistrates: the punishment for any one of the offences

cannot exceed that for which the offender is liable under the Penal Code, and the punishments should be awarded severally.

The difficulty which seems to have occurred was whether, if each of two offences were punishable with imprisonment of 2 years and fine, the Magistrate, if he should fine as well as imprison to the full extent of 2 years for each offence, could also direct by his sentence that in default of payment of the fine the offender should suffer additional imprisonment. I have no doubt that he may do so. I take the case of theft as an illustration.

Theft by the Penal Code is punishable with imprisonment of either description for a period not exceeding 3 years, or with fine, or with both. The ordinary jurisdiction of the Magistrate of the district extends to imprisonment of either description not exceeding the term of 2 years, or fine to the extent of 1,000 rupees, or both imprisonment and fine. Upon conviction of a prisoner of one offence of theft, the Magistrate could sentence him to 2 years' imprisonment, and to pay a fine of 1,000 rupees. By the 64th Section of the Penal Code, he might also direct by the sentence that, in default of the payment of the fine, the offender should suffer imprisonment for a certain term, regulated by the 65th Section, in excess of any other imprisonment to which he might have already sentenced the prisoner.

By the 65th Section of the Penal Code, the term for which the Court directs the offender to be imprisoned in default of payment of fine is not to exceed one-fourth of the term of imprisonment, which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. Thus, the Magistrate might for one offence of theft sentence a prisoner to 2 years' imprisonment and a fine of 1,000 rupees, and direct that, in default of the payment of the fine, the prisoner should be imprisoned for a term not exceeding half a year, that being one-fourth part of the imprisonment to which the Magistrate might sentence him for the offence.

Section 64 of the Code of Criminal Procedure directs that "when a person shall be convicted at one time of two or more offences punishable under the same or different Sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the *several* penalties prescribed by the said Code, which such Court is competent to inflict; such penalties, when consisting of imprisonment, to commence the one after the expiration of the other. It shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which such Court is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: provided that in no case shall the person be sentenced to imprisonment for a longer period than 14 years, and provided also that, if the case be tried by a Magistrate, the punishment shall not in the aggregate exceed twice the extent of punishment which such Magistrate is by his ordinary jurisdiction competent to inflict." If he convicts at the same time of two offences of theft, he may sentence for each offence to imprisonment for 2 years, and a fine of 1,000 rupees, and he may direct, with regard to the fine in each case, that, in default of payment, the offender shall suffer imprisonment for half a year, which sentences in effect will subject the offender to 2 years and a half imprisonment in each case, unless the fines be paid. By payment of the fines the prisoner will be free from the imprisonment awarded in default of the non-payment of the fines.

The next question is—whether, if a person is convicted at the same time of two or more offences punishable under the Indian Penal Code, it is lawful for the Court, in addition to the penalties prescribed by the Penal Code, to sentence the prisoner to whipping.

There is no doubt that, if the Magistrate sentences the prisoner for one only of the offences of which he is convicted, he may sentence him to whipping, if whipping is warranted by Act VI. of 1864. But I am clearly of opinion that if the Magistrate sentences the prisoner for both offences, whipping cannot form a portion of the punishment for either.

It is a rule of construction that penal Statutes, or Statutes which subject men to punishment, are to be construed strictly; and it appears to me that, if there is in the whole Statute Book one Act more than another to which that rule ought to be applied, it is Act VI. of 1864, which subjects adults to the punishment of whipping.

The recital in that Act is, that it is expedient that in certain cases offenders should be liable, under the provisions of the Indian Penal Code, to the punishment of whipping.

Section 1 enacts that, "In addition to the "punishments described in Section 53 of "the Indian Penal Code, offenders are also "liable to whipping under the provisions "of the said Code."

The word "are" cannot have been intended to mean that whipping was one of the punishments which the Indian Penal Code authorised, because it was not so; that punishment was purposely and advisedly omitted from the Code. The word is used in a future sense, and means that, after the passing of this Act, whipping shall be one of the punishments to which offenders shall be liable under the Penal Code. The Act speaks from the time it took effect. The meaning is the same as if it had said: "Offenders are now by virtue of this Act liable to whipping," &c. Section 53 of the Penal Code, which is the Section referred to in Section 1 of Act VI., contains merely a description of the punishments to which offenders are liable under the Code; that is to say, that the punishments therein enumerated are the several classes of punishment to which, by the various Sections of the Code, offenders of different kinds are made subject. The effect of Section 1 is to add whipping as one of the several classes of punishments, and, instead of there being six, as there were under the Penal Code, there are now seven classes of punishment. Death is one of the punishments, imprisonment is another, fine is another, whipping is another. But it is not because death is one of the punishments enumerated in the Penal Code, that death is a punishment provided by the Code for every offence mentioned in the Code. Such also is the case as regards whipping.

Section 2 of Act VI. of 1864 says that, "Whoever commits any of the following offences may be punished with whipping in lieu of any punishment to which he may for such offence be liable under the Penal Code." It does not say, and it could not say, that by the Penal Code he was liable to be whipped, but it might say that by the Penal Code as amended by this Act he shall be liable to be whipped. Take the case of theft. Section 2 of the Act does not say that by the Penal Code a man who commits theft is liable to be whipped, but it says that, in lieu of giving him the punishment inflicted by the Penal Code, *viz.*, three years' imprisonment and fine, he may be punished with whipping. Sections 3 and 4 render offenders liable to whipping in lieu, of or in addition to, the punishments imposed by the Penal Code.

Section 46 of the Code of Criminal Procedure says that—"When a person shall be convicted at one time of two or more offences punishable under the same or different Sections of the Indian Penal Code, it shall be lawful for the Court to sentence such person for the offence of which he shall have been convicted *to the several penalties prescribed by the said Code.* But it does not say that, when a prisoner shall be convicted of two or more offences, it shall be lawful for the Court to sentence such person for the offences of which he shall have been convicted to the several penalties prescribed by any subsequent Act.

The punishment of whipping is not one of the offences prescribed by the Penal Code, but it is a punishment prescribed by a subsequent Act. in lieu of the punishment prescribed by the Penal Code, or in addition to it, as the case may be. The proviso in Section 46 of the Code of Criminal Procedure declares that, if the case be tried by a Magistrate, the punishment shall not in the aggregate exceed twice the extent of punishment which such Magistrate by his ordinary jurisdiction is competent to inflict. The ordinary jurisdiction of a Magistrate with full powers is defined in Section 22, *viz.*, imprisonment not exceeding two years, or fine to the extent of one thousand rupees, or both. If whipping be awarded in lieu of, or in addition to, any of the punishments provided by the Penal Code, the punishments for the several offences will in the aggregate exceed the extent of punishment which a Magistrate by his ordinary jurisdiction is competent to inflict.

Section 22 of the Code of Criminal Procedure is not intended to describe the punishments allotted to the several offences of which a man may be guilty, but merely the ordinary jurisdiction of the Magistrate. Take theft, again, as an example. Theft by the Penal Code is punishable with three years' imprisonment, or with fine, or with both; but the Magistrate of the district, or a Magistrate with full powers, cannot sentence the prisoner if he convicts him of the offence of theft to three years' imprisonment, and fine without limit, because his jurisdiction is limited to two years' imprisonment, and a fine of one thousand rupees. The punishment to be awarded for the several offences is limited by the Sections of the Penal Code which provide the punishment for them. I agree that, under Act VI. of 1864, a sentence of whipping may be passed by an officer not

inferior to a subordinate Magistrate of the first class. The extent of whipping to which a Magistrate may sentence is not limited except by Section 10 of Act VI. of 1864, which limits the amount of the punishment generally. It matters not whether whipping is imposed as a punishment by a Magistrate or by a Sessions Judge: each of them, if he can pass the sentence at all, can impose it to the full extent authorized by the Act.

Take theft once more as an example. Theft is one of the offences for which an offender may be punished with whipping in lieu of the punishment awarded by the Penal Code. The limit of the punishment is contained in Section 10 of the Act. In no case, if the cat-o-nine-tails be the instrument employed, shall the punishment of whipping exceed 150 lashes; or, if the rattan be employed, shall the punishment exceed thirty stripes. By the Government notification as to the mode in which the punishment of whipping is to be inflicted in Bengal, it is directed that the rattan shall be the instrument used, and that the rattan shall not exceed half an inch in diameter. If a man is whipped with a rattan for one offence of theft, whether under the sentence of a Sessions Judge or under the sentence of a Magistrate with full powers, he may have thirty stripes with a rattan not exceeding half an inch in diameter. If he is flogged for that offence with the cat-o-nine-tails in those parts of the country where that instrument is allowed to be used, he may have as many as 150 lashes. It cannot be supposed that it was ever intended that, if a man should be convicted of two offences at the same time, he should be subject to 150 lashes with a cat-o-nine-tails for each offence, amounting to 300 lashes altogether, or to thirty stripes with a rattan half an inch in diameter for each offence, amounting in the aggregate to sixty stripes with such an instrument. If a man is convicted of a theft to-day by a Magistrate of a district, he may be sentenced to thirty stripes with the rattan; if that same man commits another offence, and is convicted by the Magistrate of that second offence six months hence, he can have thirty stripes with a rattan for that second offence. The jurisdiction of the Magistrate, as regards whipping for those two offences, is limited to thirty stripes for each, or sixty stripes in the whole. If the Magistrate convicts the offender of two thefts at the same time, is he to be allowed to give twice the extent of the punishment which he could give for one of them? When the Legislature in 1861 enacted by the Code of Criminal Procedure that, if a Magistrate should convict a prisoner of two offences at the same time, he should have power to sentence the offender to the several penalties prescribed by the Penal Code for the said offences, provided that he should not sentence to any punishment exceeding in the aggregate twice the extent of punishment which such Magistrate was by his ordinary jurisdiction competent to inflict, they knew what they were about. They knew what the punishments prescribed by the Penal Code were, and they knew that a Magistrate had not by his ordinary jurisdiction power to inflict more than 2 years' imprisonment with a fine not exceeding 1,000 rupees. They would have taken an unjustifiable leap in the dark in dealing with the subject of punishments, if they had extended the same power with respect to any new punishment which any succeeding Legislature might think it justifiable to impose.

Section 46 of the Code of Criminal Procedure must be construed strictly, and limited to the penalties prescribed by the Penal Code and to the ordinary jurisdiction of the Magistrate as defined by Section 22 of the Code of Criminal Procedure. The Legislature, at the time when the Code of Criminal Procedure was passed, never intended by Section 46 to legislate beyond what they could foresee, and to give powers the result of which must have been unknown to them. The Code of Criminal Procedure did not intend to allow two punishments of whipping to be inflicted at the same time for two offences, of which an offender might be convicted at the same time. At the time when the Code of Criminal Procedure was passed, the punishment of whipping did not exist. There is nothing in the Code of Criminal Procedure, or in Act VI. of 1864, from which the Legislature can be presumed to have intended that, if a man should be convicted of two thefts at the same time, he might be sentenced to stripes for the one, and to imprisonment and fine for the other. The limitation in Section 46 could not have that effect; it is limited to twice the amount of punishment prescribed by the Penal Code, which the Magistrate can inflict according to his ordinary jurisdiction. If it be held that he can punish for one offence with stripes, when he punishes for both, I see no mode by which we can escape from holding that he may punish for each by whipping. He has not, as it appears to me, the power of sentencing to whipping in lieu of

imprisonment for each, and I do not see how he can have the power of sentencing to it in either. I do not believe that it was intended to sanction such a cruelty as to allow a double flogging to be inflicted upon a prisoner convicted of two offences at the same time. The object of Section 2, in giving whipping in lieu of any other punishment, appears to have been to avoid the crowding of jails and the contamination to which offenders might be subjected by being inmates of jails. But this object would be frustrated if in the case of an offender being convicted of three thefts he might have two years' imprisonment, and a fine for one, and stripes to the extent of thirty with a rattan ½ an inch in diameter for each of the others of which he might be convicted.

Looking to the words of the several Acts, and construing them according to the ordinary rules of interpretation, I am of opinion that, if a Magistrate proceeds under Section 46 of the Code of Criminal Procedure, he must confine his sentences strictly within its provisions. If he proceeds under Act VI. of 1864, in the case of a conviction for two offences at the same time, he must be guided by that Act only, and cannot sentence the offender for more than one of the offences.

The 20th March 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, J. B. Phear, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Fine—Levy by distress—Section 61, Code of Criminal Procedure.

Reference to the High Court in the case of
Chunder Coomar Mitter

versus

Modhoosoodun Dey.

In every case in which an offender is sentenced to fine, the Court which sentences the offender may issue a warrant for the levy of the amount by distress and sale. The suceessor in office of a Judge or Magistrate may levy a fine imposed by his predecessor. But the Court which levies the fine must be the same as the Court which imposed it.

This case was referred to a Full Bench by E. Jackson, J., under the following remarks:—

THE question raised upon this reference is *most* important. There seems to have been already a decision passed upon it, but there was then a difference of opinion among the Judges before whom the question came. On reconsideration, I entertain some doubts whether, when a Court, which sentences an offender to fine, and imprisonment in default of the fine, does not also direct that the fine shall be levied by distress and sale, if not paid, another Court or officer has authority to order the fine to be levied. It appears to me to be within the discretion of the Court passing the sentence to order the fine to be levied or not; and, if so, the recorded directions on the subject at the time the sentence is passed must guide other officers in passing orders regarding it.

I think it will be as well that this reference should be placed before the next Full Bench which sits, for an authoritative ruling; and that such ruling should be embodied in a Circular for the information of all Magistrates.

The judgment of the Full Bench was delivered as follows :—

Peacock, C. J.—The case is provided for by Section 61 of the Code of Criminal Procedure, which enacts that in every case in which an offender is sentenced to fine, it shall be competent to the Court which sentences the offender to issue a warrant for the levy of the amount by distress and sale.

The power is restricted to the Court which sentences the offender ; but the word "Court" is not restricted to the particular individual who held the office. The successor of a Sessions Judge may levy a fine imposed by his predecessor, and the same rule applies to other officers by whom fines are imposed.

The limitation of the time within which fines may be levied is pointed out in Section 70 of the Penal Code.

The 28th March 1868.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Summing up—Jury—New trial—Section 379, Code of Criminal Procedure.

Criminal Appellate Jurisdiction.

Queen *versus* Shumshere Beg.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of murder.

When a prisoner is on his trial by a Jury upon a charge of murder, it is the duty of the Judge to point out to the Jury accurately the difference between murder and culpable homicide not amounting to murder, and to direct the attention of the Jury to the evidence, and to leave them to find the facts, and say (under the direction of the Judge as regards the law) of what offence the prisoner is guilty.

Where the provisions of Section 379 of the Code of Criminal Procedure was neglected, and the Judge did not sum up the evidence at all, a new trial was ordered.

Elahi Buksh's case (5 W. R., p. 80, Crim.) considered.

Macpherson, J.—In this case the appellant has been convicted of murder, and sentenced to transportation for life. He was tried by the Judicial Commissioner of Assam and a Jury.

The chief objection taken to the proceedings below on behalf of the prisoner is that the charge of the Judge to the Jury was in effect no charge at all, and that the Judge decided all the questions of fact himself, and left nothing (unless possibly certain questions of law) to the Jury. We think the objection taken to the Judge's summing up is fatal to the conviction.

The Judge's charge is as follows:—

"The evidence adduced on the part of "the prosecution *conclusively proves that* "*the accused* took possession of a fowl "belonging to a person named Korenga, "with whom he got angry, because the "unfortunate man wanted either restitution "of his property, or payment for it, *and* "*that accused then knocked Korenga down,* "*killing him* with a blow on the head while "he was lying on the ground. *It is shown* "*beyond doubt that no provocation was* "*given* to the accused, and that he struck "the deceased with all the violence he could "use; and you will further observe that the "blow was dealt on the deceased's head, "and that it was inflicted with a bamboo-"stick, nearly six feet long, and weighing 73 "tollahs. Now, such a blow with such a "weapon, on so vulnerable a spot, could hard-"ly fail to cause death: *and therefore it* "*appears to me that the accused's offence* "*amounts to murder*, because, if a man does "an act with a knowledge that it is likely "to cause death, and death ensues, the law "presumes that he intended the result of "that act, which he did, with the full "knowledge of what that result was likely "to be, and there can be no doubt that any "one in his senses would know he would "be likely to kill a man whom he struck "with a heavy stick on the head with all "his force. The accused may have been, "and no doubt was, in a passion when he "struck the deceased, but he is not on that "account the less guilty, because no pro-"vocation was given to him that could "reasonably cause anger. If he had been "provoked, he was in a position to prove "the fact, for two of his countrymen went "into the village with him; but, instead of "citing these men to give evidence in his "favor, he called five others, who, to their "credit, admitted candidly that they knew "nothing about the case.

"The charge on which the Deputy Com-"missioner sent up the prisoner for trial is "culpable homicide not amounting to "murder, and *all that I have got to say to* "*you in regard to that head of charge* "*is that, should you bring the accused in* "*as being guilty of it, only you must in* "*your verdict say under which of the* "*exceptions described in Section 300 of* "*the Penal Code you think the case falls,* "and you must further say which descrip-"tion of culpable homicide you convict the "accused of."

In this summing up the Judge does really leave no one question of fact for the Jury to decide; he decides all himself, and says expressly that in his opinion it is proved that the accused has committed murder. The only thing that he does leave to the Jury is to say which of the exceptions to Section 300 of the Penal Code apply to

the case, if they shall hold that the offence does not amount to murder.

It is perfectly clear that such a summing up is not in compliance with the directions of the law, and is entirely at variance with the first principles upon which trial by Jury is based.

Section 379 of the Criminal Procedure Code says that the Judge shall sum up the evidence on both sides. In this case there has been no attempt at summing up the evidence. The Judge merely states that in his opinion certain facts are proved, and that this amounts to the offence of murder. Then he puts it upon the Jury, if they do not agree with him, to say under which of the exceptions of Section 300 the case falls, without apparently attempting to explain to them the differences existing between murder and culpable homicide not amounting to murder, or to call their attention to the evidence necessary to establish these offences respectively.

Practically, this case has not been tried by the Jury, nor can the Jury be said to have expressed any opinion upon the facts. Practically, the case has been tried and decided by the Judge alone.

It is argued for the Crown that, although the summing up had been most defective, still, according to the ruling of the Full Bench in the case of Elahie Buksh (5 Weekly Reporter 80, Criminal), we are bound to support the conviction, if, looking to the evidence on the record, we think that the conviction ought to be confirmed by us, if the case has been originally tried, not by a Jury, but by a Judge and Assessor. But we think that the present case does not fall within the rule laid down in Elahie Buksh's case (page 90). The judgment in that case refers entirely to the summing up being defective as regards the weight to be attached to evidence, or defective with reference to any particular portions of the evidence. That is a very different case from the present, where practically there has been no summing up at all. As this case has substantially been tried by the Judge only, and not by the Jury, it appears to us that the prisoner has a right to demand, at least, that there should be a new trial, and that his case may be left to a Jury. He is entitled to have the verdict of a Jury upon it. In order to that end, we shall set aside the conviction and the sentence passed, and order a new trial.

It is stated in the petition of appeal that a Police Inspector has been dismissed from the police service for misconduct in getting up evidence with reference to this case. We cannot say whether this is or is not so. But there is no doubt that the statements of the witnesses, whose depositions appear upon the record (and which, if believed, are amply sufficient to support the conviction), do exhibit a very remarkable similarity in language and tenor, which is suggestive of the necessity of carefully weighing the value of their evidence, and considering whether in the statements they have made they have spoken the whole truth.

In conclusion, we have to observe that, in a case such as this, it is most particularly the duty of the Judge to point out to the Jury, with the greatest accuracy, the difference between murder and culpable homicide not amounting to murder, and to direct the attention of the Jury to the evidence, and to leave them to find the facts, and say upon those facts (under the guidance of the Judge as regards the law) of what offence, if any, the prisoner is guilty.

The conviction and sentence are set aside, and a new trial is ordered.

The 30th March 1868.

Present :

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Section 193, Criminal Procedure Code—Charge—Evidence.

Criminal Appellate Jurisdiction.

Queen *versus* Denonath Bujjur.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of giving false evidence.

Before an accused person can be convicted of giving false evidence, it must be proved that he made the satements which are the basis of the charge, and further that he made them with the necessary criminal intention.

The mere fact that a man has made contradictory statements does not necessarily prove that he has committed an offence under Section 193. The Court must be satisfied as to the intention with which the statements were made.

Macpherson, J.—THE appellant has been convicted of the offence of giving false evidence under Section 193 of the Penal Code.

He was tried by the Sessions Judge of East Burdwan and a Jury upon the charge—"that he intentionally gave false "evidence in a stage of a judicial proceeding, "either that he, on the 26th of November "1867, before the Joint Magistrate of Burd-"wan, knowingly and falsely stated that "'I saw in the field, to the south of Doobe, "Obheram and Nuddea Chund: there was "no one else with them. They were walk-"ing along to the east along a pathway "through the fields;' or that he, on the 7th of "January 1868, before the Sessions Judge "of Burdwan, knowingly and falsely stated "that 'I saw to the south of Doobe Village "on the public road Obheram and Nuddea "Chund with others. There were five or six "in all, but these two were going along "together behind the others. Obheram had "a gunny in his hand, and Nuddea Chund "had a *lattee*. There were three others. "They were going along together'—and "that he has thereby committed," &c.

It was decided by a Full Bench in the case of Mussamut Zumeerun (6 Weekly Reporter 65, Criminal) that, where a man has made two contradictory statements, he may (under Section 242 of the Criminal Procedure Code) be convicted of the offence of giving false evidence upon an alternative finding. But the proper way to charge a prisoner, when it is doubtful which of the statements is false, is, as is pointed out by the Chief Justice in giving judgment in that case, to frame a charge with two or more heads—not to have a long alternative charge, such as that on which the appellant was tried.

In whatever way the charge is framed, however, it is necessary, before a man can be convicted of giving false evidence because he has made two contradictory statements, to prove that he did make the statements, which are the basis of the charge.

In the present instance there is absolutely no evidence that the prisoner ever made either of the statements which he is said to have made: and this is one of two objections, each of which is fatal to the conviction. The other objection is, that the Judge left the case to the Jury without going through even the form of summing up the evidence, much less of explaining to the Jury what facts they had to find before they could bring in a verdict of guilty.

The Judge's record of the trial is of the briefest description. It is as follows:—

"The two depositions—the one taken "before the Joint Magistrate by his own "hand, and the other taken before this "Court by the hand of the Sessions Judge—"were read over to the Jury. The prisoner "had no defence to offer, merely stating "that he did not mean to say that he was "certain that all the men were in company. "The Jury, without retiring, brought in a "verdict of guilty on the alternative charges "that the prisoner has given false evidence "either in the Court of the Joint-Magistrate, "or in that of the Sessions Judge.

Save as appears in this record, there is no compliance on the part of the Judge with the provisions of Section 379 of the Code of Criminal Procedure, which enacts that in a trial by Jury a statement of the Judge's direction to the Jury shall form, part of the record. The record, in fact, contains no statement of the Judge's direction to the Jury, and it is clear that the Judge omitted to give them any direction at all.

The two depositions which were read to the Jury were neither of them legally in evidence, because neither of them was proved to be that which it purports to be. The first is a document purporting to contain the depositions of one Denonath Buzzar. At the end of it are the words: "Taken before me. Read over to witness in Bengalee, which he understood, and admitted to be correct," and then there follow a signature and a date, "W. E. Ward, 26-11-67." The Judge says that this is a deposition taken before the Joint-Magistrate by his own hand. But there is no evidence that it is so. The Judge may be personally acquainted with the hand-writing, of the Joint-Magistrate, but that is not enough; for the Judge's knowledge in the matter is no evidence.

So as to the other document which purports to be a deposition taken by the Judge himself on the 7th January.

If the prosecution meant to prove that the prisoner made the statements with which he was charged, by merely putting in the two depositions, it was essential that witnesses should have been called to prove that the depositions are in the hand-writing of the Joint-Magistrate and Sessions Judge respectively, and to prove that the prisoner is the person whose statements are recorded in these depositions. As it is, there is nothing in the record to show by whom the depositions were recorded, or that the

"punishable under Section 91 of Act XX. of "1866, triable by the Court of Session, and "I direct that he be tried by the said Court "on the said charge."

This document for the first time in the case exhibits who was the person accused, and what was the matter of accusation. No complaint against Kalichurn Lahoree, made either by the Magistrate or any one else, preceded the investigation, for Lahoree was himself solemnly affirmed and examined as a witness at that investigation, and there seems to have been no period at which his position was changed until the commitment was made out against him.

The charge upon which the Assistant Magistrate commits for trial is in this document expressed with a generality and vagueness which in my judgment is exceedingly improper. Of all criminal charges which can be made, perhaps the charge of perjury is that which the ends of justice require to be the most carefully and accurately worded. The more general is the allegation of falsehood, the less is the risk in putting it forward, and the greater the difficulty of rebutting it. It is, therefore, the right of the person accused of perjury to have the statement which he is charged with having falsely made distinctly and separately pointed out to him, and I will venture to say that no Court can safely and satisfactorily arrive at a judicial conclusion relative to a charge of perjury, unless its investigation be directed singly to each alleged false statement, with the view to ascertaining, *first*, whether it was made at all; *secondly*, whether, if made, it was true or untrue; and, *thirdly*, whether, if untrue, its untruth was present to the mind of the person making it at the time he made it. Now, the charge presented by Mr. Coxhead's commitment mentions at least four statements alleged to have been made by Lahoree, each one of which may or may not have been made, may or may not be true, and may or may not have been falsely uttered by Lahoree, quite independently of the others. The accused person is entitled to have a judicial determination with regard to each of them. The measure of his criminal conduct would vary with the result. Supposing, for instance, that the Court should hold it not proved that he committed perjury in solemnly affirming "that he knew "nothing about the subject-matter of the "deed, and that he had no conversation with "Ram Lall Rai about the subject treated of "in the deed, or that there was any arrange-"ment between them with reference to such "subject-matter," but at the same time should think it made out that he did commit perjury in affirming that he *did* not know Ram Lall Rai became possessed of the deed: in such a case it is obvious that, although the letter of the law would have been broken, still the offence committed would have been insignificant. It appears to me that the charge of perjury for trial of which the commitment is made should contain a distinct assertion with regard to *each* statement intended to be characterized as perjury, that it is untrue in fact, and that the accused person knew it to be so when he made it. And it is not the less necessary that this should be so because an alternative charge can by law be made. Indeed, the cases of alternative charges are in my opinion exactly those in which it is requisite that the prosecution should be most closely held down to the obligation of proving the two elements of perjury just referred to, because it is in those that the prosecution is most liable to consider that its responsibility ends with simply shewing that two contradictory statements have been made by the accused person.

On the whole, then, it seems to me that Mr. Coxhead's instrument of charge and commitment is irregular in a very important respect, but I am not prepared to say that it is therefore invalid.

I think, however, that it ought to be quashed for another reason, namely, that it was not made upon such a preliminary enquiry as the law prescribes that a Magistrate should hold before he can properly commit for trial. It is clear that it is necessary to such an enquiry that the accused person (or, under certain circumstances, his agent) should be present, that the witnesses whose evidence is to be the foundation of the commitment should be examined before him, and that he should have the opportunity of cross-examining them. Generally, too, there should be a complainant who can be made responsible for the preferring of a false charge, although in some cases a Magistrate may take cognizance of, and probably hold an enquiry with regard to, an offence which has come to his personal knowledge without waiting for a complaint from a third person. However, in all cases alike, there must be an *accused* person present, *viz.*, some one against whom a definite criminal charge is made either by the Magistrate himself, when it is legitimate for him to make one, or by another complainant. In this case, there was no complaint preferred by a third person; for, if Mr. Coxhead, the Sub-Registrar, can,

for this purpose, be distinguished from Mr. Coxhead, the Assistant Magistrate, it was the latter, and not the former, who made the charge, as appears by the commitment: also. had the fact been that the Sub-Registrar ostensibly prosecuted, it is perhaps doubtful how far such prosecution ought to have been entertained without the Registrar's specific sanction; and certainly no such sanction was given, for Mr. Bell, when he wrote, expressed himself as not knowing whom his Subordinate intended to prosecute.

But, assuming that this was a case in which the Assistant Magistrate might have proceeded without a complaint (as to which I desire to express no opinion), he was at any rate bound to put Lahoree in the position of an accused person, and the preliminary enquiry contemplated by the Criminal Procedure Act could only commence from that point. Lahoree ought to have been aware during the whole time the witnesses were being examined before him that he was the person intended to be incriminated by their evidence, and also what was the nature of the charge sought to be established against him. He ought also to have been told that he might cross-examine the witnesses if he thought fit. It appears to me that, during the enquiry before Mr. Coxhead, Lahoree never stood in the situation of an accused person at all. His own evidence was taken on solemn affirmation in the same way as that of the other witnesses. He had no opportunity of cross-examining the other witnesses, because, according to Mr. Coxhead's own representation, no charge was made against him until the whole of their evidence was given, and the commitment written out. In truth, Mr. Coxhead, instead of making a preliminary enquiry as to the matter of any specific complaint against Lahoree, seems to have conducted a general investigation of a somewhat abnormal kind, and then to have committed Lahoree for trial on a charge which was the result of that investigation. I do not know what authority a Magistrate has to take evidence on oath except in reference to some matter of complaint made against some specified person, and I am certainly of opinion that proceedings like this will not in law justify a commitment. No one can, I think, be properly committed for trial except after a preliminary enquiry, during the whole of which he has known the charge made against him, and has been afforded all due means of defending himself.

In my opinion, therefore, the commitment of Kalichurn Lahoree for trial at the Court of Session made by Mr. Coxhead on the 21st August last ought to be quashed.

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The 9th April 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Procedure—Appeal—Jurisdiction—High Court as a Court of Revision.

Criminal Appellate Jurisdiction.

Sib Chunder Rai, *Appellant.*

A Deputy Magistrate restored to an accused money found in his house along with stolen property, the prosecutor having failed to prove that the money was his. The Sessions Judge on appeal reversed that order, and directed the money to be made over to the prosecutor.

HELD that the order of the Sessions Judge was made without jurisdiction. Held, further, that the order of the Deputy Magistrate was one which could not be interfered with by the High Court as a Court of Revision.

Kemp, J.—THIS is an application to set aside the order of the Sessions Judge of the 24-Pergunnahs, altering the decision of the Deputy Magistrate of the same district.

The Deputy Magistrate had made over to the applicant Rupees 188-2, which had been discovered in his house under most suspicious circumstances, but which, in the opinion of the Deputy Magistrate, the prosecutor had failed to prove to be a portion of the property stolen from him.

The Sessions Judge, in appeal by the prosecutor, reversed so much of the decision of the Deputy Magistrate which directed the restoration of the rupees to the applicant, who was the accused in the Court below, and upheld the conviction for abetting the theft of certain ornaments.

The Judge had, in my opinion, no jurisdiction to reverse, alter, or amend the

Deputy Magistrate's order on appeal. Right or wrong, the Deputy Magistrate had found that there was not sufficient evidence that the money belonged to the prosecutor, and he ordered it to be restored to the accused. In directing it to be again taken from the accused and made over to the prosecutor, the Sessions Judge acted without jurisdiction, and I would reverse his order, and direct that the money remain with the accused, to whom after trial it was made over by the Deputy Magistrate. I express no opinion upon the propriety of the Deputy Magistrate's order in respect to the disposal of the money, as this Court, sitting as a Court of revision, has no jurisdiction to do so—the Deputy Magistrate having found on the evidence that there was no proof that the money belonged to the prosecutor, such finding being a question of fact, and not of law.

Jackson, J.—I concur. The Sessions Judge has clearly no jurisdiction to entertain any appeal on the part of the complainant. The decision of the Deputy Magistrate, being on a question of fact, and not of law, is not open to revision. The Deputy Magistrate's order must be carried out, though I agree with the Sessions Judge that the result of the Deputy Magistrate's order is a great failure of justice.

The 14th April 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Civil Court—Prosecution (Sanction for)—False evidence — Verification — Evidence —Fine—Section 193, Penal Code — Sections 120 and 209, Act VIII. of 1859.

Criminal Appellate Jurisdiction.

Queen *versus* Kartick Chunder Holdar and others.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of giving false evidence.

A general sanction by a Judge to a prosecution for giving false evidence under Section 193 of the Penal Code, and for false verification, is not sufficient. The exact words upon which the prosecution is based, and the exact offences which the Magistrate is to investigate, should be pointed out.

The verification of an application filed in the Civil Court, in which it was stated that the applicant did not sign an alleged deed of compromise, does not subject him to punishment for giving false evidence. Such an application falls, not under Section 120, Act VIII. of 1859, but under Section 209 of that Act, and need not therefore be verified.

Documents which were tendered in the civil suit, if relied on in a prosecution for giving false evidence, must be proved in the Criminal Court before they can be received as evidence.

An order directing the payment to a witness of a portion of the amount of fine levied on an accused held to be illegal, in the absence of proof that the witness suffered any loss owing to the conduct of the accused.

Jackson, J.—THESE prisoners were tried by the Sessions Judge of East Burdwan and a Jury, and convicted of the offence of giving false evidence, Section 193, Penal Code, and sentenced to three years' rigorous imprisonment, and to pay a fine of 100 rupees each, to be levied by distress and sale, and out of the amount thus realized Rupees 50 were directed to be made over to the first witness, Purtab Chunder Dutt, as compensation for the loss he had been put to by the false objections raised by the prisoners.

The proceedings arose out of a civil suit in the Court of the Sudder Ameen of Burdwan, Mr. Wright.

Purtab Chunder Dutt, on the 15th February 1865, brought a suit against Kartick Chunder Holdar and Shiboo Pershad Holdar to recover Rupees 200 principal, and Rupees 95 interest, which he stated to be due to him from them.

He filed no bond or document of any sort in support of his claim.

On the same day, the defendants are said to have appeared in Court, and to have filed a *ruffanamah*, admitting the claim of the plaintiff; and upon the same day the Sudder Ameen recorded a decree against them. It is stated that this form of action is customary in the Sudder Ameen's Court in Burdwan. The parties, having agreed beforehand that in order to save limitation a decree shall pass, go to the Court; the plaintiff files his claim; the defendant, his admission of its correctness; and a decree there-

upon passes. As, however, there seems to be some impression that decrees may thereby be obtained by false personation of defendants, the rule is that in all such occasions a descriptive roll of the defendants shall be prepared by an officer of the Court, and recorded on the admission of the defendants. This was done as respects the defendants in this case.

Subsequently, on the 25th of January 1867, Purtab Chunder Dutt took out execution of this decree; and after notice was served on the defendants, and no objection was preferred by them, execution issued, and certain property was attached. Objections were raised to the attachment and sale of this property by Goluck Chunder Dutt, the brother of the defendants, but these were overruled on the 27th May. On the 30th May the defendants appeared in Court, and applied to be heard in defence of the suit, alleging that they had not been aware of the institution of the suit, and that they had filed no *ruffanamah*, and owed the plaintiff no money, and further stating that the false action had been brought about by the machinations of a vakeel of the Court, Kaleechurn Dutt, since deceased, who had been at enmity with them. An enquiry was made upon this application, and the Sudder Ameen then presiding in the Court, finding that the description of the defendants, as recorded in the back of the admission of judgment, tallied with that of the defendants, rejected their allegations as false. The defendants appealed to the Judge, but he dismissed their appeal. Purtab Chunder Dutt then applied to the Judge to sanction a prosecution under Section 193 of the Penal Code against the defendants on charges of the offence of having given false evidence and of having verified as true a false statement in their application to the Sudder Ameen. The Judge's order upon this petition is in the following words, *viz.*: "The applicant may, if he chooses, "prosecute in the Fouzdaree, this Court "seeing no ground on which to prohibit him "from doing so." Thereupon Purtab Chunder Dutt brought a complaint before the Magistrate, who committed the prisoners, and the result was their conviction.

The Magistrate's charge against the prisoners is recorded in the following words: "That there is hereby made against "Kartick Chunder Holdar and Shiboo Per-"shad Holdar the charge that they, being "bound by an express provision of law, *viz.*, "Sections 24 and 123 of Act VIII. of 1859, "to state the truth, did, on or about the 23rd "day of May 1867, at Burdwan, present to "the Sudder Ameen a verified statement set-"ting forth—

(1.) "'That in a suit instituted against "them on the 15th February 1865 by one "Purtab Chunder Dutt in the Sudder "Ameen's Court, they did not present a "written confession of judgment.

(2.) "'That the signatures appended to "the *holiyar* or descriptive roll endorsed on "the written confession of judgment filed in "the aforesaid case are not their signatures.

(3.) "'That they never received any inti-"mation of a notice served upon them under "Section 216 of Act VIII. of 1859, in execu-"tion of decree obtained by the plaintiff in "confession in the aforesaid case.

"That these statements are false, and that, "in making them, they have intentionally "given false evidence in a stage of a judicial "proceeding, and that they have thereby "committed an offence punishable under Sec-"tion 193 of the Indian Penal Code, and with-"in the cognizance of the Court of Session."

It is not quite certain whether the Sessions Judge amended this charge, but upon the calendar of commitment there is a note in the hand-writing of the Judge as if he had amended it, and the charge he proceeded to try was for giving false evidence, *i. e.*, "that they have stated in a "written statement duly verified, first, that "they did not know of the institution of "the case in the Sudder Ameen's Court, and "that they did not put in a confession of "judgment; also that the execution-notice "was served secretly, and that they had only "received intimation of execution four days "before the date of petition."

The Sessions Judge's alteration of the charge is not alluded to in his proceedings. The cause of the alteration is not recorded, but it is evident the words upon which the Magistrate grounded his charge are not the exact words used in the application of the defendants, and the 2nd clause of his charge is not to be found in the application at all, whereas the words stated in the charge, as framed by the Sessions Judge, are those in the application.

The evidence offered at the trial consists of the depositions of Purtab Chunder Dut and of his brother Goluck Chunder Dutt. The first deposed that the prisoner filed a confession of judgment, and the second that

he pointed out the prisoner Kartick Chunder Holdar to the peon who went to serve upon him the notice of execution of the decree having been taken out. There is also the evidence of Koylash Chunder Banerjee, the mohurrir who wrote the descriptive roll of the defendants in the Sudder Ameen's Court, who, however, admits that he cannot recognize the prisoners as those defendants, and of Sonaolla Sheikh, the peon who served the notice, and who deposes that Goluck Chunder Dutt pointed out Kartick Chunder Holdar, and he signed the notice, though he is not asked whether he recognizes him to be the same, or how he is satisfied on the point. The question should have been put, as a peada, who serves a notice, as a general rule, would not be able to recognize the person on whom he served it three years after the occurrence, unless he had some previous acquaintance with the person so served. The prisoners before the Magistrate, and in their defence before the Sessions, denied their guilt, and asserted that they did not give in the *ruffanamah*, and were not aware of the suit having been brought.

The following is the Judge's charge to the Jury :—

"The prisoners are charged jointly with having made, in a written statement filed in the Court of the Sudder Ameen, two false statements; one to the effect that they had not been aware of the institution of a suit against them by the first witness in 1865, and that they did not file a confession of judgment in the said case; likewise that they were not aware of the issue of notice of process of execution which is said to have been served in 1273.

"The evidence relied on to prove the falsity of the first statement is that of the first witness, who was the plaintiff in the original suit; and he has stated on oath that the two defendants did in person file the confession of judgment, and that they went to Court in his Company for that purpose. Secondly, there is the evidence of the mohurrir who wrote the description of the two men who filed the confession of judgment, which he declares he wrote after carefully examining the persons of those parties. This description is written on the back of the *kabool-jawab* as circumstantial evidence. There is the description of the two men who filed the confession which has been read before you, and which you are able to compare with the appearance of the defendants who are before you. Secondly, there are the signatures on the several papers connected with the case, one of which at least, namely, the verified petition for review, is admittedly signed by the defendants, and also certain signatures written by them in the presence of the Sudder Ameen and by his orders. After comparing these signatures and the description of the parties who filed the confession of judgment, you will consider whether there is any cause for distrusting the evidence of the first witness, although he was plaintiff in the case in which the confession of judgment was filed.

Secondly, you will decide whether the second statement has been proved to be false by the deposition of the peon Sonaoollah and that of the last witness, and whether you are satisfied that Kartick Chunder did personally receive the notice of execution, and did sign it with his own hand. If this is proved, it cannot be true that the defendant was unaware of execution having been taken out till four days before the said petition was put in, the receipt to the notice having been signed in Magh 1273 or February 1867, while the petition which contains the statement said to be false was put in on the 30th May 1867. The petition was a written statement of the defendants' objection to the plaintiff's claim, and was such a statement as required to be verified; and if the defendants have in that petition stated anything that was untrue, they are liable to the penalty of perjury on account of such statements.

"You are only to decide whether those two statements noted above are true or false, and whether they were made, if false, with a fraudulent motive."

It seems to me that from first to last the proceedings of the Courts, both Civil and Criminal, have been illegal. It is not perhaps my duty, in considering the appeal of the prisoners from the conviction and sentence in a criminal trial, to animadvert upon the mode of procedure adopted by the Sudder Ameen in trying such undefined civil actions as these. I am inclined to think that the procedure is not according to Act VIII. of 1859. It is certain, however, that the summary procedure adopted may lead to false suits, and it was, I think, incumbent on the Sudder Ameen, when it was stated before him that such a false suit had been brought, to investigate it thoroughly, and I think the Judge also should, on appeal, have seen that the whole of the circumstances

were thoroughly enquired into. There were facts, however, which made the story of the prisoners improbable, unless some explanation was given of those facts, and on these facts the civil officers may have had ground for arriving at the conclusion they did.

In sanctioning proceedings being taken in the Criminal Court by Purtab Chunder Dutt, the Judge seems to me to have acted illegally in not having distinctly recorded the exact points upon which he sanctioned such proceedings.

If he merely gives a general sanction to a prosecution for giving false evidence and for false verification, without pointing out the exact words upon which the prosecution is based, such prosecution may proceed upon statements made by the accused different from those which the Judge held to be false. The Judge should point out the exact offences which he thinks the Magistrate should take notice of and investigate. I do not think that the prisoner was prejudiced by the omission in this case.

The first question which arises on the fact of the offence having been committed is, whether the verification of the application made in the Civil Court by the prisoners, even if proved to be false, subjects the accused to punishment for the offence of giving false evidence. Section 24, Act VIII. of 1859, rules that: "If any plaint, written statement, or declaration in writing, required by this act to be verified, shall contain any averment which the person making the verification shall know or believe to be false, or shall not know or believe to be true, such person shall be subject to punishment according to the provision of the law for the time being in force for the punishment of giving or fabricating false evidence." Is there, then, any Section of Act VIII. of 1859 which requires that such an application as this should be verified? Both the Magistrate and the Sessions Judge consider the application to be in fact a written statement under Section 120. But it appears to me that this is erroneous. It is more properly an application to have the suit re-heard on the ground that the decree was pronounced in their absence, and so far *ex parte*. It would therefore be an application under Section 209, Act VIII. of 1859, and that Section does not enact that such applications shall be verified. The whole prosecution, therefore, upon this one point must fall to the ground.

There are, however, numerous other irregularities in the course of the trial, and especially in the charge to the Jury. The different documents which were placed before the Judge were not in any way proved. The *ruffanamah*, or confession of judgment, was not proved to have been put in by the accused. Purtab Chunder Dutt deposes that they put in a confession of judgment, but he is not required to identify it. The notice issued on the accused of the execution of the decree and the signature of Kartick Chunder Holdar upon the receipt for such notice were similarly not identified. Goluck Chunder Dutt deposed that Kartick Chunder Holdar did sign such a receipt to such a notice, but the paper was not put into his hand for identification. The application on which the false verification is charged to have been made was not proved to have been put in by the accused, as it should have been. The signatures on other papers by the accused, which, it is said, they admitted, and which were put before the Jury for the purpose of comparison, are not shewn to have been admitted upon the Sessions trial. The defence of the accused before the Magistrate or in the Sessions Court contains no such admission. All such papers should be clearly proved before they are submitted to the Jury as evidence in the case. Some person who was present, and saw the accused write their signatures before the Sudder Ameen, should have been called to attest those signatures before the Jury was allowed to draw any comparison from them. The Magistrate might have examined the accused regarding these signatures, and, if they had then admitted that these were their signatures so recorded, such admission might have been taken as evidence. All these papers which were relied on for the prosecution as evidence on the Sessions trial should be placed upon the record of the trial. They are to be found scattered through different records. Some are in the Civil Court record, some again in the Magistrate's record.

Upon the facts of the case, and looking now only to the facts proved at the Sessions trial, it seems to me that the conviction of the accused could not be sustained on such facts. The only witnesses who really give any evidence against the accused are Purtab Chunder Dutt and his brother Goluck Chunder Dutt. These are the very persons whom the accused charge with having fraudulently brought the false charge against them. The whole question at issue was whe-

ther they committed the fraud and secured persons to personate the accused, or whether the accused committed the fraud in afterwards denying what they had done.

In deciding between the two, some additional evidence was necessary. There is the deposition of the mohurrir of the Sudder Ameen's Court, but he cannot recognize the accused; and, though he states he wrote down the description of them, he is not required to identify that paper, and he admits that he wrote that paper, not in open Court before the Sudder Ameen, but in the serishta. If, then, this man could be gained over to write, not a description of the parties actually before him, but such a description as the plaintiff wished, the opportunities to a plaintiff to commit such a fraud as the accused charge Purtab Chunder Dutt with having committed are greatly increased, and it is to be recollected that the accused have all along stated that a vakeel of the Court was at the bottom of the whole proceeding. There is nothing on the record to show whether Purtab Chunder Dutt and the accused were even acquainted with each other before the case was put into Court. There remains only the evidence of Sonaoolla peada; and, as I have before stated, his evidence is good, solely if he had previous acquaintance with Kartick Chunder Holdar, and no question was put to ascertain this. If he had not previous acquaintance with Kartick Chunder Holdar, his evidence is of very little weight in deciding on the guilt of the accused.

The further evidence from comparison of signatures is neither proved nor admitted.

There were other circumstances which came out in the civil proceedings, but which are not alluded to on the Sessions trial, which make it probable that the accused were acquainted with the circumstances of this suit having been brought against them. It is impossible for me to give any opinion as to whether the accused are guilty or not. Without much more enquiry than any officer, civil or criminal, has yet made, I could not hazard an opinion upon the point. This being a trial by a Jury, the sole point before me is whether the proceedings have been conducted legally, and whether the evidence in law bears out the prisoners' offence. For the reasons I have already given, I think the proceedings have been illegal in numerous points. I would therefore reverse the conviction, and discharge the accused.

I would add that the order directing 50 rupees to be paid to Purtab Chunder Dutt is also illegal. There is no proof on the record that he has suffered any loss owing to the conduct of the accused.

Kemp, J.—I concur in directing the discharge of the prisoners.

The 21st April 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Fine—License Tax—Procedure—Examination of accused—Section 266, Code of Criminal Procedure.

Reference to the High Court by the Sessions Judge of Beerbhoom, under Section 434 of the Code of Criminal Procedure.

Queen *versus* Bissessur Sein.

Under Section 15, Act XXIX. of 1867, the fine to be imposed for non-payment of the tax cannot be less than the amount stated in the notice.

A Deputy Magistrate is bound to examine the accused under Section 266 of the Code of Criminal Procedure in answer to the charge brought against him.

Reference.—THE Assessor of License Tax of this district prosecuted the defendant as well as some others for breach of Act XXI. of 1867. The case was referred by Baboo Ooma Churn Banerjee as Deputy Magistrate in charge to Moulvie Ally Mahomed, Deputy Magistrate, exercising full powers of a Magistrate, for trial. The Moulvie (Deputy Magistrate) examined a chuprassie regarding the service of the notice; and under Section 205, Criminal Code of Procedure, the defendant Bissessur Sein, who stated that he sent his son with Rupees 100 to the Assessor at Futtehpore and Mowrassee; that his son prayed for the tax being reduced after reference to his papers, but the Assessor, without reducing the tax or accepting the money, told him that he would pass proper orders when he arrived at Soory; that, when the Assessor

arrived at Soory, his son presented himself before the Assessor with a petition, but that officer took from him the petition, but not the amount of the tax; and that he has certain witnesses, whom he named, to prove that money was offered to be paid to the Assessor at Mowrepore and Futtehpore. No certificate of its accuracy is attached to the examination of Bissessur, as required by the said Section 205. The Deputy Magistrate then examined the Assessor, Baboo Janokenath Ghosal, who deposed that, on the day appointed, a man, who alleged himself to be the son of Bissessur, appeared before him, but not with the amount of the tax; that he verbally informed him that he had not the means to pay Rupees 100, but he could pay if the tax be fixed at Rupees 20. Whereupon he (the Assessor) told him that, unless he pays in the whole amount of the tax, he can pass no orders; that he (the Assessor), on the contrary, told him to pay Rupees 100 on the evening of the last day mentioned in the notice, and that otherwise it would not be received; and that that individual did not pay in the money, and said he could not do so unless the tax was reduced.

The Deputy Magistrate then gave his judgment, and fined the defendant Bissessur Rupees 20.

The Deputy Magistrate's order appears to me to be illegal for the following reasons:—

1st.—He has not taken the defence of the accused, nor examined his witnesses, except one, *viz.*, the Assessor, as he should have down under Section 266, Criminal Code of Procedure.

2nd.—He has fined the defendant Rupees 20: whereas under Section 15, Act XXI. of 1867, as amended by Act XXIX. of 1867, Section 3, the maximum amount of fine should have been the sum mentioned in the notice, or Rupees 100.

3rdly.—The order of reference by Baboo Ooma Churn as Deputy Magistrate in charge was illegal.

I would, therefore, recommend that the Deputy Magistrate's order be quashed as illegal.

Judgment of the High Court.

Glover, J.—It appears to me that the order of the Deputy Magistrate was illegal on both the grounds taken by the Sessions Judge.

But, even if it be admitted that the defendant, by desiring the presence of the Assessor as his witness, and not pressing for the attendance of the others, gave up his privilege of having the latter summoned, the Deputy Magistrate would still be wrong, under Section 15, Act XXIX. of 1867, as by that Act the fine to be imposed could not have been less than the amount stated in the notice, *viz.*; 100 rupees.

The Deputy Magistrate's order is therefore quashed as illegal.

Loch, J.—The mode in which the Deputy Magistrate, Moulvie Ally Mahomed, has dealt with this case is very unsatisfactory; and the explanation he has given for passing the order he made, most unbecoming an officer of his standing and experience. The Deputy Magistrate apparently forgets the position he holds as a Magistrate—that it is his duty as such to execute the law as it stands, and not to make the law suit his ideas of convenience and justice. The Deputy Magistrate was bound to examine the accused in answer to the charge brought against him, and he was bound by law to sentence him to a fine not less than Rupees 100, the sum at which he had been assessed. The proceedings of the Deputy Magistrate are quashed.

The 22nd April 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Civil Court—Resistance of process—Section 25, Regulation IV. of 1793.

Criminal Appellate Jurisdiction.

Miscellaneous Case.

Chunder Kant Chuckerbutty.

A Civil Court cannot make over a case of simple resistance of its process to a Magistrate for trial, Section 25, Regulation IV. of 1793, being still in force.

Loch, J.—THIS is a case of resistance of process of the Civil Court, and is punishable by the Court under the provisions of Section 25, Regulation IV., 1793. This Section, with the two previous Sections—22 and 23 of the same law—was not repealed by Act X. of 1861; nor was Regulation IX., 1799,

which made some modification in the above Sections; nor have the above Sections of Regulation IV. 1793 been rescinded by the repealing Act VIII. of 1868. It is clear, therefore, that the Civil Courts are still empowered to punish resistance of their processes without reference to the Magistrate, and the Principal Sudder Ameen should, we think, have followed this course in the present instance. So long as Section 25, Regulation IV., 1793, is in force, the Civil Court should exercise the jurisdiction vested in it by law, and cannot make over a case of simple resistance of its process to the Magistrate for trial. We therefore reverse the orders of the Civil Courts passed in this case.

The 22nd April 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Fine—License Tax—Section 3, Act, XXIX. of 1867.

Criminal Appellate Jurisdiction.

Miscellaneous Case.

Doorgachurn Giree.

Under Section 3, Act XXIX. of 1867, a person once fined for not taking out a license is not liable to a second fine or to any further demand for the tax.

Loch, J.—We do not think, as pleaded by the vakeel for the petitioner, that the punishment in this case was a second punishment for the same offence. The punishment now inflicted was for a second act of disobedience to the orders of the Collector requiring the petitioner to take out a license. Looking, however, to the wording of Section 3, Act XXIX. of 1867, amending Section 15, Act XXI. of 1867, we think that it was not the intention of the Legislature that a party once fined should again be liable to fine for not taking out a license. Indeed, if we might interpret that Section by Section 17 of Act IX. of 1868, there can be no doubt as to the intention of the Legislature that, if the fine levied equalled or exceeded the license-tax, no further demand was to be made on the party fined. Section 3 of Act XXIX. of 1867 provided for the realization of the full amount of the tax by directing that the penalty imposed by the Magistrate should not be less than the sum mentioned in the notice; and from these words we gather that if a fine equal to what the license-tax demanded were once paid in the shape of penalty, no further demand for the tax was intended to be made against the same individual. Under this view of the case, we reverse the order passed by the Magistrate and Sessions Judge.

The 28th April 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Investigation — Procedure — Land disputes — Breach of the peace—Section 318, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Gya.

Mussamut Anundee Kooer *versus* Ranee Soonaet Kooer.

To satisfy the requirements of Section 318 of the Code of Criminal Procedure, a Magistrate must himself enquire into the likelihood of a breach of the peace happening, and must come to a judicial decision upon it; and in conducting the subsequent investigation, he must *examine* the witnesses whom the parties have tendered.

Phear, J.—In this case the Magistrate held an investigation under Section 318 of the Criminal Procedure Code, and made an award of possession in favour of a certain party. The papers have been sent to us by the Sessions Judge, and we are unable to find in them any record of a proceeding by the Magistrate, stating the grounds of his being satisfied that a dispute likely to induce a breach of the peace existed concerning the land with regard to the possession of which he made his award. Without such a record of proceeding, according

to several decisions of this Court, a subsequent investigation by the Magistrate is illegal and void. One of those cases is reported in the 5th Volume of Sutherland's Weekly Reporter, page 14, Criminal Rulings; and another in the 6th Volume of the Weekly Reporter, page 61. As it appears that no proceeding of this kind has been recorded or in fact taken in the case before us, we are bound, by the decisions to which I have just referred, to quash the award of the Magistrate which has been made upon his investigation.

I take the opportunity of adding that, even if there had been a proceeding in this case, and assuming that it was confined to the statement by the Magistrate that he had been directed by the Judge to hold the investigation, it would not be sufficient to satisfy the requirements of Section 318, for it is necessary that the Magistrate himself should enquire into the likelihood of a breach of the peace happening, and should come to a judicial decision upon it. It is that judicial decision which is the foundation of the subsequent investigation, and without it the investigation is void and inoperative.

I would further remark that, even in the conduct of the investigation itself, which has here taken place, the Magistrate seems to have committed an error in law. Although he did proceed, according to the words of the Section, to summon the parties and their witnesses, it yet appears that he decided the question upon the results of his own personal inspection, and did not examine either the parties themselves or their witnesses, who were present before him for the purpose of giving their testimony. This has already been made matter of decision in this Court in the case of Maharajah Gobind Nath Roy *versus* Rajah Anund Nath Roy, decided on the 14th May 1866,* where the Court laid down that it is incumbent upon the Magistrate as a matter of law to examine the witnesses whom the parties have tendered. If he does not do so, his investigation is imperfect, and his award invalid.

* *See* 5 W. R., Crim., p. 79.

The 9th May 1868.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Sessions Judge — Procedure — Appeal — Conviction.

Reference to the High Court by the Sessions Judge of Mymensingh under Section 434 of the Code of Criminal Procedure.

Ramjee Doss *versus* Meeajan Sheikh and others.

A Sessions Judge in trying an appeal has to look to the offence, as charged, of which the accused has been found guilty, and to determine whether it is proved or not. He has nothing to do with the form the offence may take owing to subsequent events. A conviction for an offence for which the accused was tried will not prevent his conviction, if guilty, of another distinct offence subsequently committed.,

Glover, J.—It appears to me that the Sessions Judge should proceed with the appeal, and confirm the Deputy Magistrate's order *pro tanto*, if he considers the evidence in the record sufficient.

A conviction under Section 498 of the Penal Code will not interfere with any further proceedings which the Magistrate may take against the abductors to prevent their being afterwards tried for any graver offence they may be shewn to have committed.

Loch, J.—I see no sufficient ground for quashing the proceedings of the Deputy Magistrate. The Sessions Judge should not suppose that a higher offence than that of which the parties were convicted may have been committed. It is his duty to deal with the case as put before him. The parties were charged with enticing away the complainant's wife, and evidence was adduced to prove the charge. Was that evidence sufficient to prove it? If it were, the conviction should not be disturbed because the Sessions Judge thinks that, owing to subsequent events, the parties may have committed a higher offence. The conviction of the parties of the offence for which they were tried will not prevent their conviction, if guilty, of another distinct offence subsequent-

ly committed. The Sessions Judge, in trying the appeal, has to look to the offence as charged, and of which the parties have been found guilty, and to determine whether it is proved or not. He has nothing to do with the form the offence may take by the subsequent acts of the parties. It might have been more prudent had the Deputy Magistrate in this case refrained from punishing these parties till he had ascertained what had become of the woman, and examined her if forthcoming; but, as he acted otherwise, and convicted the prisoners of having enticed her away from legal protection, the only point for the Sessions Judge to determine on appeal was, whether the offence was or was not proved. The Court will not interfere, and direct the record to be returned.

The 12th May 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Criminal Appellate Jurisdiction.

Perjury—Charge—Procedure.

Queen *versus* Khoab Lall and others.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Gya, on a charge of intentionally giving false evidence.

A person accused of perjury is entitled to have the specific charge made against him tried quite independently of a like charge against another person, and the Court of Session must find judicially whether all, or, if not all, which of the particular charges of perjury, where there is more than one charge, is made out against each prisoner. A conviction for perjury, moreover, should not be sustained on the bare testimony of one witness.

Phear, J.—Some time on the night of the 8th September last, one Jedo Lall was found lying dead in the zemindaree Kutcheree of a village called Ganawan. His brother, Jit Lall, who appears to have been on the spot with other persons very soon after, if not before, the death of Jedo Lall, made a charge before the Police, in which he accused Mohun Singh and Bundha Mullick of having murdered his brother Jedo Lall. This charge was supported at the Thannah by the evidence of several persons, and eventually the testimony of Jit Lall and some 14 others was given on oath before the Assistant Magistrate in support of the charge of murder against Mohun Singh and Bundha Mullick. It is now said that Jit Lall and these 14 other persons have committed perjury in the statements which they made before the Assistant Magistrate, and that they committed that perjury with the view to getting Mohun Singh and Bundha Mullick wrongly convicted of the murder of Jedo Lall.

In sending these 15 persons for trial, the Assistant Magistrate very properly specified against each of them the false statements which constituted the particular charge or charges of perjury of which each was accused. Unfortunately at the trial at the Sessions the whole 15 were tried together as if upon one single and improperly general charge of having given false evidence within the scope of Section 194 of the Penal Code. I say 'unfortunately,' because the charges of perjury against the different individuals, as framed by the Magistrate, were singularly distinct the one from the other; and if the prisoners committed perjury at all, the perjuries were committed by them at different times. I may remark that the crime perjury is in its nature essentially personal, dependent on the actual words uttered, and the motives which dictated the utterance. The accused person is entitled to have the specific charge made against him tried quite independently of a like charge against another person, and disembarrassed of the prejudice which cannot fail to be caused in his own case by the mere fact of its being united with another or others for the purpose of trial. Of all crimes which can come before a Criminal Court for investigation, perjury is that which most taxes the attention and discrimination of the Court; and it can never be without risk to the interests of justice that the Court should lose sight of the singleness of the issue which should be laid down and determined between the accused person and the prosecution. At any rate, the present case to my mind affords a prominent instance of the mischief which may be caused either on the one side or the other by reason of want of precaution in this respect on the part of the Court. For, assuming that any grouping together of the charges made against the different prisoners could properly have been made for the purpose of trial, it appears to me that they range themselves at least under as many as three distinct heads. The first head would comprehend those alleged false statements in which the persons accused of making them stated in various ways that they heard the deceased person just before his death give certain information with regard

to the persons who had assaulted him; the second head would comprehend those statements made by the accused persons who are alleged to have said that they saw Mohun Singh and Bundha Mullick actually commit the crime of murder; and the third head would comprehend the statements of the other accused persons who said that they saw Mohun Singh and Bundha Mullick, on the night when the body was found, passing along the road in the direction of the place where the crime of murder, if it was committed, must have been committed.

The Sessions Judge concurs with the Assessors in finding all the prisoners guilty of the charge of giving false evidence with the view to convicting Mohun Singh and Bundha Mullick of a capital offence within the meaning of Section 194 of the Penal Code; and the Judge has given the reasons upon which his conclusions were based. But he has omitted to find judicially whether all, or, if not all, which of the particular charges of perjury is made out against each prisoner. We have carefully considered these reasons, and we have looked through the whole of the evidence. The result in my mind is, that I am of opinion that, as regards two of the three classes of charges of perjury to which I have just referred, the evidence is not sufficient in law to establish them against those persons respectively who are said to have committed the perjury comprised in them. First, as regards those who said that they heard Jedo Lall, the deceased person, accuse Mohun Singh and Bundha Mullick—the sole evidence upon which the Judge appears to form his opinion is that of the Civil Surgeon, who examined the body of Jedo Lall some 24 hours after it was found, and who, speaking in reference to the wound which then existed on the person of the deceased, said that in his opinion it was in the highest degree improbable that the deceased could have uttered any articulate sounds after receiving those wounds. Apparently from this evidence, and from this evidence alone, the Judge has come to the conclusion that the accused persons must have been telling that which was false when they said that they heard Jedo Lall before his death, but after he had received his mortal injuries, making the statement which they say they heard him make.

Indeed, the other evidence before the Court, which could bear upon this point at all, did nothing more than tend to show that the prisoners might well have been, as they said they were, present on the spot before Jedo Lall died; and the conclusion that they spoke falsely in saying that Jedo Lall uttered any words in their hearing before he died can have no other basis than the Civil Surgeon's deposition. I need hardly remark that it is in itself most unsatisfactory to found a charge of such a serious character as that of perjury merely upon the opinion of a gentleman, who, however skilful and however honest he may be, is speaking without actual knowledge of the occurrences which had in fact taken place, and whose opinion as to the fact which could or could not have occurred at the most is expressed to be a matter of scientific probability or possibility. I do not think that, according to law, evidence of this character alone would be sufficient to support a charge of perjury. It is a maxim of English Law, which may not improperly be allowed to guide the discretion of Criminal Courts in this country, that a person shall not be convicted of perjury upon the bare testimony of one witness, for this does make but a matter of oath against oath, unless some corroborating circumstance can be introduced from another source. But I observe further that in this particular case the Surgeon's testimony is not even a denial on oath of the facts said to have been falsely stated by the prisoners. It is an opinion only, and the deponent forms his opinion merely on his observation of the condition

of the corpse made many hours after death must have occurred. There is no evidence on the record to show that the state of the body when he saw it was that which the body exhibited when it was found. In cases of this kind, where inferences of so high a consequence to the accused persons are to be drawn from the observation of the condition of a dead body, it is always incumbent upon the Court which conducts the enquiry to take care before those inferences are drawn, that are brought home to the persons accused by that most important link of evidence which I have already mentioned as wanting in this case, namely, the evidence upon oath that the body, when seen by the scientific expert, is exactly in the same condition as it was when the persons who are to be affected by his evidence were brought in connection or relation with it.

I may add that even the testimony of the single witness upon which the convictions now under consideration were obtained was not given *vivâ voce* in Court. It was produced in the shape of a deposition previously made on oath, and the prisoners had no opportunity of cross-examining the witness at their trial before the Sessions Court. Now, although there was no illegality (according to Indian procedure) in the receiving of this document by the Court, still the absence of the witness himself is certainly an addition to the unsatisfactory features of this trial, and I fail to detect any reason why the discretion of the Court was not exercised to secure his attendance. In truth, the objection to a conviction on this evidence alone are so patent and serious that I feel assured they would not have escaped the notice of the Sessions Judge himself had it not been for the confused way in which the trials of the 15 prisoners were jumbled up together. I think, then, that all those persons who are charged with having falsely deposed to the deceased Jedo Lall having made certain statements to them before he died, ought to be acquitted of that charge, and, as far as that charge is concerned, to be released from custody.

As to the second class of charges against the prisoners, namely, those which accused the persons against whom they are made of having falsely stated that they saw Mohun Singh and Bundha Mullick committing certain acts of violence and assault upon the person of the deceased Jedo Lall at Gonawan Kutcherry; it seems to us that there is a considerable body of evidence on the record tending to show that Mohun Singh and Bundha Mullick were not on the spot at the time, but on the contrary passed the whole night at some considerable distance from it, and further that these prisoners could not have said what they did say with great detail and distinctness, assuming it to be false, without actually knowing that it was false. Therefore, so far as these charges against this particular set of prisoners is concerned, we see no reason to interfere with the judgment of the Sessions Court.

There remains the third class of charges, by which certain accused persons are made to say falsely and intentionally that they saw Mohun Singh and Bundha Mullick pass them in the road during the night in a direction tending towards the scene of the murder. The only evidence on the record which can lead to the conclusion that they were speaking false when they made those statements is the evidence which satisfied the Sessions Court that Mohun Singh and Bundha Mullick were during the whole time in question at some distance from the spot where the offence was committed. We do not think that there is in these cases, as in the last head of cases to which I have referred, sufficient to show that these persons might not, even if they were not speaking correct-

ly, have been mistaken in what they asserted : and it is, of course, the essence of the offence of perjury that the person making the statement should know at the time of uttering the words that he was stating that which was false. We therefore think that the prisoners who are affected by this class of charges, as well as those who are affected by the first class of charges to which I have referred, ought to be acquitted and released from custody.

The result of what I have just said will be that Pokah Singh, Sakhan Roy, and Himmut Roy, will stand convicted of the charges which have been established against them in the Sessions Court, and the sentence passed upon them will be affirmed, but all the other prisoners will be released.

The 16th May 1868.

Present :

The Hon'ble G. Loch and F. B. Kemp, *Judges.*

Civil Court—Perjury—Memorandum of evidence—Procedure.

Criminal Revisional Jurisdiction.

Case of Beharee Lall Bose and others.

The failure of the Civil Court in a case of perjury to make a memorandum of the evidence of the accused when examined before it does not vitiate the depositions, if the evidence itself was duly recorded in the language in which it was delivered in such Court.

Loch, J.—THIS case has evidently failed through the Judge's misdirection to the Jury on a point of law. The prisoners, when examined by the Collector regarding the purchase of a certain putnee sold by him for arrears of rent, made certain false statements, which appear to have been duly recorded in Bengalee. After making this preliminary enquiry, the Collector, considering there were grounds for believing that they had committed an offence under Section 193, sent the case to the Magistrate for investigation. The Magistrate recorded the evidence, and committed the prisoners for trial.

After recording the evidence of the witnesses for the prosecution, "the depositions given by the prisoners before the Collector were named as the first documentary evidence that it was necessary to examine ; but, before doing so, the record was laid before the Court, with a view to ascertain whether the depositions were recorded in the manner laid down by the law. It was then found that no memorandum of evidence in the hand of the Collector was with the record, and the Judge called the attention of the prosecution to the fact that the depositions did not appear to have been recorded in the manner prescribed by the law, and that in such a case they could not be used as legal evidence against the prisoner. * * * The Court being of opinion that the defect in the manner in which the evidence of the defendants was recorded is sufficient to vitiate the said depositions in so far as to render them no legal evidence that the defendants were guilty of giving false evidence, the Jury, at the direction of the Court, brought in a verdict of not guilty as regards each of the prisoners."

We think the view taken of the law to be altogether erroneous. The fact that the Collector had failed to make a memorandum with his own hand of the depositions of the prisoners when examined by him would not vitiate, as the Judge has supposed, any detailed examination recorded in Bengalee or other vernacular language of the prisoners, if taken before the Collector, and duly found to have been made before him. The Collector's conduct in omitting to make a memo. might be highly reprehensible, but this failure of duty on his part could not have the effect of rendering the depositions given by the parties no legal evidence against them if they were admissible at any time as evidence. The prisoners have been acquitted by the Jury on a misdirection on a point of law by the Judge. We do not think, however, that we can interfere with that sentence of acquittal, though we consider it erroneous.

The record will be returned to the Sessions Judge with a copy of these remarks.

The 28th May 1868.

Present:

The Hon'ble F. A. Glover, *Judge.*

Provocation—Exception to Section 300, Penal Code—Charge to Jury.

Criminal Appellate Jurisdiction.

Queen *versus* Gunesh Luskur and others.

Committed by the Magistrate, and tried by the Additional Sessions Judge of the 24-Pergunnahs, on a charge of culpable homicide.

In charging a Jury on the point of provocation in a case of culpable homicide, a Judge should tell the Jury that to bring the case within the exception to Section 300, Penal Code, the prisoner must have been deprived of the power of self-control by grave and sudden provocation, that there ought to have been sufficient cause for such loss of self-control, and that the provocation was not voluntarily provoked by the prisoner as an excuse for doing harm.

No point of law is raised in this petition of appeal, and the evidence appears to have been fully laid before the jury. Believing that evidence, I think they were perfectly justified in convicting the prisoners. The appeals must, therefore, be rejected.

I think, however, that the Additional Sessions Judge should have been more precise in his charge on the question of provocation. Whether provocation is sufficiently grave and sudden as to bring the case within the exception to Section 300, is no doubt a matter of fact, of which the Jury are the judges; but where, as in the present case, the assailants came and first abused, and then attacked the party, who were lawfully engaged in cutting the dhân, receiving no provocation beyond a return of the abuse which usually passes on such occasions, there was really no provocation which could have justified the attack, and the Judge should, I think, have brought that point more prominently to the notice of the Jury, instead of putting it in a vague and general way. The Jury should have been told that to bring the case within the exception, the prisoner, who struck the deceased, must have been deprived of the power of self-control by grave and sudden provocation, and that there ought to have been a sufficient cause for such loss of self-control.

The Jury should, moreover, have been told that to bring the prisoners under the exception, it must have been shewn that the provocation was not voluntarily provoked by the offenders as an excuse for doing harm.

Looking to the evidence in this case, I should say that there were grounds for supposing that the prisoners went to the rice-field for the express purpose of driving off the persons cutting the dhân, and that the 1st proviso to Exception 1, Section 300 of the Penal Code, would have applied—at any rate it ought to have been mentioned to the Jury.

Sentence for Dacoity.

Extract (para. 3) from Letter No. 47, dated the 9th January 1868, from the Registrar of the High Court, Appellate Side, to the Sessions Judge of Midnapore.

Present :

The Hon'ble L. S. Jackson, *Judge.*

In the case of Kisto Chowdry and others (3 Statement 4), the Court observe that a dacoity having been actually committed, Section 398 of the Indian Penal Code, which refers to attempts, would not be applicable; but, under Section 397, all of the offenders who, at the time of committing the dacoity, used deadly weapons, or caused or attempted to cause grievous hurt, would be punishable with a *minimum* imprisonment of 7 years. In either case, however, the conviction (not being for dacoity with murder) would be under Section 395, and the punishment must be regulated accordingly with this proviso that in those cases to which Section 397 applies, the imprisonment is to be not less than 7 years. Section 395 provides as the punishment for dacoity transportation *for life*, or imprisonment which may extend to 10 years, with fine. By Section 59 imprisonment may be commuted to transportation for a term not exceeding the imprisonment to which the offender was liable. That in the present case was ten years. The Court is, therefore, of opinion that the sentence of transportation for 14 years was unwarranted, as it is not provided that an offender who might have been sentenced to transportation for life may, therefore, be sentenced to transportation for a less period. The sentence of transportation for 14 years passed on the prisoner Kisto Chowdry is, consequently, set aside, and you are hereby directed to pass a sentence either of imprisonment or of transportation for such period not less than 7, or more than 10, years as you think fit, or you may pass a sentence of transportation for life.

Magistrate how to proceed in proceedings under Sections 297-299, Code of Criminal Procedure.

Letter No. 98, dated the 18th January 1868, from the Registrar of the High Court, Appellate Side, to the Sessions Judge of Moorshedabad.

(Criminal Side.)

Present :

The *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

With reference to paras. 5, 6, and 7 of your letter No. 194, dated 17th September 1867, I am directed to intimate to you that, when proceedings are taken under Sections 297, 298, and 299 of the Code of Criminal Procedure, the final order passed is the order of the Sessions Court. The Magistrate's warrant in the first instance should direct the prisoner to be detained until receipt of the orders of the Sessions Court, with a proviso that such detention is not to exceed three years. When the Sessions Court has finally disposed of the case, that Court should forward a copy of its order, together with a warrant for its execution, to the Magistrate of the District or other officer in charge of the Jail, who should proceed to have such order carried out according to the exigency thereof. (*See* Sections 384—386, Code of Criminal Procedure.)

Magistrate how to act with regard to offences relating to Marriage which are compounded.

Letter No. 122, dated the 20th January 1868, from the Registrar of the High Court, Appellate Side, to the Sessions Judge of Rungpore.

(Criminal Side.)

Present:

The Hon'ble G. Loch, *Judge.*

In acknowledging the receipt of letter No. 58, dated the 31st ultimo, from the Officiating Magistrate of Bograh, forwarded with your Memo. No. 1, dated the 7th instant, to the effect that the 16 cases shewn under heading 61, *viz.*, offences relating to marriage, were admitted to compromise under Section 271 of the Code of Criminal Procedure, I am directed to request that you will be so good as to inform the Officiating Magistrate that, though an offence under the above heading may be compounded out of Court, and the parties do not, by making such composition, commit an offence punishable under the Penal Code, as they would do for compounding any offence not falling within the exception to Section 214, Penal Code, yet, as offences relating to marriage do not come within the provisions of Chapter XV. of the Code of Criminal Procedure, the Magistrate cannot permit a case of the kind to be withdrawn under the provisions of Section 271; but he should proceed with the case, and, if no one appears, or if any one appearing declines to prosecute, the Magistrate should dismiss the case.

Actual opinions of Assessors to be recorded—Elements of an offence under Section 203, Penal Code.

Extract (paras. 6 and 8) from Letter No. 135, dated the 21st January 1868, from the Registrar of the High Court, Appellate Side, to the Sessions Judge of Rungpore.

Present:

The Hon'ble L. S. Jackson, *Judge.*

6. I am to remark that, from the general uniformity of the mode in which the Assessors' opinions are given, it is manifest that the actual opinions are not set forth as directed by Circular Order No. 5, dated the 12th July 1867. It is not necessary that, when those opinions are given at great length, they should be set out in full, but they should at any rate be so stated as to mark their individuality. These opinions are spoken of, moreover, as *verdicts*, which is a serious verbal inaccuracy. It is only when trials are with a jury, whose verdict, in fact, is conclusive, that you are called on to state your concurrence or otherwise.

8. The very concise reason for acquittal in the case of Sertaz (8 Statement 5) is by no means conclusive. The elements of an offence under Section 203 of the Indian Penal Code are—

1st.—That the accused should know or have reason to believe that an *offence has been committed.*

2nd.—The giving of information respecting such offence, which the accused knew or believed to be false.

Therefore, in order to constitute this offence, it would not be necessary that the accused should be aware of the circumstances attending the death of Mohinee, but only that he should know or have reason to believe that Mohinee had been killed by criminal means, or that otherwise some offence had been committed; and, if with such knowledge or belief the accused gave any information in relation thereto, which he knew or believed to be false, he would commit the offence. In the present instance the abstract statement fails very much on the side of over-scantiness.

Sicca Rupee, if issued under authority of Government of India, &c., is a Queen's Coin within Sections 230 and 240, Penal Code.

Extract (para. 2) from Letter No. 154, dated the 23rd January 1868, from the Registrar of the High Court, Appellate Side, to the Sessions Judge of Gya.

With advertence to your remark in the case of Munger Panee (8 Statement 4) that "a sicca rupee is not the Queen's coin," I am to observe that, if it was a rupee stamped and issued by authority of the Government of India, or of any Government in the Queen's dominions, it would be, equally with the old Company's rupee, a Queen's coin within the meaning of Sections 230 and 240 of the Penal Code.

Names of dissenting Jurors should be distinguished.

Extract (para. 4) from Letter No. 192, dated the 4th February 1868, from the Registrar of the High Court, to the Sessions Judge of Patna.

Present :

The Hon'ble L. S. Jackson, *Judge.*

THE Court remark that the verdict of the Jury in the case of Mussamut Soonderbassee (58, Statement 5) is clearly against the evidence. It is one of those cases in which it is impossible to trust a Native Jury. I am to add that the proceedings were imperfectly kept if the names of the dissenting Jurors were not distinguished.

Offence established to be properly entered in Column 6 of Statement No. 4.

Extract (para. 3) from Letter No. 203, dated the 6th February 1868, from the Registrar of the High Court, to the Sessions Judge of Rajshahye.

Present :

The Hon'ble C. Hobhouse, *Judge.*

IN the case (4, Statement 4) of the prisoner Mungle Khan, the Court observe that in Column 6, under the head *offence established*, you have entered the words "as charged;" but there were four charges. The Court presume that you convicted under the second head (Section 381 of the Penal Code), but, if so, you should have stated so.

Abstract to be given in Statement No. 4 whether prisoner pleads guilty or not.

Letter No. 232, dated the 8th February 1868, from the Registrar of the High Court, to the Judicial Commissioner of Assam.

Present :

The Hon'ble C. Hobhouse, *Judge.*

IN acknowledging the receipt of the Jail Delivery Statements of your District for December last, I am directed to state, with advertence to the case of Nomola (63, Statement 4), that one object of these abstracts is, as pointed out in paragraph 4 of Circular Order No. 5, dated the 12th July 1867,* that the High Court may be enabled to judge whether the sentence passed by the Courts below is appropriate to the offence. Whether, therefore, the prisoner in question pleaded guilty or not, the abstract should still have been given.

Cases which may be withdrawn—Wrongful restraint—Wrongful confinement—Chapter XV., Code of Criminal Procedure.

Letter No. 322, dated the 25th February 1868, from the Registrar of the High Court, to the Sessions Judge of the 24-Pergunnahs.

Present :

The Hon'ble G. Loch, *Judge.*

WITH advertence to your letter No. 25, dated the 13th instant and enclosures, I am

* *See* 8 W. R., Criminal Circular Orders, p. 1.

directed to state that the explanation given by the Joint Magistrate is not satisfactory.

2. The Court observe that Mr. * * * must look for the law in the body of Chapter XV., and not in its heading. Had he taken the trouble to read Section 257, and compared it with Section 271, of the Code of Criminal Procedure, he would have found that withdrawals can only be allowed in cases coming within the purview of this Chapter, and Section 257 clearly shows to what class of cases the Chapter relates, *viz.*, those which are punishable, under the Indian Penal Code, with imprisonment for a period not exceeding six months.

3. Wrongful restraint of any person (Section 341 of the Penal Code) is punishable with imprisonment for one month, or fine, or both. This, therefore, is a case coming under Chapter XV., and may be withdrawn under the provisions of Section 271. Wrongful confinement, Section 342 of the Penal Code, is punishable with imprisonment of either description for one year or fine, or both. As the period of imprisonment in such cases, prescribed by the Penal Code, is more than six months, they do not fall under Chapter XV., and the fact of a summons, being the ordinary mode of requiring the attendance of the party accused, is nothing to the purpose.

4. The Court desire me to forward herewith a copy of a letter No. 1339,* dated the 3rd December 1867, to the Sessions Judge of Backergunge to be circulated for the information of Baboo * * * * and other officers, who have a difficulty in comprehending the law. The Magistrate has no authority to allow parties to withdraw a case unless it be one that comes within the provisions of Chapter XV. of the Code of Criminal Procedure. In all other cases, should the complainant decline or not attend to prosecute, the Magistrate should, in his discretion, dismiss the case.

* *See* the letter next following.

Compromise — Adultery — Section 214, Penal Code—Chapter XV., Code of Criminal Procedure.

Letter No. 1339, dated 3rd December 1867, from the Registrar of the High Court, to the Sessions Judge of Backergunge.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*.

I AM directed to acknowledge the receipt of your memo. No. 55, dated 12th August last, forwarding a letter from the Officiating Magistrate; and, with reference to the contents of the latter, to request that you will point out to Mr. * * * that he has confounded two questions wholly distinct.

2. The letter of this Court, No. 617, dated 11th June 1863, was in reply to a query whether certain cases could "be compromised by the plaintiff under the exception noted at the foot of Section 214 of the Indian Penal Code." This Section deals with a question of substantive law, and declares it to be an offence punishable under the Penal Code to compromise certain classes of crimes not coming within the exception appended to Section 214, Penal Code. A charge of adultery does not come within the provisions of Chapter XV. of the Code of Criminal Procedure, and therefore cannot be compromised in Court under Section 271 of that Code, though the parties may privately compromise such a case without thereby committing an offence, inasmuch as the case falls within the exception of Section 214, Penal Code.

3. The question of what cases can be compromised under Section 271 of Act XXV. of 1861 is, on the other hand, one of procedure. A compromise under this Section is a settlement of the case sanctioned by the Court, and having the effect of barring all further proceedings, and for obvious reasons it is limited to those cases which involve petty offences only.

Accused against whom no evidence was adduced — Section 362, Code of Criminal Procedure.

Extract (para. 4) from Letter No. 328, dated the 26th February 1868, from the Registrar of the High Court, to the Sessions Judge of Mymensingh.

Present:

The Hon'ble C. Hobhouse, *Judge.*

THE accused Jamee Sheikh (Case 51, Statement 5), against whom no evidence was produced, should have been formally arraigned and called on to plead guilty or not guilty (*vide* Section 362, Code of Criminal Procedure), and if, and when, he had pleaded "not guilty," he should have been finally acquitted by the assessors and yourself.

Dacoity includes theft—Forgery.

Extract (paras. 2 and 3) from Letter No. 361, dated the 4th March 1868, from the Registrar of the High Court, to the Sessions Judge of Purneah.

Present:

The Hon'ble C. Hobhouse, *Judge.*

2. WITH advertence to your abstract statement in the case of Depalla and others (1, Statement 4), that the dacoits decamped "without being able to carry off any of the property," the Court observe that dacoity includes theft, and, therefore, if no property was carried off, there was no dacoity; the conviction should have been under Section 402 of the Penal Code, and for attempt. I am to request that you will be so good as to forward the record of the case with a view to its revision by the High Court.

3. If your abstract statement of the facts in the case of Munj Shah and others (3, Statement 5) be correct, the accused were taken in the act of preparing the rough draft of a false petition of complaint, in which one Dilawour Shah was made to charge a certain person with the offence of murder. The Court is of opinion that this was forgery, or abetment thereof, or attempt thereto, within the meaning of the Code, and that the acquittal was, therefore, erroneous.

Post-mortem examination—Evidence.

Extract (para. 3) from Letter No. 401, dated the 16th March 1868, from the Registrar of the High Court, to the Officiating Sessions Judge of Backergunge.

Present:

The Hon'ble C. Hobhouse, *Judge.*

IN the case of Shorufullah and others (3, Statement 4), the Court observe that, unless

the *post-mortem* examination recorded by the Sub-Assistant Surgeon was supported on oath, it was not evidence; but, in this case, it does not matter, as it was used in favor of the accused.

Verdict of assessors.

Extract (para. 18) from Letter No. 431, dated the 20th March 1868, from the Registrar of the High Court, to the Commissioner of Cooch Behar.

Present:

The Hon'ble L. S. Jackson, *Judge.*

"The assessors, Gholam Ghose, Ghagee Mahomed, and Kurreem Bux, concur with the Court that there is no evidence, and acquit."

WITH advertence to the entry in Column 6 in the case of Buxoo (31, Statement 5 for August), marginally noted, the Court observe that this appears to be reversing the proper form of procedure, *viz.*, that the assessors should first give their opinion, and then the Court decide. Here you appear to have given your opinion, and the assessors to have concurred with you. You had no authority to direct an acquittal by the assessors. They are members of the Court, and entitled to give an opinion upon all questions, both of law and of fact. The Court request a careful attention on your part in future to the relative duties of Judge, Jury, and assessors in criminal trials.

Charge — Dacoity — Term "plaintiff" inapplicable in criminal cases.

Extract (para. 5) from Letter No. 473, dated the 30th March 1868, from the Registrar of the High Court, to the Sessions Judge of Hooghly.

Present:

The Hon'ble L. S. Jackson, *Judge.*

IN the case of Troylucko Mookerjee (15, Statement 5), I am to remark that it should have been stated where and when the dacoity occurred. The Court observe that you use throughout the word "plaintiff," which is a term applicable to Civil, and not Criminal, Procedure. Such inaccuracies disfigure the Statement.

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Foreman of Jury should always be distinguished.

Extract (para. 5) from Letter No. 482, dated the 2nd April 1868, from the Registrar of the High Court, to the Judicial Commissioner of Assam.

Present:

The Hon'ble L. S. Jackson, *Judge.*

THE Court observe, with reference to the case of Toagaol Kishore Singh and others (12, Statement 5), that the foreman of a Jury should always be distinguished.

Accused tried by Sessions Court must be either acquitted or convicted—Magistrate may discharge—Civil business to give way to criminal.

Extracts (paras. 12 and 15) from Letter No. 519, dated the 14th April 1868, from the Registrar of the High Court, to the Sessions Judge of Bhaugulpore.

Present:

The Hon'ble L. S. Jackson, *Judge.*

12. I AM to point out to you, with advertence to the case of Rughoonath Pershaud and others (4, Statement 5), that an accused person, tried before your Court, must be either acquitted or convicted, and must apparently be called on for his defence. (*vide* Sections 363 and 372 of the Code of Criminal Procedure). An order for the discharge of the accused otherwise than an acquittal is one which can be made by a Magistrate under Section 225 or 250 of the Code. But no similar power otherwise than on full acquittal appears to have been given to this Court of Session, it being apparently assumed that the preliminary investigation has established a *primâ-facie* case against the accused. The Court does not exactly comprehend whether you mean that the parties tried in the case were committed for trial without there being any evidence that their statements were false, or whether the prosecution was withdrawn by the Government. You are requested to be a little more explicit in future.

15. In conclusion, the Court observe, with advertence to remark *C*, attached to Statement *C*, that, if civil and criminal business come in conflict, the civil should give way, in order that accused persons may not be harassed by unreasonable detention in jail.

In a case of making a false statement, it is not necessary that the statement should be taken down.

Extract (para. 4) from Letter No. 531, dated 16th April 1868, from the Registrar of the High Court, to the Additional Sessions Judge of the 24-Pergunnahs.

Present:

The Hon'ble L. S. Jackson, *Judge.*

WITH advertence to your abstract in the case of Dulal Sheikh (12, Statement 5), that the false statement of the accused, that "a certain prisoner was no relation of his," was not recorded, the Court observe that Section 191 of the Penal Code defines the offence of giving false evidence. It is sufficient if the accused has "made a statement which is false," whether it has been taken down or not. You are requested to submit the proceedings for revision.

The word "count" not employed in the Code of Criminal Procedure—"Head of charge" the correct expression.

Extract (para. 3) from Letter No. 533, dated the 16th April 1868, from the Registrar of the High Court, to the Sessions Judge of Tirhoot.

Present:

The Hon'ble L. S. Jackson, *Judge.*

IN the case of Adhur and another (2, Statement 4), the Court observe that you repeatedly use the word "count" in order to indicate the particular offence of which the accused has been found guilty. That is a term which is not employed in the Code of Criminal Procedure. The term used is "head of charge" (Section 239 *et seq*). It is desirable that the Courts should make use of the phraseology of the Code, and use each term in its proper sense.

The statement of acquittals should contain, not expressions of the Sessions Judge's concurrence in the verdict, but his approval thereof.

Extract (para. 4) from Letter No. 603, dated the 11th May 1868, from the Registrar of the High Court, to the Sessions Judge of the 24-Pergunnahs.

(Criminal Side.)

Present:

The Hon'ble L. S. Jackson, *Judge.*

THE Court observe that, in several of the cases entered in Statement 5, the finding of the Jury is followed by the words "and the Court concurring in the verdict directed," &c. The expressions read as if the concurrence of the Judge is necessary before the accused could be discharged. The Court have no doubt that Mr. Wauchope is quite aware that the case is otherwise, but it is not advisable to use a form of expression which suggests an erroneous idea. The Court always desire to know whether the Judge *approved* of the verdict or not.

Where prisoner pleads guilty of the principal charge, the other charges ought not to be proceeded with — Identification by a mooktear — Section 52, Penal Code.

Extracts (paras. 4 and 5) from Letter No. 662, dated 27th May 1868, from the Registrar of the High Court to the Sessions Judge of Bhaugulpore.

Present:

The Hon'ble L. S. Jackson, *Judge.*

4. WITH reference to your observation (case of Baboololl) that "the accused pleaded guilty to the commission of dacoity, but, as he denied the receipt or retention of the stolen property obtained in such dacoity, the assessors were required to give an opinion on that point," the Court observe that such opinion was clearly unnecessary; the accused having pleaded guilty on the principal charge, the other charge ought not to have been proceeded with.

5. The Court cannot understand your observation (case of Ramdharee Singh and another) that "the mooktear certified in good faith, and hence he was deemed an innocent party," and must call your attention to Section 52 of the Indian Penal Code, which declares that nothing is said to be done or believed in "good faith," which is done or believed without due care or attention. The form of identification used in such cases is—"Ramishoonasam," "I know (or am acquainted with, or recognize)." Can a person exercising the profession of a mooktear and presumably of more than ordinary circumspection, if he used due care and attention, say that he knows or recognizes a person with whom he was not acquainted. There may not have been a criminal intention, but that there was a reprehensible laxity it would appear to the Court to admit of no doubt.

Section 24, Act II. of 1855, regarding privileged communications does not apply to mooktears —The Jury ought not to declare their opinions on portions of the evidence before the trial is concluded, and they have heard the summing up and direction of the Judge.

Extracts (paras. 4 and 6) from Letter No. 668, dated 28th May 1868, from the Registrar of the High Court, to the Sessions Judge of East Burdwan.

Present:

The Hon'ble L. S. Jackson, *Judge.*

4. WITH advertence to the objection mentioned in your abstract of the case of Chunder Kant and others (3, Statement 5), that the evidence of the witness who acted as mooktear of the prisoner could "not be accepted as proof against the prisoner, as the showing of the document must be held to be a privileged communication," the Court observe that it is untenable, as Section 24, Act II. of 1855, refers only to barristers, attorneys, or vakeels, not to mooktears. You will also forward the proceedings of this case for the Court's revision.

6. With advertence to your abstract in the case of Khetoo Dome and others (8, Statement 5), marginally noted, the Court observe that the Jury ought not to be allowed to declare their opinions on portions of the evidence before the trial is concluded, and they have heard the summing up and direction of the Judge.

"After the evidence for the prosecution in this case had been concluded, the Jury unanimously declared that they could place no faith in the evidence as to recognition.

"Witnesses were next examined as to identification of the property found in the houses of the prisoners Nos. 23 and 24."

Substitutes new rule regarding stamp-paper on which applications for new trials under Section 21, Act XI., 1865, &c., are to be engrossed.

CIRCULAR ORDER No. 35.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Side, to the Judges of Courts of Small Causes, dated Calcutta, the 14th December 1867.

(Civil Side.)

Present :

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

THE following rule is to be substituted for that prescribed by Circular Order No. 32,* dated 19th December 1865 :—

"An application for a new trial under Section 21, Act XI. of 1865, in any case in which the amount or value of the subject-matter is less than fifty rupees, shall bear a stamp of *one anna.* In other cases it shall bear a stamp of eight annas." (*See* Clause 10, Schedule B, Act XXVI. of 1867.)

* *See* 4 W. R., Civil Circular Orders, p. 7.

CIRCULARS Nos. 36, 37, AND 38.

Called for lists of all persons who have given notice of their intention to appear at the examination of pleaders to be held on the last Monday in January, and at that of mookhtears to be held on the second Monday of February next.

Notifies the days in 1868 on which the Civil Courts subordinate to the High Court are to be closed.

CIRCULAR No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Side, to the Civil Judges in the Lower Provinces, dated Calcutta, the 3rd January 1868.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L S. Jackson, and A. G. Macpherson, *Judges*.

It is hereby notified for general information that the Civil Courts, subordinate to the High Court, will be closed in the year 1868 on the dates indicated in the annexed list.

The Civil Courts are not to be closed except on the Holidays authorized as above.

List of Holidays for the Subordinate Civil Courts for the year 1868.

[List omitted as unnecessary.]

Calls for statement of charges allowed for the various descriptions of fees of processes in cases appealed to the High Court with a view to their being commuted for a fixed rate payable in Calcutta.

CIRCULAR No. 2.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to District Judges, dated Calcutta, the 12th February 1868.

(Civil Side.)

Present :

The Chief Justice, and Justices G. Loch, H. V. Bayley, and A. G. Macpherson.

It is proposed that the fees for service of processes in cases appealed to the High Court be commuted for a fixed rate payable in Calcutta. It has been suggested by the Government of Bengal that charges for boat-hire and road or ferry-tolls be likewise so commuted. In order to enable the Court to fix a proper rate for these latter items, I am directed to request that you will be good enough to furnish me with a statement of the charges usually made on these heads in your district, with full details of distances, seasons, &c.

Charges for binding books to be met from allowance for stationery, and not to form an item in contingent bill.

CIRCULAR No. 3.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Judges of Small Cause Courts, dated Calcutta, the 26th March 1868.

(Civil Side.)

Present :

The Hon'ble G. Loch. *Judge.*

I am directed by the Court to forward copy of a letter from the Accountant-General, Bengal, No. $\frac{T}{4416}$, dated 14th instant, and to request, with reference thereto, that all charges for binding books may in future be met from the fixed allowance for country-stationery, instead of being allowed to form an item in your contingent bill.

No. $\frac{T}{4416}$.

Calcutta, the 14th March 1868.

OFFICIAL MEMORANDUM.

To the Registrar of the High Court.

I BEG to draw your attention to the charge of Rupees 4-12 on account of binding books, which has been admitted by you on the accompanying detailed contingent bill of the Small Cause Court of Moorshedabad for the month of September last. All charges for binding books are required, under orders of the Government of India, to be met from the fixed allowance for country-stationery; and I request that, with the permission of the High Court, the amount under reference, and all similar expenditure, may be retrenched from the contingent bills of Small Cause Court Judges, and be directed to be met from the stationery-allowance ; or that the orders of Government may be obtained, with the Court's permission, for the admission of the extra expenditure, if it is considered indispensable.

(Signed) HUGH SANDEMAN,

Accountant-General, Bengal.

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Regarding the practice of closing the Courts on the criminal as well as on the civil side during the Dusserah vacation.

CIRCULAR No. 4.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil and Sessions Judges and Judicial Commissioners, dated Calcutta, the 2nd April 1868.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*.

SEVERAL of the Zillah Judges appear to have entirely closed their Courts on the criminal as well as on the civil side for the period of the Dusserah vacation, and to have abstained during the whole of that period from attending to business, receiving or opening communications from the superior Court, despatching returns which were due, or doing any act whatever of an official kind.

Such a practice is justified by nothing in the law or in the orders of this Court: it causes great inconvenience. The Zillah Judges are, therefore, reminded that, under the Circular Order (Nizamut Adawlut) No. 8, dated 23rd March 1838, issued under the orders of Government, which has never been rescinded, the Court of Session "must never be closed for the despatch of criminal business except on those days only when a total cessation from all business is necessary and usual;" and, moreover, that even on the civil side of their Courts it does not follow that, because there is no sitting of the Court, therefore every official duty is to be suspended.

Exempting Rajah Gopaul Singh Bahadoor from personal attendance in the Civil Courts.

CIRCULAR MEMO. No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Authorities in the Lower Provinces, dated Calcutta, the 12th May 1868.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge*.

THE Government of Bengal* having been pleased to exempt Rajah Gopaul Singh Bahadoor, of Pergunnah Sooltanabad, in the Sonthal Pergunnahs, from personal attendance in the Civil Courts, the High Court direct that his name be included in the list prepared under the provisions of Section 22, Act VIII. of 1859.

* *Vide* Government Letter No. 2208, dated 16th April 1868.

Directs the insertion of costs in decrees and orders in Miscellaneous Cases.

CIRCULAR No. 6.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all subordinate Civil Courts, dated Calcutta, the 22nd May 1868.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*.

THE High Court have observed that subordinate Civil Courts, with few exceptions, omit to enter costs in their orders in miscellaneous cases, stating sometimes as a reason for the omission that the pleader's fees have not been awarded for want of any specification of the value of the claim: and that in the few exceptional cases in which the pleader's fees are entered in the order, the computation appears to have been made by a mohurrir or other ministerial officer with reference to the value of the cases, while the officer presiding in the Court is required specifically to fix the fees at the hearing.

The Court, therefore, request the attention of all subordinate Courts to the injunction contained in Circular Order No. 22 of the 13th of June 1866, * that "Civil Officers will invariably act up to the letter and spirit of the Rule" therewith circulated, for regulating and fixing the fees payable in subordinate Courts, and more particularly to Section 8 of those Rules, which enjoins that "the amount of the fee of an adversary's pleader, when allowed in any Miscellaneous proceeding, or for any other matter than that of appearing, acting, or pleading in a suit prior to decree, shall be fixed by the Court," &c.

* See 6 W. R., Civil Circulars, p. 1.

Cases of escaped prisoners not to be returned as pending.

CIRCULAR ORDER No. 13.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Side, to all Sessions Judges, dated Calcutta, the 14th December 1867.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

THE cases of *escaped prisoners* should not be regarded or returned as pending upon the files of Sessions Judges, as such persons cannot be said to be awaiting trial.

Enjoins new Annual Register of fines, No. 7, in Judge's and Magistrate's Returns.

CIRCULAR ORDER No. 14.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate Side, to all Sessions Judges and Magistrates, dated Calcutta, the 16th December 1867.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE form herewith enclosed is to be substituted for that hitherto used for the Annual Register of fines, No. 7, in Judge's and Magistrate's Returns.

The Court think it unnecessary to require the detailed Statement of fines heretofore submitted. The Register, however, should be kept up in the Vernacular both in the Judge's and Magistrate's Office, and the Sessions Judges, in submitting the Annual Returns, should state that they have examined the Registers in their own and in the Offices of the Magistrate and his subordinates, and certify to their being properly kept up. An explanation will be called for when the outstandings of any year are excessive.

NO. 7.

Annual Return of Fines for the District of

Amount unrealized from former years.	Amount of Fines imposed during the year 186 .	Total.	Amount awarded as compensation under Section 44, C. C. P.	Amount realized on account of former years.	Amount realized on account of the year.	Total realized.	Amount paid as compensation under Section 44, C. C. P.	Amount credited to Government.
Amount unrealized of fines imposed in ...			1867					
Ditto ditto ditto ...			1866					
Ditto ditto ditto ...			1865					
Ditto ditto ditto ...			1864					
Ditto ditto ditto ...			1863					
Ditto ditto ditto ...			1862					
Total unrealized ...								

Summonses on Sub-Assistant Surgeons, &c., to give evidence in cases in which they have held "post-mortem examinations," &c., to be served through Magistrate, who will communicate with the Civil Surgeon.

CIRCULAR ORDER No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Magisterial Authorities in the Lower Provinces, dated Calcutta, the 10th January 1868.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*.

CONSIDERABLE inconvenience having been experienced in consequence of Sub-Assistant Surgeons or Native Doctors at Subdivisions being summoned from their stations without the knowledge of the Civil Surgeon of the District, to whom they are subordinate, for the purpose of giving evidence in cases in which they have held *post-mortem* examinations, or when their attendance may be otherwise required by the Judicial Authorities, the High Court are pleased to direct that, in future, all summonses on these Medical Subordinates be served through the Magistrate or other executive head of the district to enable him, in communication with the Civil Surgeon, to make arrangements for the conduct of their medical duties during their absence.

Power of Magistrates to sentence to whipping and the maximum punishment awardable under Section 46 of the Code of Criminal Procedure.

CIRCULAR ORDER No. 2.

From the Registrar of the High Court, to all Criminal Judicial Authorities, dated Calcutta, the 6th April 1868.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*,

IN a recent case* certain questions as to sentences of whipping and the maximum of punishment which can be awarded under Section 46 of the Code of Criminal Procedure were referred to a Full Bench of this Court for determination.

The attention of all officers entrusted with the administration of criminal justice is called to two points which have been

* See *supra*, Criminal Rulings, p. 41.

decided by the majority of the Judges composing the Full Bench Court.

It has been decided—

I.—That when a person who has not been "previously convicted" (using the term in the sense in which it is used in Section 4, Act VI. of 1864) is convicted at one time of two or more offences, it is illegal to sentence him to whipping for one of these offences, *in addition* to imprisonment or fine for the other or others; but that it is not illegal to sentence him to *one whipping, in lieu of all other punishment.*

II.—That when a person who has been "previously convicted" is convicted at one time of two or more offences, he may be punished with one, but only *one*, whipping, *in addition to* any other punishment to which, under Section 46 of the Code of Criminal Procedure, he may be liable.

The Court take this opportunity of impressing upon all officers vested with power to pass sentences of whipping that such sentences should be passed with the utmost caution and with due deliberation; and that, if any doubt is felt either as to the legality or propriety (in any particular case) of passing a sentence of whipping, such a sentence ought not to be passed.

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Blank criminal statements should not be sent up, but a note should be made instead on the back of statements Nos. 1 to 5.

CIRCULAR No. 3.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities in the Lower and Extra Regulation Provinces, dated Calcutta, the 16th April 1868.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE Court direct that in future blank statements be not sent up with quarterly returns, as they only cumber the office. Whenever, therefore, the whipping statement or the statement of solitary confinement is blank, a note to that effect will be entered at the back of the statements Nos. 1 to 5 in the column of remarks, and the blank statements will not be sent up.

Prescribes new forms of quarterly statements, and gives directions as to the holding of Criminal Sessions, the submission of the quarterly Sessions statements, &c., the procedure to be observed in commitments, &c., &c.

CIRCULAR No. 4.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges and Committing Magistrates, dated Calcutta, the 6th May 1868.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

REFERRING to the periods at which Sessions of Jail Delivery now take place, and to the various changes which have been introduced by the Code of Criminal Procedure and the Circular Orders of this Court, the returns at present submitted by the Sessions Judges are no longer perfectly adapted to the purpose for which they are intended, information on some important points not being found in them at all, and the statements being, on the other hand, encumbered with figures which may be found in the Magistrates' returns, and which it is not necessary to repeat. The rules relating to the holding of the Criminal Sessions also appear to be susceptible of improvement.

The High Court has consequently determined that the returns of the Court of Session not relating to its appellate business should be submitted at the close of each actual Sessions, and should be so altered in form as to exhibit more conveniently the result of the Sessions' operations.

But as the Court of Session must frequently sit for the purposes of appellate jurisdiction in order to the prompt decision of appeals and petitions coming before it, the returns of appellate business must continue to be submitted periodically, and the Court are of opinion that such statements may now be required not oftener than quarterly, in the same manner as the civil returns are now transmitted. The form of these returns has also been modified.

The statements, therefore, which the Courts of Session will hereafter submit (except the annual statements, which will be dealt with in a separate order) are as follows:—

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I. A general abstract of the business which has come in each quarter before the Court of Session in its appellate or superintending capacity. In this statement it is intended that appeals and applications of every kind made to the Court of Session should be exhibited. The form is so simple as to require no explanation.

II. This statement, which is to accompany No. I., will exhibit the result of appeals and applications under Section 434 in detail, showing how the decisions and orders of each Magisterial Officer have been affected. This form is also exceedingly simple. Appeals in criminal trials include such appeals under Section 409, Code of Criminal Procedure, and also under Section 410. Appeals in other cases include appeals against orders to give security for good behaviour and any appeals allowed by law against orders not being convictions in criminal trials. Applications and requisitions under Section 434 have been entered under a separate head, because it has been thought expedient that the extent to which this provision of the law has been resorted to should be recorded, whether the Court of Session has acted on application or of its own motion. Such application, when made by petition to the Court and refused, will be entered in the same column as appeals rejected. When the record has been called for, but the proceedings have not been referred for the orders of the High Court, the case will be entered with orders affirmed. When such reference has been made, the case will appear under " orders reversed."

III., IV., & V. Jail delivery statements.

Nos. III., IV., and V., will be submitted within a week after the close of each Sessions. Nos. IV. and V. are the same as the present returns bearing those Nos.

No. III. is designed to exhibit the results of one Sessions at a single view. In it will be shown the cases of all accused persons who were in jail or on bail at the commencement of the Sessions, awaiting trial before the Court of Session, and the mode in which each case and person was disposed of.

The High Court has reason to believe that trials are sometimes too lightly postponed. It cannot be too often pointed out that a further detention of an accused person in jail for perhaps two months is in itself no trivial infliction, and is only justified when there is apparently a good case against the prisoners, and when the Judge is satisfied that, for the ends of justice, it is necessary to postpone the trial.

The High Court, therefore, directs that at each periodical Session all persons awaiting trial be brought before the Judge in open Court, and if the Government Prosecutor should not be prepared to go to trial in any particular case, that he should be required to show cause, properly supported, why the accused should not be acquitted and released, the accused himself being also heard in answer to such cause shown. When any trial is postponed, the ground of postponement is to be shortly stated in the column of " remarks " in statement No. III.

Offences are to be stated as concisely as possible, with the Section of the Indian Penal Code (or other law) applicable, in the form given.

When solitary confinement is awarded, the fact (specifying the period) is to be stated in red ink in the column of remarks opposite the name of the prisoner so sentenced.

A sentence passed in addition to any other sentence in a different case passed at the same Sessions, or one which is to take effect on the expiration of another sentence which the prisoner may be undergoing, is to be similarly indicated.

Cases will be entered in the order of trial, so as to enable the Judge's clerk to place each case in the statement at the conclusion of the trial.

Part II.

The smaller form given on the reverse side of this statement is intended to show the number of witnesses and others who have come before the Court at each Sessions and the time occupied in disposing of the cases collectively.

The existing rule, under which in all districts the Sessions are to be held in each alternate month, is abrogated, and the number of Sessions and the time of holding them will now be left to the discretion of each Sessions Judge to be determined according to the varying circumstances of his district and the state of business therein.

The Judge will, accordingly, in the first week of December in each year, fix the number of Sessions to be held in the year following and the dates on which respectively they are to begin (the number varying with the estimated or average number of trials, and not being less than six or more than ten in each year), and the Magistrate of the District, in communication with all the Subordinate Magistrates who exercise the power of committing to the Sessions, and obtaining from them the particulars of all cases committed by them, will prepare and submit to the Zillah Judge, two days before the commencement of each Sessions, a calendar of all such cases in the form annexed, which will be the basis of the Sessions Judge's calendar (statement No. III.).

The document now misnamed a calendar will be discontinued, and the names of the witnesses should be placed on the back of the charge-sheet. The observations or judgment of the Magistrate in committing the prisoner will always go up in original with the record, where, with the original depositions, they should be read by the Judge before the trial. Abstracts of the evidence are considered unnecessary, and they are at times misleading.

The Magistrates will be careful to arrange their commitments with a view to the trials taking place at the earliest or next ensuing Session, in order to avoid the needless detention of accused persons for prolonged periods.

Whenever a commitment is made, intimation will be immediately given to the Court of Session, through the Magistrate of the District, by a letter in the annexed form. It will be unnecessary for the Court of Session to send any answer fixing a date for the trial. But the Judge will be guided by the information which he thus receives in estimating the time which it will be necessary to devote to the Criminal Sessions, and consequently at what period he will be able to take up civil business thereafter.

Prosecutors and witnesses will be bound over to appear "at the next Criminal Sessions commencing on ."

But it will be the duty of the Magistrate in order to prevent hardship and unnecessary detention to such persons, so to arrange the coming on of cases before the Court of Session that such parties may not be brought from their homes to the Sudder Station before they are actually required, and that they should have written notice of the specific date on which their attendance will be necessary, and it should be carefully explained that failure to attend will be severely dealt with.

The directions herein contained for committing Magistrates are to be observed so far as they are applicable by Civil Courts and other authorities committing persons for trial at the Sessions.

I. Quarterly.

I. A general abstract of the business which has come in each quarter before the Court of Session in its appellate or superintending capacity. In this statement it is intended that appeals and applications of every kind made to the Court of Session should be exhibited. The form is so simple as to require no explanation.

II. Quarterly.

II. This statement, which is to accompany No. I., will exhibit the result of appeals and applications under Section 434 in detail, showing how the decisions and orders of each Magisterial Officer have been affected. This form is also exceedingly simple. Appeals in criminal trials include such appeals under Section 409, Code of Criminal Procedure, and also under Section 410. Appeals in other cases include appeals against orders to give security for good behaviour and any appeals allowed by law against orders not being convictions in criminal trials. Applications and requisitions under Section 434 have been entered under a separate head, because it has been thought expedient that the extent to which this provision of the law has been resorted to should be recorded, whether the Court of Session has acted on application or of its own motion. Such application, when made by petition to the Court and refused, will be entered in the same column as appeals rejected. When the record has been called for, but the proceedings have not been referred for the orders of the High Court, the case will be entered with orders affirmed. When such reference has been made, the case will appear under "orders reversed."

III., IV., & V. Jail delivery statements.

Nos. III., IV., and V., will be submitted within a week after the close of each Sessions. Nos. IV. and V. are the same as the present returns bearing those Nos.

No. III. is designed to exhibit the results of one Sessions at a single view. In it will be shown the cases of all accused persons who were in jail or on bail at the commencement of the Sessions, awaiting trial before the Court of Session, and the mode in which each case and person was disposed of.

The High Court has reason to believe that trials are sometimes too lightly postponed. It cannot be too often pointed out that a further detention of an accused person in jail for perhaps two months is in itself no trivial infliction, and is only justified when there is apparently a good case against the prisoners, and when the Judge is satisfied that, for the ends of justice, it is necessary to postpone the trial.

The High Court, therefore, directs that at each periodical Session all persons awaiting trial be brought before the Judge in open Court, and if the Government Prosecutor should not be prepared to go to trial in any particular case, that he should be required to show cause, properly supported, why the accused should not be acquitted and released, the accused himself being also heard in answer to such cause shown. When any trial is postponed, the ground of postponement is to be shortly stated in the column of "remarks" in statement No. III.

Offences are to be stated as concisely as possible, with the Section of the Indian Penal Code (or other law) applicable, in the form given.

When solitary confinement is awarded, the fact (specifying the period) is to be stated in red ink in the column of remarks opposite the name of the prisoner so sentenced.

A sentence passed in addition to any other sentence in a different case passed at the same Sessions, or one which is to take effect on the expiration of another sentence which the prisoner may be undergoing, is to be similarly indicated.

Cases will be entered in the order of trial, so as to enable the Judge's clerk to place each case in the statement at the conclusion of the trial.

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The Judge will, accordingly, in the first week of December in each year, fix the number of Sessions to be held in the year following and the dates on which respectively they are to begin (the number varying with the estimated or average number of trials, and not being less than six or more than ten in each year), and the Magistrate of the District, in communication with all the Subordinate Magistrates who exercise the power of committing to the Sessions, and obtaining from them the particulars of all cases committed by them, will prepare and submit to the Zillah Judge, two days before the commencement of each Sessions, a calendar of all such cases in the form annexed, which will be the basis of the Sessions Judge's calendar (statement No. III.).

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The Magistrates will be careful to arrange their commitments with a view to the trials taking place at the earliest or next ensuing Session, in order to avoid the needless detention of accused persons for prolonged periods.

Whenever a commitment is made, intimation will be immediately given to the Court of Session, through the Magistrate of the District, by a letter in the annexed form. It will be unnecessary for the Court of Session to send any answer fixing a date for the trial. But the Judge will be guided by the information which he thus receives in estimating the time which it will be necessary to devote to the Criminal Sessions, and consequently at what period he will be able to take up civil business thereafter.

Prosecutors and witnesses will be bound over to appear "at the next Criminal Sessions commencing on ."

But it will be the duty of the Magistrate in order to prevent hardship and unnecessary detention to such persons, so to arrange the coming on of cases before the Court of Session that such parties may not be brought from their homes to the Sudder Station before they are actually required, and that they should have written notice of the specific date on which their attendance will be necessary, and it should be carefully explained that failure to attend will be severely dealt with.

The directions herein contained for committing Magistrates are to be observed so far as they are applicable by Civil Courts and other authorities committing persons for trial at the Sessions.

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The High Court has reason to believe that trials are sometimes too lightly postponed. It cannot be too often pointed out that a further detention of an accused person in jail for perhaps two months is in itself no trivial infliction, and is only justified when there is apparently a good case against the prisoners, and when the Judge is satisfied that, for the ends of justice, it is necessary to postpone the trial.

The High Court, therefore, directs that at each periodical Session all persons awaiting trial be brought before the Judge in open Court, and if the Government Prosecutor should not be prepared to go to trial in any particular case, that he should be required to show cause, properly supported, why the accused should not be acquitted and released, the accused himself being also heard in answer to such cause shown. When any trial is postponed, the ground of postponement is to be shortly stated in the column of "remarks" in statement No. III.

Offences are to be stated as concisely as possible, with the Section of the Indian Penal Code (or other law) applicable, in the form given.

When solitary confinement is awarded, the fact (specifying the period) is to be stated in red ink in the column of remarks opposite the name of the prisoner so sentenced.

A sentence passed in addition to any other sentence in a different case passed at the same Sessions, or one which is to take effect on the expiration of another sentence which the prisoner may be undergoing, is to be similarly indicated.

Cases will be entered in the order of trial, so as to enable the Judge's clerk to place each case in the statement at the conclusion of the trial.

Part II.

The smaller form given on the reverse side of this statement is intended to show the number of witnesses and others who have come before the Court at each Sessions and the time occupied in disposing of the cases collectively.

The existing rule, under which in all districts the Sessions are to be held in each alternate month, is abrogated, and the number of Sessions and the time of holding them will now be left to the discretion of each Sessions Judge to be determined according to the varying circumstances of his district and the state of business therein.

The Judge will, accordingly, in the first week of December in each year, fix the number of Sessions to be held in the year following and the dates on which respectively they are to begin (the number varying with the estimated or average number of trials, and not being less than six or more than ten in each year), and the Magistrate of the District, in communication with all the Subordinate Magistrates who exercise the power of committing to the Sessions, and obtaining from them the particulars of all cases committed by them, will prepare and submit to the Zillah Judge, two days before the commencement of each Sessions, a calendar of all such cases in the form annexed, which will be the basis of the Sessions Judge's calendar (statement No. III.).

The document now misnamed a calendar will be discontinued, and the names of the witnesses should be placed on the back of the charge-sheet. The observations or judgment of the Magistrate in committing the prisoner will always go up in original with the record, where, with the original depositions, they should be read by the Judge before the trial. Abstracts of the evidence are considered unnecessary, and they are at times misleading.

The Magistrates will be careful to arrange their commitments with a view to the trials taking place at the earliest or next ensuing Session, in order to avoid the needless detention of accused persons for prolonged periods.

Whenever a commitment is made, intimation will be immediately given to the Court of Session, through the Magistrate of the District, by a letter in the annexed form. It will be unnecessary for the Court of Session to send any answer fixing a date for the trial. But the Judge will be guided by the information which he thus receives in estimating the time which it will be necessary to devote to the Criminal Sessions, and consequently at what period he will be able to take up civil business thereafter.

Prosecutors and witnesses will be bound over to appear "at the next Criminal Sessions commencing on ."

But it will be the duty of the Magistrate in order to prevent hardship and unnecessary detention to such persons, so to arrange the coming on of cases before the Court of Session that such parties may not be brought from their homes to the Sudder Station before they are actually required, and that they should have written notice of the specific date on which their attendance will be necessary, and it should be carefully explained that failure to attend will be severely dealt with.

The directions herein contained for committing Magistrates are to be observed so far as they are applicable by Civil Courts and other authorities committing persons for trial at the Sessions.

I. Quarterly.

I. A general abstract of the business which has come in each quarter before the Court of Session in its appellate or superintending capacity. In this statement it is intended that appeals and applications of every kind made to the Court of Session should be exhibited. The form is so simple as to require no explanation.

II. Quarterly.

II. This statement, which is to accompany No. I., will exhibit the result of appeals and applications under Section 434 in detail, showing how the decisions and orders of each Magisterial Officer have been affected. This form is also exceedingly simple. Appeals in criminal trials include such appeals under Section 409, Code of Criminal Procedure, and also under Section 410. Appeals in other cases include appeals against orders to give security for good behaviour and any appeals allowed by law against orders not being convictions in criminal trials. Applications and requisitions under Section 434 have been entered under a separate head, because it has been thought expedient that the extent to which this provision of the law has been resorted to should be recorded, whether the Court of Session has acted on application or of its own motion. Such application, when made by petition to the Court and refused, will be entered in the same column as appeals rejected. When the record has been called for, but the proceedings have not been referred for the orders of the High Court, the case will be entered with orders affirmed. When such reference has been made, the case will appear under "orders reversed."

III., IV., & V. Jail delivery statements.

Nos. III., IV., and V., will be submitted within a week after the close of each Sessions. Nos. IV. and V. are the same as the present returns bearing those Nos.

No. III. is designed to exhibit the results of one Sessions at a single view. In it will be shown the cases of all accused persons who were in jail or on bail at the commencement of the Sessions, awaiting trial before the Court of Session, and the mode in which each case and person was disposed of.

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Cases will be entered in the order of trial, so as to enable the Judge's clerk to place each case in the statement at the conclusion of the trial.

Part II.

The smaller form given on the reverse side of this statement is intended to show the number of witnesses and others who have come before the Court at each Sessions and the time occupied in disposing of the cases collectively.

The existing rule, under which in all districts the Sessions are to be held in each alternate month, is abrogated, and the number of Sessions and the time of holding them will now be left to the discretion of each Sessions Judge to be determined according to the varying circumstances of his district and the state of business therein.

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But it will be the duty of the Magistrate in order to prevent hardship and unnecessary detention to such persons, so to arrange the coming on of cases before the Court of Session that such parties may not be brought from their homes to the Sudder Station before they are actually required, and that they should have written notice of the specific date on which their attendance will be necessary, and it should be carefully explained that failure to attend will be severely dealt with.

The directions herein contained for committing Magistrates are to be observed so far as they are applicable by Civil Courts and other authorities committing persons for trial at the Sessions.

The rules now communicated will take effect from the 1st July next, and the Zillah Judges will be good enough to fix the Sessions for the latter half of the year in the first week of June. All such arrangements for the Sessions (both on the present occasion and afterwards yearly) are to be immediately reported to this Court for approval, but may be carried out, unless the disapproval of the Court be communicated.

Form of letter to be sent by Committing Officers through the Magistrate of the District to the Judge.

FROM

Magistrate of

TO

THE SESSIONS JUDGE OF

SIR,—I beg to report that I have this day committed to take his trial before the Court of Session the person named in the margin on the charge specified below.

I have, &c.,

A. B.,

Magistrate (as the case may be).

Charges.

1.

2.

(Form of District Magistrate's Calendar.)

Calendar of accused persons for trial before the Court of Session.

SESSIONS OF 186 .

No. of case.	Committing Officer.	No. and Name of accused.	Charges and Section, I.P.C.	Date of offence.	Date of apprehension or appearance to summons.	Date of commitment.	In Jail or on Bail.

Sessions Statement No. I.—*(Quarterly).*

Abstract of business before the Court of Session of the District of _____ *in its Appellate Jurisdiction for the* _____ *Quarter of 186* .

Nature of business.	Pending on	Instituted during the quarter of	Total to be disposed of.	Total disposed of.	Pending on the of	REMARKS.
Appeals in criminal trials ...						
Appeals in other cases ...						
Applications under Section 434, C. C. P. ..						
Other applications ...						

Sessions Statement No. II.—*(Quarterly).*

Result of appeals and applications with reference to the several Magistrates in the District of _____ *for the* _____ *Quarter of 186* .

Names of Magistrate, &c.	Pending at close of last quarter.	Instituted during the quarter.	Total to be disposed of.	Appeals rejected under Section 417, C. C. Pro., and petitions refused.	Decisions confirmed on appeal, and applications not reported.	Reversed, modified, or reported to the High Court.	Total disposed of.	Total pending at end of quarter.	REMARKS.
Mr.									
Appeals in criminal trials									
Appeals in other cases ...									
Applications under Section 434, C. C. P. ...									
Mr.									
Appeals in criminal trials .									
Appeals in other cases ...									
Applications under Section 434, C. C. P. ...									
Mr.									
Appeals in criminal trials .									
Appeals in other cases ...									
Applications under Section 434, C. C. P. ...									
Mr.									
Appeals in criminal trials .									
Appeals in other cases ...									
Applications under Section 434, C. C. P. ...									
Mr.									
Appeals in Criminal trials .									
Appeals in other cases ...									
Applications under Section 434, C. C. P. ...									

Sessions Statement No. III.—*(To be submitted after each Sessions.)*

CALENDAR of accused persons committed or remaining for trial before the Court of Session of the District of at the Jail Delivery held in the Month of 186 .

No. of Case.	Date of Commitment.	Name of Committing Magistrate.	Names and number of accused.	Nature of offence.	Disposal of the accused.	Date of Order.	REMARKS.
1	8th Dec. 1867.	J. Smith, Esq., *Subordinate Magistrate of the First Class, with power to commit to the Sessions.*	1. Jeswant Singh ...	Dacoity, 395, P. C. ..	7 years' rigorous imprisonment		
			2. Halwan Khan ...		10 years' rigorous transportation		
			3. Hasen Khan ...		Acquitted		
			4. Kanie Khan ...		5 years' rigorous imprisonment		
			5. Nubbee Haree ...		3 years' rigorous imprisonment		3 months' solitary confinement.
2	10th ,, ,,	Baboo	6. Sreenath Dass ...	False evidence, S. 193.	Acquitted		
3	15th ,, ,,	Moulvi	7. Kallee Mohun ...	Murder, S. 302, P. C. ..	Trial postponed under S. 389, C. C. P.		On proof that the prisoner was incapable from unsoundness of mind of making a defence.
4	23rd ,, ,,	C. D. French, Esq., *Assistant, with full powers of a Magistrate*	8. Romesh Chunder Mitter ...	Taking a gratification, S. 161, P. C. ...	Remanded on bail to next Sessions on the motion of the Government Vakeel ...		The Court being satisfied that the witnesses for the prosecution are not forthcoming, and that the ends of justice would be answered by the order made.
5	24th ,, ,,	A. B. Wall, Esq., *Magistrate of the District*	9. Waris Ali ..	Murder, S. 302 ...	Death		Reported for confirmation to the High Court.
6	29th ,, ,,	Ditto ditto ...	10. Ram Dass ...	Attempt to murder, S. 307 ...	Acquitted; Insanity ..		Detained pending orders of Government.
7	30th ,, ,,	J. Wood, Esq., *Joint Magistrate*	Kisto Kishur Roy ... / Nobocoomar Sen ...	Forgery of Will, S. 467.	Adjourned till 10th proximo ...		For the attendance of a material witness resident at Lahore.

Part II.

Abstract of Business at the Sessions of *186* , *District of*

Date when Sessions		Number of days of sittings.	Number of persons examined.	Number of Accused Persons				Number of Cases	
Commenced.	Ended.			For trial.	Convicted.	Acquitted.	Not tried.	Tried.	Postponed.

Modifies Circular No. 94, dated 6th May 1862, regarding the transmission of appeal-records.

CIRCULAR No. 5.

From the Registrar of the High Court of Judicature at Fort William in Bengal. to all Sessions Judges and Magistrates. dated Calcutta, the 28th May 1868.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*.

In modification of Circular Order No. 94, dated the 6th May 1862, the Court direct that, as a general rule, in cases of appeal to the High Court from the sentence or order of a Sessions Ju lge, the record shall be forwarded to the High Court by the Sessions Judge immediately on receipt of the notice of appeal directed to be forwarded to him by Circular Order No. 9, dated 7th August 1867.*

But whenever from any cause public inconvenience would arise from the transmission of the original record, the Judge will forward, in the first instance, a certified copy of his reasons (Section 429, Code of Criminal Procedure) for making or passing such sentence or order, stating, at the same time, why the original record has not been immediately sent.

* *See* S W. R., Criminal Circulars, p. 7.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 16th December 1867.

Present:

The Master of the Rolls, Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Hindoo will—Construction—Accumulation—Surplus profits.

On appeal from the late Supreme Court at Calcutta.

Prankisto Chunder and others

versus

Sreemutty Bamasoondery Dassee and another.

Principle of construction of the will of a Hindoo.

The meaning of the testator is to be ascertained by the words which he has made use of, having regard to the laws which prevail in India relative to these subjects.

A testator directed his sons, using the words "living jointly in respect of food," to take care of and look after his property, moveable and immoveable, and carry on his trading business. HELD that this interest is not accurately represented by the words joint-estate in England, nor is it analogous to the case of a testator in England who gives property to executors for the purpose of carrying on his trade, but is more analogous to the tenancy in common which prevails in England.

The will also directed that, on the death of a son, if that son died leaving a son, the share of that son was to go to that son's son, and if the son dying left no son, that the share should go to the survivors. HELD that the share of profits made during the joint-lives of the sons, which belonged to the deceased son, goes over to the other sons of the testator as they would go according to law, as from a consideration of the various terms of the will itself, there was an absence of all directions on the part of the testator to accumulate the profits, or to dispose of the profits which were the property of the son.

THEIR Lordships are of opinion that the decree of the Court of Supreme Judicature at Calcutta is correct. It is a question upon the construction of the will, and the meaning of the testator is to be ascertained by the words which he has made use of, having regard to the laws which prevail in India relative to these subjects.

It is important, in the first place, to consider what is the nature of the interest which he has given to his sons. He has directed his sons, using the words, "living jointly in respect of food," to take care of and look after his property, moveable and immoveable, and carry on his trading business. It is to be observed that this interest is not accurately represented by the words joint-estate in England, for if he had given the property simply to the sons with no further direction than that they should live jointly in respect of food, and one of the sons had died, his share, with all the accretions, would have gone to his heir, to the person who was entitled to inherit according to the Hindu law, so that, in point of fact, the interest was, as regards succession, more analogous to the tenancy in common which prevails in England. It is also proper to observe that no analogy exists between the present case and that to which it was endeavoured to be likened, *viz.*, where a testator in England has given the property to executors for the purpose of carrying on his trade, in which case a trust is imposed upon the executors, who take no beneficial interest in it, and the question is, how the profits of that trade are to be divided amongst the persons who are pointed out by the testator. It is, therefore, in this case important to observe whether the testator has pointed out in his will how the share of his property is to go, upon the death of any one of his sons, and also how far that direction extends. According to the will, if one of the sons had died, leaving a son, the share of the son so dying would have gone to his son, or, in other words, the grandson of the testator. It is only in the event of his son not leaving a son that the testator has directed that the share shall go to the survivors. This is of the more importance, because their Lordships are of opinion that this construction is not lightly to be inferred, but that it is necessary that the testator should express distinctly what his intention is. This they think that he has done. It was argued that a considerable distinction existed between this case and the case in* 6th Moore, because in that case one-fifth was given to each son, and if one died, the fifth was given over; but their Lordships are of opinion that the effect of this will is to direct that the share which each son took, and which would have gone to his heirs according to the Hindoo law, was, in the case of any one of his sons leaving no son, directed to go to the other sons, if not in express words, still

* Sreemutty Soorjeemoney Dassee, *Appellant, vs.* Denobundoo Mullick and otners, *Respondents*, 6 Moore, page 526; and 4 W. R., page 114.

by a necessary inference to be drawn from the expressions used by him, and this is, indeed, the contention of the respondents, and was so held in the Court below, from which decision the appellants have not appealed. The question is, whether the share of profits made during the joint-lives of the sons, which belonged to the deceased son, follows his share of the capital, and goes over to the other sons. In the first place, it is to be observed that the testator has given no direction to accumulate; it remains, therefore, to be seen whether the Court can find, from the words of the will, as Counsel argued, an irresistible inference that such was the intention of the testator. This is the more important, because in the case* in the 8th Moore, which is relied upon as governing this case, there is an express direction to accumulate. It was there directed that the surplus was to be added to the capital. There is an absence of that in this case. It is admitted that the testator could not dispose of the property of his son, or prevent the heir of the son from inheriting his property; therefore the only question here is, whether the testator has directed the accumulations of the property to be added to, and made part of, his own property, because, if he has not, it was the property of the son, and the testator had no power of disposing of it.

In this view of the case, their Lordships think that this will, on whichever translation it is taken, shows an absence of any direction to accumulate. The first direction is, that the sons should live joint in respect of food, and that they should carry on the trading business, and so forth. If the will had stopped there, the only result would have been that, upon the death of this son, his heir would have taken his share in the business; but the will goes on to give a direction that, should the sons disagree, then, after making certain directions as to the application of the income, the surplus was to be partitioned equally amongst them. That is directly opposed to any accumulation. Nor does the testator give any direction whatever in respect to what is to be done with the profits before they disagree and separate. It would follow, therefore, if the will ended there, that the profits arising from the business would be the separate property of each of the five sons in fifths, after they had provided for the carrying on of the business. We find nothing in the subsequent parts of the will which interferes with that. The second Section is the only part of the will which relates to this subject. The testator there directs that, if any of the sons should die without a son, then that the daughters of that son should receive Rupees 100, and his widowed wife, if she lived, being included as a member of the family, should receive the expenses of *brilonoem*, and the other religious acts and ceremonies which she should perform. Then he directs what is to be done, "if ungovernable, and not living in my house, she should go and live elsewhere, or not wish to live in the family, then she shall receive Rupees 2,000." Besides this, he directs that "she shall not be able to make any demand or claim on any moveable and immoveable property, trading business, and estate, &c., upon the allegation of her husband's proper share;" that is to say, she is not to be at liberty to make any claim or demand upon the moveable or immoveable property of the testator, and there it stops. This brings it round exactly to the same question, whether the testator has, in fact, by these words disposed of anything more than the capital of the fund. The words he uses are: "my moveable and immoveable property, trading business, and estate, &c., upon the allegation of her husband's proper share," that is his share of the testator's property, that is the one-fifth of the trading business, which the testator had given to him. If their Lordships are right in coming to the conclusion that the testator has said nothing about what is to be done with the profits of the business, and has made no direction to accumulate, it necessarily follows that those profits being to each of the sons in fifths, and accordingly would be divided as such, and therefore, upon the true construction of the will, their Lordships are of opinion that the testator has not attempted to dispose of these profits, which are the property of the son; if he had, a question might have arisen whether such a direction could have been a valid one or not, but their Lordships are of opinion, upon a fair construction of the words he has used, that it was his intention not to touch the question of profits, but to leave them to go as they would go, according to law, in case there was no disagreement between the sons, the result of which would be that each would take a fifth of the surplus profits, that this fifth would be the property of each son, and

* Sonatun Bysack, *Appellant*, *vs.* Sreemutty Juggut Soondurce Dassee, *Respondent*, 8 Moore, p. 66.

would go to his heirs, exactly in the same manner as any other property that he might have acquired. It will be obvious that, if the son had taken his share of the profits, and invested it in the purchase of any other property, no question could have arisen. It is a fair inference also that the view that he took in case they disagreed, *viz.*, that they should divide the surplus profit, is a sort of guide for what he intended they should do in case they did not disagree at all.

Their Lordships also think that this case is exceedingly close upon the case in 6th Moore, and, although they would reluctantly allow in the construction of a will the construction of one will to be an imperative guide for the construction of another, where the expressions were not identical, still they think that the principles laid down in that case govern the present; and they concur with the observations made by Sir Barnes Peacock in delivering judgment, that the testator has not attempted to dispose of, and, if he had, could not effectually have disposed of, the property of his son.

There is another point relative to the property of the partnership, consisting of Company's paper. The facts of the case appear to be these: the partnership-assets consisted in part of Company's paper, which were taken in the name of the deceased son, or in his name jointly with the names of the other brothers, and it was necessary that they should be indorsed. The result was that he indorsed the bills in blank, and gave them to his brothers. This was, in their Lordships' opinion, a mere ordinary partnership-transaction for the purpose of enabling the partners to realize part of the assets of the partnership, which would not affect the right that each son had to his share of the profits, not giving to the son, who has died, the exclusive right to the Company's paper, which he so indorsed, though taken in his name alone, but only making it a part of the assets of the partnership, in which he would be entitled to his share after the expenses of partnership were duly discharged.

Their Lordships, therefore, will humbly recommend Her Majesty that the decision of the Supreme Court of Judicature in Calcutta be affirmed with costs.

The 20th December 1867.

Present:

Lord Cairns, Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard T. Kindersley, and Sir Lawrence Peel.

Jurisdiction—Under-tenants—The term "pottah" in Act X.—Hereditary and transferable tenures—Evidence—Section 15, Act X., 1859.

On Appeal from the High Court at Calcutta.

Baboo Dhunput Singh and others

versus

Gooman Singh and others.

Tenants intermediate between proprietor and ryots are subject to the jurisdiction of the Collector under Act X. of 1859, which contemplates under-tenants as distinct from ryots, and contains provisions relating to both classes.

A *pottah* must not, *primâ facie*, be assumed to give a hereditary interest, though it contains no words of inheritance; "pottah," as used in Act X., 1859, being a generic term, which embraces every kind of engagement between a zemindar and his under-tenants or ryots.

Where proof exists of long uninterrupted enjoyment of a tenure, accompanied by recognition of its hereditary and transferable character, it is sufficient to supply the want of the words "from generation to generation" in the *pottah*, and the tenant cannot be dispossessed by his superior.

Where a tenure was or has become hereditary and transferable, and the rent has not been changed from the time of the Perpetual Settlement, the tenants (being intermediate between proprietor and ryots) are protected from enhancement by Section 15, Act X., 1859.

THIS is an appeal against a decree dismissing the suit brought by the appellant under Act X. of 1859, for the enhancement of the rent of land within his zemindary. The argument before their Lordships raised various questions of some perplexity and of real public importance, but the facts of the case are, for those of an Indian cause, unusually free from doubt.

A claim to enhance rent assumes the existence of some right of occupation in the defendants (the actual tenants), and of a right to raise the rent previously paid in the plaintiff (the zemindar). The appellant's title is thus derived: He is the son and representative of Baboo Pertab Singh, who, in 1851, purchased the zemindary, in which the lands in question are situate, at an execution-sale. The execution, though at the suit of Government, was one in a mere civil suit for moneys, and accordingly the purchaser acquired none of the extraordinary rights of a purchaser at a sale for arrears of Government revenue. He took merely the right, title, and interest of the judgment-debtor, and therefore subject to whatever subsisting interests in the lands had been effectually granted or created by any former zemindar.

The following is the history of the respondent's occupation: In 1792, shortly after the Decennial Settlement of this zemindary had been completed, but before that settlement had been declared perpetual, the then zemindar granted the lands in question to one Augham Singh at an annual rent of 101 sicca rupees, under a *pottah*, of which the terms and effect will hereafter be considered. Augham Singh continued to pay that rent, without variation, up to the time of his death, which took place in 1820; and in some of the latest of the zemindar's receipts or acquittances, which have been produced in evidence, he is described as *mukurrureedar*. After his death, his sons Pertab Singh and Neerbhan Singh continued to hold the lands on the same terms, and some of the zemindar's receipts, accepting the same rent of 101 sicca rupees from Pertab Singh, and describing him as *mukurrureedar*, are also in evidence. Pertab Singh died on or before 1838; for, in the proceeding at page 20 of the record, his son Gooman Singh, one of the present respondents, and Neerbhan Singh, are described as the then occupants of the lands

That proceeding was in a suit brought by Government for the resumption and assignment of these lands which failed on proof that they were included in the zemindary, of which the revenue had been permanently settled in 1793, and were, therefore, not subject to any claim on the part of Government. The zemindar being no party to this proceeding, it is material only as showing that the title on which the respondents now rely was openly asserted as early as 1838. Some of the other receipts that are in evidence show that rent for the years 1835, 1836, and 1837, at the old rate of 101 sicca rupees, was received from Gooman Singh, and in these also he is described as *mukurrureedar*. It is not, however, clear that these last-mentioned receipts were granted by the zemindar or his officers. It seems more probable that they were granted by a Receiver, who, under the Court of Wards, during the minority or incapacity of the zemindar, or under some other unexplained circumstances, was at that time in possession of the zemindary. It also appears that, although the rent was often taken from one member of the Singh family, as shown by the receipts, there were many persons of that family beneficially interested in the lands; Pertab Singh having left five sons, besides Gooman Singh, and Neerbhan Singh having on his death left two sons, Dabee Singh and Akbur Singh. And from one of the documents in evidence in the cause, it appears that fees were paid by the two last-named persons to, and accepted by, the Receiver in 1845, on a mutation of names, as upon the devolution of a *mukurruree* tenure.

The father also of the appellant is shown to have brought in 1855 a summary suit for the recovery of one year's rent, at the rate of 101 sicca rupees, alleging that the lands were held as a *mukurruree* at that rent by the defendants there named.

So far the tenure, whatever was its nature, remained in the Singh family, but it afterwards became the subject of transfer by sale. By various transactions, partly of voluntary sale and purchase, partly of purchase at judicial sales, of which the earliest is in 1858, the respondent, Muddun Lall Doss, had, before the commencement of the

present suit, acquired the whole interest in the tenure, except the shares (at most one-twelfth each) of Gooman Singh, and of one of his brothers; and it is stated in the respondent's case that he has since acquired the last-mentioned shares also, and is now the only person interested in supporting the decree under appeal. The result, therefore, of what has been stated is, that, at the time of the commencement of this suit, the lands had been held as against the zemindar at one unvarying rent since 1792, under a tenure originating in the *pottah* of that year, but treated *de facto* as a hereditary tenure, and from time to time described by both the zemindar and the tenants as a *mukurruree* tenure; and that, as such, it has been made the subject of sale and transfer to the knowledge, and with the assent, of the zemindar, who, on one occasion, bid through his manager for a portion of it.

The first proceeding in this suit was necessarily the notice which the 13th Section of the Act directs to be served on the under-tenant or ryot whose rent is sought to be enhanced. That document stated that the *taidad*, meaning probably the rent-roll, of the lands was extremely small; that the respondents had produced "no reliable document," showing on what special grounds they occupied them; that, with a view to settle the rent, the lands had been measured, and were found to consist of 11,645 beegahs; and that the rent of them, according to the rate paid by other ryots cultivating the same kind of land, would amount to 24,842 rupees 10 annas and 8 pies.

And the plaint founded on this notice, accordingly, claimed the sum with interest amounting in all to 26,752 rupees 6 annas and 9 pies, as due from the respondents to the appellant.

The learned Counsel for the appellant have argued that the defence set up by the respondents must be taken to be that they are the holders of a *mukurruree istemraree* tenure, *i. e.*, a hereditary tenure at a fixed rent, under the *pottah* of 1792, and that they must stand or fall according as the terms of that instrument establish or fail to establish such a title. Their Lordships cannot accede to that argument. It is to be observed that Act X. of 1859 (see Section 59) does not require the defendants to put in any written pleading. And in their Lordships' opinion the fair construction of the written statement, which, under the option given to him, the respondent Muddun Lall did put in is, that, under all the circumstances stated above, he and those from whom he derives title must be taken to have held as hereditary *mukurrureedars*, which of itself would be an answer to the suit; and that, if that contention could not be supported to this full extent, they were protected against an enhancement of rent by the provisions of Act X. of 1859.

The respondents have been successful in every stage of the suit in the Courts below, but the several decisions in their favor have proceeded on different grounds. The Collector (the Judge of first instance), in his judgment of the 31st of March, seems to have held that, though the *pottah* neither stated the amount of the land, nor said that it was to be held for ever at the rate fixed, the defendants have proved that they have held for upwards of 70 years at one rate, and that the plaintiff had totally failed to prove that his proposed enhancement was a fair one, or at a rate which could be enforced under the Act. From this there was an appeal to the High Court. The petition of appeal treats the respondents as ryots; and on the first argument in the Court, their Counsel argued their case on the assumption that they were properly described as ryots. On that occasion, the Judge held that the *pottah* did not in its terms confer any *mukurruree* title; and that the statement of the appellant's father, and the receipts describing the tenants as *mukurrureedars*, would not, in the absence of all *mukurruree* title in the original lease, confer such a title or form an estoppel to the appellant's suit. But they also held that the law, as declared by the 3rd and 4th Sections of Act X. of 1859, conferred, in fact, a *mukurruree* title on all ryots in the position of defendants who held lands at fixed rents, which had not been changed since the date of the Permanent Settlement. The appellant petitioned for a review of this decision, partly on the ground afterwards decided against him, and now abandoned, as to what, in legal contemplation, is the date of the Permanent Settlement, and partly on the ground that the Court had proceeded upon the provisions of the 3rd and 4th Sections of the Act, which were specifically applicable to ryots only, whereas it ought to have proceeded under the 15th and 16th Sections, relating to persons possessing a transferable interest in the land intermediate between the proprietor of

the estate and the ryots, such as the defendants were; that between these last-mentioned Sections, on the one hand, and the 3rd and 4th Sections, on the other, the right may be dependent on the conditions of a lease, whereas, under the latter, it would be independent of the conditions of any lease; and, finally, that the question was to be treated, not as one of prescriptive right, but as one dependent on the terms of the *pottah*. The High Court, on this final hearing, held that the defendants were not ryots, but tenants intermediate between the proprietor and the ryots; that they did not hold under a terminable lease, nor under the *pottah*, which did not in any way refer to them, but only to the original lessee; but that, inasmuch as they had been allowed by the proprietors to hold the tenure without any *pottah* for fifty years and ever since the death of the first lessee, and the proprietors had by their acts admitted the tenure to be transferable and *mukurruree*, *i. e.*, permanent, it was not for the Court, sitting as a Revenue Court under Act X. of 1859, and in a suit for rent, to declare the tenure neither permanent nor transferable; and that the respondents, holding a tenure at a fixed rent, which had not been changed from the time of the Permanent Settlement, were protected by the 15th and 16th Sections of the Act from enhancement.

It is now assumed on both sides that, whatever was the interest of the respondents in these lands, they were not ryots, but tenants intermediate between the proprietor and the ryots. And one of the points taken for the first time here was that, that being so, they were not subject to the jurisdiction of the Collector under Act X. of 1859; that this tenure, if it could be made the subject of enhancement of rent at all, could be made so only by a suit in the Civil Court; and for examples of this we were referred to the cases of the Ranee Surnomoyee* and that of Gopaul Lall Thakoor,† which are both reported in the 10th Volume of Moore's Indian Appeals.

Their Lordships cannot entertain any doubt of the jurisdiction of the Courts below. Both the cases cited were tried before Act X. of 1859 was passed. That Act throughout contemplates under-tenants as distinct from ryots, and contains provisions relating to both classes. And their Lordships think that the 23rd Section of the Act, by which exclusive jurisdiction is given to the Collector over the suits therein mentioned, embraces such a suit as this, whether it be treated as what it substantially is, *viz.*, "a suit for the determination of the rate of rent at which a *pottah* and *kubooleut* should be given," or, as what it is in form, a suit for "arrears for rent due on account of land."

This being so, the first question is, what is the nature of the respondents' sub-tenure? If it can be shown to be a *mukurruree istemraree*, there is an end of the case. If this cannot be established, the question whether the respondents are not protected by the 15th or 16th Section of the Act will arise.

The *pottah* is addressed to Augham Singh as *Mostajir*, which is translated "farmer," of Mouzah Cheloone and other villages in forests of *Sukhooa* trees in the zillah named; and the operative part of it, according to one version of it, is in these words: "Inasmuch as, in accordance with your "application, the lands of the villages in the "said forest have been assessed with a rental "of 101 rupees, everything being consolidated "and a *pottah* granted to you, it is required "that you will, in all confidence, have the "lands of the said forests occupied by Pur-"buttea and other ryots, and keep paying "to the Sircar the rent year by year according "to this *pottah*, and whenever you may be "summoned for the purpose of hunting, you "will attend, accompanied by all the Purbut-"teas."

In the course of the arguments for the appellant, a question was raised whether this *pottah* was more than a lease of the village-lands then in cultivation, and whether the greater part of the land now in the occupation of the respondents had not been acquired by subsequent and gradual encroachment. Their Lordships, however, are of opinion that the *pottah* covered, not only the lands then in cultivation, but also the forest-lands which the grantee was to settle and reclaim by bringing Purbuttea and other ryots upon them; and, upon the pleadings and evidence in this cause, they must assume that it included all the lands which the appellant now seeks to re-assess. The nature and extent of the interest in these lands which it conferred on Augham Singh have now to be considered.

Upon these points, their Lordships are not prepared to dissent from the judgment

* *See* 2 W. R., P. C. Cases, 13.
† *See* 3 W. R., P. C. Cases, 1.

of the High Court, in so far as it found that the *pottah*, taken by itself, cannot be held to have granted a *mukurruree istemraree* tenure. It does contain the term *mukurruree* or any equivalent words, from which an obligation on the part of the grantor never to raise the rent is fairly to be inferred; nor does it contain the expressions "from generation to generation," or other like words, importing that the tenure, whether the rent was to be fixed or variable, was to be hereditary. Their Lordships cannot accede to the argument for the respondents, that a *pottah* must *primâ facie* be assumed to give a hereditary interest, though it contains no words of inheritance. They do not think that the case cited from Morton's Decisions, still less that of Freeman *vs.* Farlie, is any authority for such a proposition. *Pottah*, as may be seen by referring only to Act X. of 1859, is a generic term, which embraces every kind of engagement between a zemindar and his under-tenants or ryots. Nor can it be disputed that the expressions here wanting are ordinarily used in the grant of a perpetual tenure.

Again, neither the date nor the nature of the transaction is, on the whole, in favor of the hypothesis that the intention of the grantor was to create a perpetual tenure at a fixed rent. It may be conceded to respondents that the zemindar in 1791 may have deemed himself capable of granting such a tenure: for though, according to the preamble of Regulation XLIV. of 1791, zemindars, before the Perpetual Settlement, had no power to enter into engagements for a period exceeding that of their own engagements with Government—and in 1792, the Decennial Settlement, which had just been completed, had not been declared perpetual—yet at that time there was every reason to believe that the settlement would be declared perpetual; and the 2nd Section of the Regulation last referred to, which restricts the zemindar's power of disposition, had not been enacted. The whole policy, however, of the Decennial Settlement, as appears by Regulation VIII. of 1793, was adverse to *mukurruree* tenures. It made them all subject to reassessment, unless they fell within the protection of the 49th Section of that Regulation. It is, therefore, not probable that the zemindar would, immediately after the completion of the settlement, grant such a tenure except upon special grounds and adequate consideration; and of these there is no proof. Though the *pottah* contains some reference to future services as incidental to the tenure, the transaction, on the face of it, is a grant of lands partly cultivated but chiefly waste, with the object, on the part of the grantee, of bringing the latter into cultivation.

If, on the one hand, it is improbable that the grantee should undertake such an obligation without some fixity of tenure, and some assured and permanent interest in the lands, it is, on the other hand, equally improbable that the grantor should part for ever with all his interest in the improveable value of his lands. But passing from the *pottah* taken by itself, it is necessary to consider the character of the occupation of the land, as shown by the uncontested facts of the case.

The appellant, as we have already remarked, is not, as was the plaintiff in the case of Gopaul Lall Thakoor (10 Moore's Indian Appeals), which was cited in the argument, an auction-purchaser who, under the Revenue Laws, can throw upon the tenant the burden of showing that his tenure would have been valid against a zemindar unfettered by any personal engagement at the time of the Perpetual Settlement. He is bound by the engagements and acts of his predecessors in the zemindary; and we must consider the evidence of these as it bears, first, upon the tenure, and next, upon the question of fixed or variable rent. And, in doing this, we must recollect that, after the passing of Regulation V. of 1812, there was no restriction upon the disposing power of the zemindar.

The facts already stated afford incontestable proof that, ever since the death of Augham Singh, the hereditary character of his sub-tenure has been recognized by the successive zemindars. There is also evidence, which is not contradicted, that some of them have recognized its transferable nature. This evidence affords ample grounds for inferring either that the tenure was always intended to be hereditary, although not so expressed in the *pottah*, or that, if the original grant were limited, as was suggested, to the life of Augham Singh, his tenure has, by some subsequent grant, become hereditary and transferable. And upon the proof here given of long uninterrupted enjoyment, accompanied by the recognition of the hereditary and transferable character, it is almost impossible to suppose that a suit by the zemindar in the Civil Court to disturb the dispossession of the respondent could not be successfully resisted. The case of Joba Singh (4 S. D. A. Reps., 27,) is an

authority for the proposition that evidence of this kind will supply the want of the words "from generation to generation" in the *pottah*, which is the foundation of such a title.

Upon this second point, the evidence of the subsequent acts and conduct of the zemindars is material only in so far as the receipts and proceedings above referred to show that both Augham Singh and his successors were described as *mukurrureedars*. Their Lordships are not prepared to say that from this evidence a Court or Jury might not legitimately infer, as against the first zemindar and his successors, either that the rent had been always fixed, or that by subsequent contract that which had been originally variable had been made invariable. It is not necessary, however, for the determination of this appeal, that they should so decide; and they are unwilling without necessity to draw from the facts proved conclusions which were not drawn by the Court below.

It is sufficient to say that, if the tenure was or has become hereditary and transferable, as stated above, and if, as is abundantly shown, the rent has not been changed from the time of the Perpetual Settlement, the case, as ruled by the High Court, falls within the protection of the 15th Section of Act X. of 1859. Whatever be the interpretation to be given to the somewhat loose and ambiguous expression "a terminable lease," it is clear that a tenure under which the tenant can no longer be dispossessed by his superior cannot be brought within that exception.

There is another ground upon which, though it does not seem to have occurred to the Court below, their Lordships cannot but think that the present suit ought to have been dismissed. It has been seen that the respondents were sued as occupying ryots, liable for the rent assessed upon them in that character; that the High Court held that, considered as ryots, they were protected by the 3rd and 4th Sections of the Act; and that thereupon the appellant, shifting his ground, and treating the respondents, not as ryots, but as tenants intermediate between him and the ryots, obtained an order for review.

But if the respondents were tenants intermediate between the proprietor and the ryot, that fact seems to raise objections both of form and of substance fatal to the maintenance of the present suit. The notice on which it was founded did not, in that case, accurately specify "the ground on which enhancement of rent was desired," and the assessment on which the sum sued for was calculated was improperly made. Dyaram's case (I. S. D. A. Reps., 139), and the note of Sir Wm. McNaughten at the foot of it, show that, where the suit is against an intermediate tenant, the enhancement ought to be made according to the pergunnah rate of the rents payable, not by the ryots, but by the holders of similar tenures. To assess such an intermediate tenant according to the rents paid by ryots must necessarily deprive him of all beneficial interest in his tenure. Their Lordships, however, do not decide the case on this last ground.

For the reasons above stated, they think that the decision of the High Court was substantially right, and they will humbly recommend Her Majesty to dismiss this appeal with costs.

The 10th February 1868.

Present :

Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard Torin Kindersley, Lord Justice Rolt, and Sir Lawrence Peel.

Bond—Lands not pledged—Form of action—Disqualified female—Court of Wards—Regulations X. of 1793 and LII. of 1803.

On Appeal from the late Sudder Court at Agra.

Mahomed Zahoor Ali Khan

versus

Thakooranee Rutta Kooer.

Plaintiff sued on a simple money-bond for the recovery of a sum of money lent by him to *R. A.*, a female, whose estates were under the management of the Court of Wards, and he made co-defendants in the suit certain other parties whom he charged with endeavouring to have the estates of *R. A.* transferred to them. He also tendered in evidence another bond, by which *R. A.*, the principal defendant, purported to secure a further advance, and to pledge her zemindaree-estates to the plaintiff till the debt was paid off.

HELD that the plaintiff had no ground of suit against the other defendants, except *R. A.*, the principal female defendant, as his cause of action against *R. A.* was based on the first bond, which did not create any charge upon the lands with which they are said to have meddled.

HELD, further, that, as against *R. A.* herself, plaintiff could only get a personal decree for payment of the amount due on the bond on which plaintiff sued, and that he could not in the present suit rely on the second bond. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings.

On a consideration of the provisions of Regulation LII. of 1803—(the provisions of Regulation X. of 1793 are similar)—it was held that the mere fact that the Court of Wards has charge of the estates of a female did not necessarily disqualify her from contracting debts. That Regulation must be construed strictly, the provisions requiring the Collector to report to the Board a female as disqualified, and the subsequent procedure thereon should be strictly carried out, as not mere matters of form, but necessary preliminaries before the female can be considered disqualified. From the absence of the observance of those provisions in the case of *R. A.*, and the conduct of the Government officials representing the Court of Wards, the custody of the Court of Wards of her estates was held to be of such a character as did not render her a disqualified female incapable of contracting debts.

The case having been framed incorrectly, it was, under the circumstances, remanded for trial to the High Court under special directions.

THIS is an appeal from a decree of the late Sudder Dewanny Adawlut of the North-Western Provinces of Agra, bearing date the 11th July 1864, which affirmed a decree of the Principal Sudder Ameen of Meerut, bearing date the 25th February 1863.

The plaint was filed in the Court of the Principal Sudder Ameen of Allygurh on 3rd of May 1861, and is entitled the petition of plaint of the plaintiff against Rutta Kooer and nine other persons there named, and against the zemindaree-rights in certain mouzahs there named, the property of the said Rutta Kooer; and it claims to recover 21,280 rupees, amount due on a bond dated 19th August 1856, and states that Rutta Kooer borrowed from the plaintiff 10,000 rupees, and executed a bond engaging to pay the amount on demand with interest at 2 per cent. per mensem, and that the plaintiff had repeatedly demanded the amount due, but she evaded payment, and had not discharged the debt. It further stated that, in order that the money might be lost to the plaintiff, the other defendants had combined, and got the above estates belonging to Rutta illegally transferred to them, though they had not been put in possession; and, therefore, as a precautionary measure, the plaintiff filed that petition of plaint, *with the bond on which his suit was based*, against Rutta Kooer, the principal defendant, and the other defendants who claimed her property; and it concludes by praying that the amount sued for might be decreed against the defendants *and the property aforesaid*, with interest to the date of realization.

The bond of the 19th August 1856, thus filed with the plaint, and on which, as stated in the plaint, the suit is based, is a simple money-bond purporting to have been executed by Rutta Kooer for 10,000 rupees and interest. None of the other

defendants are in any way parties to it, nor does it purport to be a mortgage or charge upon, or in any way to refer to, the property mentioned in the plaint.

The plaintiff has also tendered in evidence another bond, dated the 28th November 1857, by which Rutta Kooer purports to secure a further advance, and to pledge her zemindaree-estates to the plaintiff until she should pay off the whole debt to him; but his suit is in no way based upon this second bond.

Now, as to all the defendants except Rutta Kooer, it is obvious, on the face of the plaint, that no relevant case is made against them. The allegation that they have combined with the plaintiff's alleged debtor to get her estates illegally transferred to them is no ground of suit against them, if, as is the case here, the plaintiff sues upon an instrument which creates no charge upon, or estate or interest of any kind in, the lands. If he can obtain judgment on his bond, and it is not satisfied, he may possibly be entitled hereafter to raise such a case as that suggested in the plaint, against the land and against these defendants; but any such proceedings before execution on the judgment are premature. It follows, therefore, that, as against these defendants, at all events, the appeal must be dismissed, and it is wholly unnecessary to consider as to them the other defences set up in their several written statements.

Nor, as to Rutta Kooer, was it open to the plaintiff, on this plaint, to ask for any decree other than a personal decree for payment of the amount due on the bond. The plaintiff is not entitled to rely on his second bond. Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings, and the only thing that can be rightly insisted on by the plaintiff here is a decree for payment against Rutta. To a decree so limited, he would be entitled in a suit properly framed, if he proved his case; and the only defences that could usefully be raised by Rutta are—that she was incompetent to contract debt, or that she did not, in fact, contract debt, or that she had satisfied it.

Two of these defences she has, in fact, pleaded, *viz.*, *first* (in substance and effect), that no such money was ever lent her, and that the bond was fabricated; and, *secondly*, that her property was under the Court of Wards, and that the Government Officials had not been made cognizant of, or accorded their sanction to, the institution of the suit, and that, even supposing the bond to be genuine, the claim of the plaintiff could not lie against the person and property of the defendant.

Amongst the issues fixed for trial by the Principal Sudder Ameen (besides those relating to the validity of the bond and the existence of the debt), was one in the following terms:—

"*3rd.*—Had the defendant the power to contract debts, her estates being under charge of the Court of Wards; and is the fact of no notice having been given of the execution of the bond and the contracting of the debts at the Collectorate a sufficient argument for the falsity of the bond or not?"

The form of the issue apparently assumes that Rutta's estates were under charge of the Court of Wards, and that the only question was the effect of this circumstance on her power of contracting debt; but it will be observed that the question is, "Had the defendant the power to contract debts?" and not the more limited question whether she had power by contract to charge her land with debts.

It is further to be observed that, though the third issue appears to assume that the defendant's estates were under the charge of the Court of Wards, yet the fact of their being, or of their having been, under charge was the only fact or point treated as open to dispute or question in the Courts below. It was assumed by both the Courts that, if her estates were in charge, the case was at an end; the plaintiff could have no relief of any kind; and both Courts being of opinion that there was sufficient proof of the estates having been in the custody of the Court of Wards, from a time anterior to the date of the bond to a time subsequent to the institution of the suit, the plaintiff's suit was dismissed with costs, and there was no examination of, or observations upon, the evidence which the plaintiff had tendered of the loan of the money to Rutta, and the execution by her of the bond.

Under these circumstances, the principal questions to be considered on this appeal

are, whether the estate and property of Rutta were, in fact, under the charge of the Court of Wards, when the bond is alleged to have been executed ; and, if so, whether such custody or charge was of a character which made her what is called, under the Regulation to be presently referred to, a disqualified female, and incapacitated her to contract debt in any way ?

These questions turn mainly on Regulation LII. of 1803. That Regulation, after reciting that it is essential to the interest and happiness of minors, and of such females as shall not be deemed competent to the management of their own estates, and of idiots, lunatics, and other proprietors of land paying revenue to Government, who are or may be rendered incapable of managing their lands by natural defects or infirmities of whatever nature, that the lands of persons coming within the above descriptions should be managed for the benefit of the proprietors by persons appointed to the trust by Government, and that a Court of Wards should be instituted with powers to superintend the conduct, and inspect the accounts, of the managers of the estates of such persons, it was enacted (Section 5) that the superintendence of the Court of Wards should extend to the persons and estates of (amongst other persons) all proprietors of entire estates paying revenue immediately to Government who were or might be females not deemed by the Governor-General in Council competent to the management of their own estates (Section 6). That the lands of disqualified landholders should not be liable to be sold for arrears of public revenue on account of the periods during which such lands might be under the charge of the Court of Wards (Section 8); that the Collectors of the revenue should ascertain and report to the Board of Revenue what proprietors were disqualified (Section 9). If a proprietor of lands were disqualified solely from being a female, the Court was to take charge of the estate, and to report to the Governor-General, with power to the Governor-General to declare her exempt from the Regulation (Section 10). Managers and guardians were to be distinct, and managers to have care of estates, real and personal; and by Sections 22 and 23 provision was made for the application of moneys received of managers, in which there was a provision that any just debts then outstanding against, or thereafter adjudged against, the estates of disqualified landholders, must necessarily be satisfied; but that the circumstances of all such debts were to be reported to the Collector, and by him to the Court of Wards, previous to payment by the manager; and by Section 26, females, though disqualified, were not to be subjected to guardians, but might themselves receive and disburse their own maintenance.

There is no pretence for saying that, but for the application of this Regulation to her, Rutta Kooer was incapable of contracting the debt in question. The Regulation itself does not in terms declare the incapacity, or define the circumstances in which it is to arise. The provisions of such a law should be strictly pursued, in order to effect the disqualification of any particular person; and no one should lose her natural liberty of contracting unless the relation of ward and guardian between her and the Court of Wards be regularly and completely constituted.

The examination, however, of the evidence in the Court below appears to have been addressed solely to the object of discerning whether the talook was, in fact, under charge; and it seems to have been assumed that, if in charge, Rutta Kooer was a disqualified person. But their Lordships are of opinion that this does not necessarily follow. The Court of Wards may have obtained the custody originally under circumstances not affecting her personally, and may have continued in charge after the estate devolved upon her under circumstances which do not necessarily make her a disqualified female under Regulation LII. of 1803. It becomes, therefore, material to ascertain, not merely whether the estate was under charge, but also what were the circumstances under which it was first brought under charge, and afterwards so continued.

The material facts are these: The landed property of Rutta Kooer in question (usually called throughout these proceedings the Talooka Chukkatul in the Collectorate of Allygurh) had previously belonged to her sister Maha Kooer. She was declared a disqualified female under Regulation LII. of 1803, as far back as the year 1811; and the talook was then placed under the Court of Wards, and a manager was appointed under the Regulations. But in 1838, in lieu of continuing it in the hands of a manager, the talook was let to farmers, who paid their rents to the Collector, who exercises the powers of the Court of Wards, and throughout the whole period from 1811 to Maha Kooer's death (with the exception of

a few years arising from circumstances not material to the question) the malikana or maintenance was paid by the Collector to Maha Kooer.

Maha Kooer died in 1853. On her death, adverse claims were set up to the property: one by Aram Singh, claiming as heir of her deceased husband; another by one Ali Buksh, claiming under a deed from her; and the third by Rutta, claiming as her sister and heir. The claim of Ali Buksh appears to have been first disposed of, and was found to be groundless. As between Aram Singh and Rutta Kooer, the Government, through the Sudder Board of Revenue, appears to have decided in favor of Rutta, whose name was recorded as proprietor of the talook in place of the deceased Maha; but she was not put into possession. About this time, and apparently in consequence of the decision of the Sudder Board, and certainly in or before 1855, a civil suit was instituted by Aram Singh in the Court of the Principal Sudder Ameen of Allygurh, to enforce his claim against Rutta, and to this suit he made the Government a party, on the ground of the estate being under the control of the Court of Wards. Thereupon the official correspondence, which is set forth in the proceeding No. 19 of the Collector, at pp. 16 and 17 of the record, took place. This mentions that, in August 1855, a petition was filed by Rutta in the Court of the Allygurh Collector, stating "that she was not subject to the Court of Wards; that Government had been wrongly made defendant; also that she had succeeded by inheritance to the property of her deceased sister, Mussamut Maha Kooer, who was subject to the Court of Wards; that the functions of the said Court had ceased with the ward's demise; and that the Board, in paragraph 16 of their Order No. 83, dated 6th February 1855, had ruled that, in the absence of any other rightful claimant, the malgoozaree management must depend upon her discretion;" and from this correspondence it appears that the final determination of the Government was to put in an answer, to the effect that Government was not interested in the suit; that the question of right should be settled between the contending parties themselves; and that Government should be exempted from all costs. This was done; the litigation went on beween Aram Singh and Rutta Kooer; a decree was made in favor of the latter by the Principal Sudder Ameen, the date whereof does not appear in the proceedings; there was an appeal from that to the Sudder Court, where, as appears at p. 36 of the record, the suit finally ended in a compromise some time in or before the year 1862. If the evidence stopped there, it would be impossible to hold that the continued possession of the Court of Wards was more than that of a stake-holder; since, if it really held the talook as a Court of Wards on behalf of Rutta Kooer, treating her as a disqualified proprietor, it was clearly the duty of the Collector representing the Court of Wards actively to defend her title to the estate. It appears, however, that the Revenue Authorities have not acted consistently on their then view of the case; for in February 1856, Rutta being recorded as proprietor, a mutation of names as to several villages in the talook was applied for on behalf of certain persons, including the present appellant, who claimed under assignments from her; and this application having been disallowed by the Collector, because a civil suit was pending, and it was difficult to say who was in possession, the Sudder Board confirming, on appeal, the Collector's decision, declared that Chukkatul never had been emancipated from the control of the Court of Wards, and had never been given into the possession of Rutta.

In 1856 the farmers set up claims to a settlement adverse to the proprietary title of Rutta in Chukkatul. Their claim was disallowed, and thereupon a correspondence between the Government authorities took place, in the course of which the Secretary to Government, in a letter dated 21st August 1856, stated that the Lieutenant-Governor agreed in opinion with the Sudder Board that no claim adverse to the proprietary title of the Thakooranee (Rutta Kooer) existed, nor had any sprung up during the administration of the Court of Wards, and that he authorized the acceptance of proprietary engagements from the Thakooranee with certain terms of settlement in favor of the theekadars or farmers. And it appears from the judgment of the Sudder Dewanny Adawlut (App., p. 481, though the document itself is not set forth in the record) that a proclamation, dated 1st October 1856, issued from the Collector's office, in conformity to the orders of Government and the Board, giving full proprietary possession to Rutta Kooer, who had filed the usual durkhast or petition, asking to engage for the payment of revenue, and that the putwary of the talook acknowledged receipt of the proclamation and the possession of Rutta

on the 13th October 1856. This arrangement, however, was not finally carried out. It appears from the letter of the Collector of the 18th of September 1858 (App., p. 31) that, before the contemplated settlement was completed, the Mutiny broke out. He says: "Then happened the Mutiny, with the farmers still in possession of the villages, and the Government orders for giving possession to Rutta Kooer were not carried out." From the same document it appears that in October 1857, when order was restored to the district, he, as Collector, resumed charge of the talook, of which, on the 2nd of March 1858 (App., p. 19), he appointed a manager. And at pp. 24 and 25 of the record is further proof that, between the last-mentioned date and April 1862, the talook was under the management of the Court of Wards. But in or before the month of August 1862, the Court of Wards for some unexplained reason gave up the possession and management of the property, as appears from the perwannah of the Collector filed in this suit, which is referred to by the Principal Sudder Ameen in his proceeding fixing the issues, at p. 44 of the record.

Their Lordships are of opinion that the Courts below were warranted in concluding from this evidence that, with the exception, perhaps, of the period during which all order and government may have been suspended in this district by the Mutiny, the Court of Wards was continuously in the actual possession of this talook from 1811 to August 1862. They do not, however, think that, by reason of that possession, which began in the time of Maha Kooer, Rutta Kooer was, when this bond is alleged to have been executed, incapable of binding herself by contract. They have already observed that, in order to effect such a disqualification, the Regulations must be strictly pursued. Under this Regulation, the Collector is to report a female proprietor as disqualified to the Board of Revenue, and the Board of Revenue, in their capacity of a Court of Wards, is to report that they have taken the estate under their charge to the Governor-General in Council, so as to enable him to exercise his discretion of exempting her from the operation of the Regulation. Nor are these mere forms; they are necessary preliminaries to the disqualification of a female so as to invalidate an alienation even of the property under charge of the Court of Wards by her. This was expressly decided in the case of Jan Khâtun (5 S. D. A. Reps. 240). That case arose in Lower Bengal and under Regulation X. of 1793. But Regulation LII. of 1803 is little, if anything, more than an extension of the earlier Regulation to the North-Western Provinces. The provisions of the two upon the point in question are absolutely identical. Again, the present case is far stronger than that of Jan Khâtun. The contract here impeached does not, like that which was then in question, affect the land. It is a simple money-obligation, and the evidence in this case not only fails to show that the necessary reports of the Collector and of the Board of Revenue were made; it also, though not uniformly consistent, goes far to negative any intention on the part of the Revenue Authorities to treat Rutta Kooer as a disqualified proprietor, or a person incompetent to manage her affairs. It shows that, when her title was attacked in 1855, they declined to act as a Court of Wards in its defence, but left her to sue or be sued as a person *sui juris* on her own responsibility, and at her own cost. It further shows that, in 1856, and in the very month in which she is alleged to have executed the bond, they had taken all the necessary steps towards putting her into the full possession and enjoyment of the talook, as a proprietor competent to its management, on her entering into proper engagements for payment of the Government revenue; and that the completion of that arrangement was only prevented by the accident of the Mutiny. The fact, if fact it be, that for some time in and after 1858 the property was regularly managed by the Court of Wards, can have no bearing on the question of her capacity to bind herself by contract in 1856.

The decisions of the Principal Sudder Ameen of Meerut, and of the Sudder Court of Agra, were nevertheless rested exclusively, on the ground that Rutta Kooer had no capacity to contract debt, because the talook was in the custody of the Court of Wards. The Sudder Court expressed itself thus:—

"Holding the opinion that the superintendence of the Court of Wards did not cease until 1862, and hence, that Mussamut Rutta Kooer was not competent to incur any debt or make any alienation of her property, or that she is in any way answerable for the claims, there is no necessity for our inquiring into the second issue."

The question whether any formal report was ever made of Rutta being a disqualified female was left wholly unnoticed.

The attention of the Sudder Court was called to the unsatisfactory nature of the decision in this respect on an application by the present appellant for a review of the judgment, when he stated as one of the grounds of his application that "no formal order was passed placing Mussamut Rutta Kooer under the charge of the Court of Wards. Hence, though the property to which she succeeded may have been under the charge of the Court, yet Rutta Kooer in person was a free agent, and should be held responsible for her acts." And the Sudder Court, in refusing leave to review, gave the following among other reasons for so doing:—

"Even allowing, for the sake of argument, that no formal order was given during 1855, 1856, and 1857, placing the person of Mussamut Rutta Kooer under the charge of the Court of Wards, yet, as it is admitted by Counsel for the plaintiff that the property to which she succeeded was under the Court of Wards during 1855 and a part of 1856, we cannot allow that such omission, if omission there be, in any way affects the case; for to all intents and purposes Mussamut Rutta Kooer was under the charge of the Court of Wards. We are unable to dissociate the person of Mussamut Rutta Kooer from the property to which she succeeded. We think that she in person and her property were under the charge of the Court of Wards, and that she was not free to contract debts and to hypothecate her property for the liquidation of such debts. Regulation LII. of 1803 certainly does provide for the liquidation of the just debts of disqualified landholders, 'just debts now outstanding against or hereafter *adjudged against the estates* of disqualified landholders;' but it does not permit a ward to contract debts without the sanction of the Court of Wards. It would be strange, indeed, if the law allowed the ward to contract debts, to alienate and hypothecate property under charge of the Court of Wards, when it distinctly declares that the manager in charge shall not dispose of any portion of the property confided to his care without the consent of the Court of Wards."

For the reasons already given, their Lordships cannot agree with this conclusion. They are of opinion that the finding of the Courts below, on the only issue which they have really tried, is wrong.

They have, however, felt some doubt as to the order which it will be their duty to recommend Her Majesty to make on this appeal. They have already intimated that the appeal must be dismissed against all the respondents except Rutta Kooer. And they have felt some doubt whether, inasmuch as the suit was wholly misconceived, the proper course was not to dismiss this appeal altogether, without prejudice to the right of the appellant to bring a new suit against Rutta Kooer upon this bond, treating it as a mere money-bond. Considering, however, that such a suit would probably be met by a plea of the Act of Limitations; that in the circumstances of this case such a defence would be inequitable; and that, the respondent not having appeared, their Lordships are not in a condition to put her on terms as to her defence to a fresh suit; they have come to the conclusion that the fairer course is to do what the Judge of the first instance might, under the Code of Procedure, have done at an earlier stage of the course, *namely*, allow the appellant to amend his plaint so as to make it a plaint against Rutta Kooer alone for the recovery of money due on a bond. Her liability on the bond may thus be tried on the issues already settled. Upon those issues, and the evidence taken on them, their Lordships will intimate no opinion. The nature of the transactions, and the *status* of the obligor, make it peculiarly desirable that the Appellate Court should have the benefit of the judgment of the Courts below on those issues.

The order, therefore, which their Lordships will humbly recommend to Her Majesty is, that the appeal be dismissed against all the respondents except Rutta Kooer; that the decrees of the Courts below be reversed, except so far as they dismiss the suit against those respondents with costs; that it be declared that Rutta Kooer was not, at the date of the alleged bond, incapable of binding herself by contract by reason of the Talook Chukkatul being still in the custody or under the charge of the Court of Wards; that the cause be remanded to the High Court of Judicature for the North-Western Provinces, with directions to allow the appellant to amend his plaint so as to make it a plaint against Rutta Kooer alone for the recovery of the money alleged to be due to him on the bond; and to take all necessary steps for the trial of the said suit upon the issues already settled, or to be hereafter settled; with liberty to the respondent, Rutta Kooer, to make any defence to the suit which is not inconsistent with the declaration aforesaid. Their Lordships will give no costs on this appeal.

The 4th March 1868.

Present :

Lord Cairns, Sir James W. Colvile, Sir Edward Vaughan Williams, and Sir Richard T. Kindersley.

Nuncupative will—Power to make will—Succession—Family-custom—Rights of junior members of a family—Regulation XI. of 1793.

On Appeal from the High Court at Calcutta.

Baboo Beerpertab Sahee

versus

Maharajah Rajender Pertab Sahee *and the cross-appeal.*

The land sued for was originally an impartible Raj, and by family-custom descended on the death of each successive Rajah to his eldest male heir. It was confiscated by Government, and in 1790, when the Decennial Settlement was made, was permanently conferred on *A*, a Hindoo. *A* in his lifetime, by his acts, and otherwise, showed that he wanted the estate to descend to a single heir, and shortly before his death he made *B*, the son of his eldest grandson, such heir, and left a testamentary paper in furtherance of that object.

The present suit was brought by some of the grandsons of *A*, who claimed to be co-heirs with *B*, under the ordinary Hindoo Law of Inheritance, and contended that the will was a forgery; that *A* had no power to make it; and that the special law of inheritance ceased when the first proprietor was expelled.

It was observed that a person who rests his title on so uncertain as foundation a the spoken words of a man since deceased is bound to allege, as well as to prove, with the utmost precision, the words on which he relies with every circumstance of time and place. The finding below as to the *factum* of the will in this case was however upheld.

It was also found from the acts of the Government, and its dealings with the property, that *A* derived his title by grant from the Government who had full dominion over the estate. The estate, consequently, must be taken to have been the separate and self-acquired property of *A*, and the nature of the estate granted was held to be a fresh grant of the family Raj, as it had existed before the confiscation with its customary rule of descent, the omission of the title of Raj in the grant (there being no sunnud in this case) not affecting the case, the title of Rajah not being absolutely essential to the tenure of the estate as a Raj.

Regulation XI. of 1793 does not apply to this case, in which the grant was made before the passing of that Regulation, which, moreover, does not affect the descent of large zemindaries held as Raj or subject to family-custom.

The grant being of the nature found, it was further held that the question as to whether *A* had, by law, power to make a will, did not really arise in this case, the only person who could impeach the will being the eldest grandson of *A*, who had waived his right in favor of his son *B*, there being no inchoate rights of inheritance in the junior members of the family.

The subject of this appeal is the right of succession to the very considerable estate of the late Maharajah Chutterdharee Sahee, who died at Hutwah in Zillah Sarun on the 16th of March 1858. He was the owner of a large zemindary called Hunsapore, which had been in the family, of which he was a member, for many generations before the East India Company, under the grant of the Dewanny in 1765, became the virtual rulers of Bengal, Behar, and Orissa. Like some other extensive zemindaries in Behar, it was during that period an impartible Raj, and by family-custom descended, on the death of each successive Rajah, to his eldest male heir according to the rule of primogeniture, who took the whole, subject to the obligation of making to the junior members of the family certain allowances by way of maintenance called *babooana*. The nature of the tenure and the custom regulating its descent were, no doubt, in dispute in the Courts below, but the evidence establishing them is conclusive; and accordingly they were faintly, if at all, contested on this appeal.

The Rajah in possession of the property, when the East India Company assumed the Government of the Province, was one Futteh Sahee. In consequence of his refusal to acknowledge the sovereign or *quasi*-sovereign rights of the Company, or to pay revenue to them, a contest ensued; and, about the end of 1767, he had been driven from Hunsapore by the Company's troops into the jungles, dividing their territories from Goruckpore, which then formed part of the dominions of the Nawab Vizier of Oudh.

The East India Company thereupon attached the estate of Hunsapore, and let it out to farmers. Futteh Sahee, however, from his retreat in the jungles, or in the dominions of the Nawab Vizier, in which he seems to have had another estate, made sundry incursions upon it, and is supposed to have killed Govindram, one of the farmers under the Company. Soon after that occurrence, there was a sort of treaty of peace between him and the Company's Government; he was permitted to return to Hunsapore, and received an allowance by way of maintenance, but was not restored to the possession of the estate. That arrangement lasted only two months; he again withdrew from the province, and renewed his predatory life on its borders; and in May 1775, he attacked and murdered his own

cousin, Bishunt Sahee, the grandfather of Chutterdharee Sahee, who was then the rentor or farmer of Hunsapore under the East India Company. It will hereafter be necessary to consider more particularly the acts of the Government and its officers during their possession of the estate. For the present, it is sufficient to state that the Company retained possession of it from the date of the first expulsion of Futteh Sahee until 1790, either making the collections by their own officers, or letting it out to farmers, but in either case applying the whole of the surplus revenue to their own purposes. In 1790, however, when the Decennial Settlement was in contemplation, or in the course of being made, the Government of Lord Cornwallis granted the property to Chutterdharee Sahee, then a minor, under circumstances which will be more particularly considered hereafter.

Chutterdharee Sahee attained his majority in 1802. In 1837, the title of Maharajah was, on his application, conferred upon him by Government for the first time. He had not previously been distinguished by any title from other zemindars.

The pedigree at p. 2 of the appellant's case (the correctness of which is not disputed) shows that the late Maharajah had two sons who pre-deceased him. The elder of them (Ram Sahee) left two sons, *viz.*, Oogurpertab and Deoraj; and the other (Pritipal Sahee) also left two sons, *viz.*, Tillukdharee and Beerpertab (the appellant). These four grandsons were living at the time of the Maharajah's death, and were his co-heirs according to the ordinary Hindoo Law of Inheritance. Oogurpertab is the father of the respondent, the Maharajah Rajender Pertab Sahee. Upon the death of the Maharajah Chutterdharee, a contest arose as to the succession to his estate; Deoraj, Tillukdharee, and the appellant, insisting that it descended as *ab intestato* to his four grandsons in equal shares, according to the ordinary course of the Hindoo law, the respondent setting up the exclusive title which will be next stated, and Oogurpertab favoring the pretensions of his son, and relinquishing his own rights in his favor.

The title set up by the respondent is shortly as follows :—

The late Maharajah had for several years before his death expressed his desire that his estate should descend, as the Raj of Hunsapore had, up to the time of Futteh Sahee, descended, to a single heir; and that the respondent in whose favor his father had waived whatever rights he, as the eldest male descendant of the Maharajah, might possess, should be that heir. Accordingly, on the 15th of March, being the day before his death, the Maharajah made, in the presence of some members of his family, including the appellant, and a considerable number of his servants and dependents, what in these proceedings is called a consignment (*tusleem*) of the Raj to the respondent. On the same day, he caused his servants to write out four *urzees* for the purpose of notifying this fact to the principal authorities in the district, *viz.*, the Magistrate, the Judge, the Collector, and the Commissioner. These are the documents at pp. 361, 364, 365, and 367 of the record. All these were directed to be forwarded to Chuprah, the sudder or principal station of Zillah Sarun. Early the next morning, the Maharajah directed his servants to prepare a similar *urzee* for transmission to the Deputy Magistrate, Mr. Lynch, who lived at Sewan, a place much nearer than Chuprah to the Maharajah's residence at Hutwah. Before this was done, Mr. Lynch, accompanied by Dr. McDonnell, the Sub-Deputy Opium Agent of the district, called to pay a visit at Hutwah. They had an interview with the Maharajah, who presented the respondent to them as his heir, recommended him to Mr. Lynch's protection, and told him that an *urzee* to his address was in course of preparation, and would be forwarded. That *urzee*, which accordingly varies in form from the others by introducing the circumstances of this visit, is at p. 363 of the record. Later in the day, the Maharajah gave what is called "*tilluck*" to the respondent, and afterwards caused his servants to prepare the testamentary paper which is set out at p. 167 of the record, which he executed. He died somewhat suddenly at 4 P. M. of the same day.

In these circumstances, the respondent rests his title to succeed to the whole estate of his great-grandfather, *first*, upon the several before-mentioned acts of the Maharajah, relying on the latest instrument as a will, but insisting that, if that be not well proven, there is *aliunde* sufficient evidence of a disposition by nuncupative will in his favor. He contends, however, further, that the Raj being impartible, and descendible by custom according to the rule of primogeniture, he, by reason of his father's abdication in his

favor, is entitled to it, to the exclusion of the other members of the family, independently of any act of the late Maharajah. But he admits that in either case they are entitled to have *babooana* allowances of a proper amount assigned to them.

The contest between the parties was commenced very shortly after the death of the late Maharajah, by those summary proceedings touching the fact or the right of possession, which are in India the ordinary prelude to a regular suit for the determination of a disputed title. The respondent, on the 26th of March, instituted a proceeding before the Collector for the mutation of names, and this was opposed by the appellant, and also by Tillukdharee and Deoraj. The respondent also instituted a summary suit in the Judge's Court for a certificate, under Act XX., as to the whole estate of the late Maharajah, which was met by cross-suits of the same nature by the appellant, Tillukdharee, and Deoraj, for certificates confined to their respective shares. The three last-mentioned parties also instituted two suits in the same Court, under Act XIX. of 1841, for the appointment of a curator. All these suits were decided in the respondent's favor by the Judge on the 22nd of May, and his judgments were confirmed on appeal by the Sudder Court in the month of August 1858. And on the 14th of June 1858, the Collector, proceeding in part on the decisions of the Judge in the last-mentioned suits, granted the mutation of names, for which the respondent had applied. That order was confirmed by the Collector on the 5th of August, and again by the Commissioner on the 8th October 1858. The effect of these preliminary proceedings was to put the respondent in possession of the whole of the estate under the title set up by him, and to cast upon the rival claimants the burthen of disputing that title in a regular suit.

Deoraj did not accept this burthen, but seems to have abandoned his claim, after making an arrangement with the respondent for his *babooana* allowance. The appellant, however, and his brother Tillukdharee commenced the suit out of which this appeal has arisen, on the 31st of December 1858; but the latter, after the decrees in the respondent's favor had been made in it, also came to an arrangement touching his allowance, and abandoned the appeal which he had contemplated. His claim, therefore, is now no longer in question; and it will be convenient to treat the suit as one between the appellant alone and the respondent.

The appellant insists on his title as one of the co-heirs of the late Maharajah, according to the ordinary Hindoo law. He impeaches, as fraudulent fabrications in support of the respondent's title, the will, and the several *urzees* or petitions alleged to have been sent by the Maharajah's desire, and under his seal, to the different Civil Authorities of the district; and he denies that the alleged consignment or installation of the respondent took place. These are all questions of fact. But he further denies, as matter of law, the power of the Maharajah to make a will to the prejudice of his male descendants, of whom he is one. He contends that, whatever may have been the previous course of descent of the Raj of Hunsapore, according to family-custom or otherwise, up to the time of Futteh Sahee, the law or custom determining that course of descent ceased on his expulsion; and that the grant to Chutterdharee was not one of an indivisible Raj, descendible according to a special custom, but one of a mere zemindary, governed by the ordinary law. In his case he further contended that, even had the grant been one of a Raj, or had the Raj continued in the line of Futteh Sahee, the special rule of succession would have been abrogated by the provision of Regulation XI. of 1793. These points, with one or two others to which it is not necessary now to advert, seem to have been sufficiently raised by the amended issues settled in the suit, which are at p. 155 of the record.

The judgment of the Zillah Judge, Mr. Wilkins, which was given on the 24th of April 1860, found that the family-custom, according to which the estate was impartible, and descended to the eldest male heir, subsisted at and up to the time of Futteh Sahee; that this custom was not abrogated by his expulsion, the retention of the property by Government, and the grant of it to Chutterdharee; and that the estate was in his hands an impartiable Raj, descendible to his next male heir alone, and, therefore, on the renunciation of Oogurpertab, to the respondent. The Judge made no distinction in this respect between the moveable and immoveable property, and on the above ground decreed in favor of the respondent. He held, however, that the alleged consignment or transfer of the 15th of March, and the will, were not well proven. And he decreed an allowance of 2,000 rupees per mensem to each of the plaintiffs, *viz.*, the appellant and his brother.

The judgment of the High Court on appeal from this decree is at page 17 of the second record, and is dated the 24th of April 1863. That Court also held that the Raj was originally impartible, and descendible by custom to the eldest male heir alone; and that it did not lose this character on its restoration to Chutterdharee. It denied that there had been, or could have been, any confiscation in the proper sense of the term; and, in Mr. Justice Levinge's separate note at page 26, this point is more fully argued. But the High Court, differing therein from the Zillah Judge, affirmed the validity of the will. It also reduced the allowance to each of the plaintiffs to 1,000 rupees per mensem.

At the close of the argument for the appellant, their Lordships intimated that, in their opinion, the judgment of the High Court, touching the *factum* of the will, was correct, and ought not to be disturbed. They will now state their reasons for coming to that conclusion. That the disposition was in accordance with the Maharajah's general wishes and intentions is shown by the strongest and most trustworthy evidence. Upon this point, the concurrent and unimpeachable testimony of Mr. Dampier (Appendix, page 392), Dr. Fleming (page 393), Mr. L. MacDonald and Mr. John Macleod (page 394), Mr. W. F. McDonnell (page 395), Mr. Tayler and Mr. R. Macleod (page 396), and Mr. Richardson (page 397), being all of them European gentlemen in the public service, or otherwise of respectable station, is to the effect that, from 1851 up to the time of his death, the Maharajah continuously entertained and constantly expressed the desire to keep his property together as a Raj, and his intention to make the respondent his successor and universal heir.

That he retained that desire and intention on the morning of his death, and was then in full possession of his senses, is proved beyond all question by Mr. Lynch and Dr. McDonnell. The general intention of the alleged testator in favor of the respondent and his testable capacity are, therefore, established. It is true that, in the interview with Mr. Lynch and Dr. McDonnell, the Maharajah did not express his intention to make a will. It is also true that to the *factum* of the will there is no testimony but that of his native servants and dependants. It is, however, most improbable that the Maharajah should have relied on what passed between him and the two European gentlemen when none of his family, except the respondent, and but few of his dependants, were present. And though he might also have relied on the *tusleem* or consignation of the preceding day as the public expression of his wishes and the formal installation of the respondent as the new Rajah (supposing that ceremony to have taken place), yet it must be recollected that the question whether the estate was impartible and descendible as a Raj was a doubtful one, and that he himself, as Mr. Dampier proves, had long known it to be so. There is, therefore, nothing improbable in the hypothesis that, pressed by this doubt, as well as urged by his strong desire to secure the succession to the respondent, he may, even after his interview with Mr. Lynch and Dr. McDonnell, have conceived and executed the intention of making a will, in order to supply, by the force of that instrument, any defects which his preceding acts may have left in the respondent's title. And if the positive testimony to the execution of the document is not of a high character, it is contradicted only by that of witnesses who, swearing to the actual incapacity of the Maharajah, are utterly discredited by the evidence of Mr. Lynch and Dr. McDonnell; and it is not contradicted (as it might have been contradicted) by the oath of the appellant, whom the witnesses deposing to the *tusleem* and to the execution of the will state to have been present on both occasions. Their Lordships are aware that the latter inference is met, as usual, by arguments founded on the unwillingness of Natives of rank to appear and be examined as witnesses in a Court of justice. There are, however, examples, increasing fortunately in number, of men who disregard this prejudice; and considering the vastness of the stake, and the pointed manner in which the contradiction was challenged by the witnesses on the other side, their Lordships cannot think that the failure of the appellant to tender himself as a witness is sufficiently accounted for by the feeling in question. In any case, the fact remains that there is no contradiction of the respondent's witnesses, except the testimony of witnesses wholly unworthy of belief, and that the probabilities are in favor of the truth of their story. Their Lordships must, therefore, hold that the execution of the will has been proved—a conclusion which, though opposed to that of Mr. Wilkins, was also that of the Judge of first instance and of the Sudder Court when dealing with the same question in the summary

suits under Act XX. of 1841, as well as that of the High Court in this suit. This being so, we have in the will executed by the Rajah a corroboration of the positive testimony as to the facts of the *tusleem* or consignation, and of the execution and despatch of the *urzees*, which far outweighs the arguments that have been founded on the lateness of the time at which four of the latter reached Chuprah. Nor do their Lordships see anything in the objection that the *tusleem* and the execution of the will are inconsistent acts; that if the former took place, the Rajah had nothing to dispose of, and the will was superfluous. Their Lordships look upon the events of the last two days of his life as a series of acts, of which the execution of the will was the crowning one, all being designed by the Maharajah to effectuate, so far as his acts legally could, his intention to leave his estate as a Raj, and to make the respondent his successor.

It is unnecessary for their Lordships to give any opinion upon the question raised in the Courts below of a disposition in favor of the respondent by nuncupative will. They will only remark that they would have had much difficulty in supporting his title on that ground upon the pleadings and evidence in this suit. There was great confusion in the Courts below on this point. The respondent seems at one time to have relied on the *tusleem;* at another on what passed between the Maharajah and Mr. Lynch as a nuncupative will. But if any party is bound to strictness of pleading, it is he who sets up a nuncupative will. He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place.

Having thus determined the principal issues of fact on this appeal, their Lordships have now to consider whether the Maharajah had, by law, the power to make the will which he did make; and also by what law the succession to his property, and especially to that portion of it which formerly constituted the Raj of Hunsapore, is to be regulated, if he had not the power to devise it.

In order to determine either of these questions, it is material to ascertain what was the nature of the estate or interest which Chutterdharee acquired through the acts of the East India Company's Government in 1790. And for that purpose it is necessary to go more particularly into the history of the estate after the expulsion of Futteh Sahee.

It has already been stated that, after that event, the property was for nearly twenty-three years held by the East India Company, who, whether they let it to farmers, or kept it under their own managment, applied the whole of the surplus revenues to their own use. During great part of that period Futteh Sahee continued to wage war with them from his retreat in the jungles or in the territories of the Nawab Vizier, and appears to have been consistently treated by them, at least after 1773, as a public enemy, with whom no terms should be made.

The murder of Bishunt Sahee took place, as before stated, in 1775. In 1778 the Revenue Council of Patna, on the application of Mohesh Dutt, the son of the murdered man and the father of Chutterdharee Sahee, proposed that Futteh Sahee should be declared to have forfeited his zemindary, and that it should be bestowed on Mohesh Dutt; but the Government of Mr. Warren Hastings declined to comply with that proposal, or to do more at that time than hold out vague hopes of reward to Mohesh for his fidelity.

In 1784 the claims of Mohesh Dutt were again under the consideration of Mr. Hastings' Government. The proceedings are set out in the Appendix (pages 328 to 331). They clearly show that it was then considered that any grant to him, though he founded his claim on being the next heir to the zemindary after the extinction of Futteh Sahee's line, was matter, not of right, but of favor; and that it was actually proposed to insert in the sunnud, by which any such grant should be made, a condition for avoiding it in case the grantee should, by negligence or from any cause unsatisfactory to Government, fail to deliver up the person of Futteh Sahee within one year. Ultimately nothing was done on this application. Mohesh afterwards died, and the estate remained as before in the hands of the East India Company.

In 1790, the question what should be done with it came before the Government of Lord Cornwallis, in consequence of the steps which were then being taken in order to effect the Decennial Settlement. On the 16th of June in that year, the Collector, Mr. Montgomerie, having received instructions for the disposal of all lands, "the immediate property of the Company," wrote to inform the Board of Revenue that there were no lands within his district which answered that

description, unless they were this zemindary and another somewhat similarly circumstanced. On the 21st of July the Board of Revenue submitted this letter to Government, with a recommendation that such part of Hunsapore as was the property of Futteh Sahee should be declared confiscated and sold, subject to the interests of the existing farmers. But on the 28th of July the Government, in answer to this communication, directed "that such part of Hunsapore as was stated by the Collector to have been the real property of the rebel Futteh Sahee should be conferred on the infant son of the late Mohesh Dutt after the usual publication had been made." That letter also provided that, upon the lands being finally confirmed to the son of Mohesh Dutt, he should receive the allowance fixed for disqualified landholders.

The Collector having, on the 18th of November 1790, reported that "no admissible claim had been preferred to the lands ordered to be confirmed to Chutterdharee Sahee," the Board of Revenue, on the 17th of January 1791, recommended that Chutterdharee Sahee, infant son of Mohesh Dutt, should be "declared proprietor of the land in Hunsapore which belonged to Futteh Sahee," and the Government on the 21st of January ordered accordingly.

These proceedings are at pages 237, 238, and 239 of the Appendix. A subsequent letter of the Board, of the 29th of April 1791, fixes the malikana-allowance for the infant at 1,027 sicca rupees 7 annas 4 pies per mensem, and makes it payable from the 11th of October 1790.

In October 1802, Chutterdharee, having come of age, entered into a formal engagement for the payment of the Government revenue; and the Revenue Officers, who had managed the estate during his minority, relinquished it to him, and issued a proclamation directing the ryots and tenants to pay the collections to him. These documents, called respectively the dowl and the amuldustuck, are at pages 296 and 297; but they do not throw much light upon any of the questions raised in the suit.

It is material to observe that, during all these proceedings, Futteh Sahee and his line continued to exist, and that the latter exists to this day. He himself was alive in 1808, but had then become a fakir, having given up even his Gorackpore property to his family. In 1790, his wife and one of his sons appealed to Government for an allowance, but their application was rejected on the 25th of June in that year. In April 1792 one of the sons, and in April 1808 four of the sons, of Futteh Sahee made applications for the restoration of the estate and for allowances out of it. On the 29th of April 1808, the latter application was rejected by Government in a letter which stated that "the estate of Futteh Sahee had been forfeited to Government." Areemurdhun Sahee, one (and apparently the eldest) of the four, made similar claims by petition in 1816 and again in 1821. In both these petitions he stated that his younger brother had come forward before Mr. Montgomerie in 1790, claiming, on behalf of Futteh Sahee's line, to settle for the revenue. The claim, if made, was clearly treated as inadmissible. The order indorsed on the petition of 1821 is to the effect that, "whereas the property of Futteh Sahee was confiscated on account of rebellion," no further proceedings on the petition are necessary. In June 1829, the great-grandson of Futteh Sahee brought a regular suit against Chutterdharee and the Government for the recovery of the estate, which was dismissed on the simple ground that the claim was barred by the Statute of Limitations. And the same persons seem to have appeared on the proceedings before the Collector, of the 14th of June 1848, which is above referred to, alleging that the grant to Chutterdharee was for life only, and again setting up his own title as the descendant and representative of Futteh Sahee.

On these facts, it is at least clear that there was a virtual confiscation of the interest of Futteh Sahee and his descendants in the property, and the assertion of full dominion over it on the part of the East India Company. The Government has not only persistently treated the estate of Futteh Sahee as forfeited, and refused to recognize any claim on the part of his descendants; it has for more than twenty years applied the revenue to its own purposes; it held itself at liberty either to reject (as it ultimately rejected) the applications of Mohesh Dutt, or to make a fresh grant of the estate to him, imposing new conditions upon the tenure; it held itself at liberty in 1790 to dispose of the property by sale, though, as a matter of grace and favor, it finally conferred it on Chutterdharee.

Their Lordships are, therefore, unable to see the force of the argument which the Judges of the High Court, and in particular Mr. Justice Levinge, have founded upon the supposed obligation of the East

India Company to govern the provinces which they held under the Mogul Emperor by virtue of the grant of the Dewanny according to Mahomedan law, and upon the doctrine of that law which denies to the ruling power the right to confiscate the property of a rebel. Such an argument might, perhaps, have been plausibly urged in the suit which the great-grandson of Futteh Sahee brought against Chutterdharee and the Government, if that had ever come to a hearing. In this suit, however, both parties claim under Chutterdharee; and as between them, and for the purposes of this suit, it must be taken for granted that he derived his title (whatever may have been the nature of his estate, or the incidents to it) by grant from the East India Company, which had full dominion over the estate, and therefore the power to grant it.

One consequence from this conclusion (and it has a material bearing on the question of testamentary power) is, that the estate must be taken to have been the separate and self-acquired property of Chutterdharee. The fact that he was the member of the family, which had so long held the estate, next in succession to the line of Futteh Sahee, and the son and grandson of persons who had established claims on the gratitude of the Company, may have been a motive determining the selection of him as grantee; but it does not affect the nature of his estate, or give to it the character of ancestral property. The legal foundation of his title is still the grant to him from those who had power to make or to withhold it. This point was ruled in the Shevagunga case (9 Moore's Indian Appeals 606).*

The question remains—what was the nature of the estate granted; whether it was a fresh grant of the family Raj with its customary rule of descent, or a grant of the lands formerly included in that Raj to be held as an ordinary zemindary?

There was not in this, as in the Shevagunga case, a new sunnud. We have no evidence of the intention of the grantors except that which is to be collected from the proceedings and correspondence already referred to, nor have we any record of the proceedings in the Council-room, or any means of knowing the precise grounds on which Lord Cornwallis's Government rejected the recommendation of the Board of Revenue, and determined to confer the property on Chutterdharee. Again, it cannot be denied that in these proceedings the term "Raj" is never used, or that in some of them the subject of the grant is spoken of as "the land in Hunsapore, which belonged to Futteh Sahee." On the other hand, there is no expressed intention to alter the nature of the tenure. The estate, whilst it was in the hands of the Company, had never been broken up. The policy of the Decennial Settlement was to form a body of landholders by ascertaining in whom the zemindary-interest in the soil actually was, and making with those persons a permanent settlement of the Government revenue so as to give them greater fixity of tenure. Lord Cornwallis's Government determined to set up Chutterdharee as the zemindar with whom the settlement in respect of this property should be made. But the estate of a zemindar was not merely the right to the possession or enjoyment of certain lands. It involved rights against, and corresponding obligations to, dependent talookdars or other under tenants, ryots of various classes, and others; and the Decennial Settlement, as a reference to the rules re-enacted by Regulation VIII. of 1793 will show, proceeded upon an inquiry into all or many of these particulars. In the absence of all evidence to the contrary, it must be presumed that the settlement was made precisely as it would have been made, had the estate continued in the line of Futteh Sahee; and, therefore, that the subject conferred on Chutterdharee was the old zemindary with all its incidents, excepting, at most, its descendible quality. It seems to follow that the intention to alter that quality, if it existed, would have been expressed. Again, the selection of a member of the old family, the next in succession to the excluded line, though it cannot make ancestral that which was self-acquired, is a very strong circumstance in favor of the hypothesis that the intention of Government was to restore the zemindary as it had existed before the confiscation or attachment, making no further change than was involved in the forfeiture of the rights of Futteh Sahee and his descendants, and in the substitution, by an act of power, of the person next in the order of succession, and consequently that the transaction was not so much the creation of a new tenure as the change of the tenant by the exercise of a *vis major*.

The circumstance that the grant was in the first instance of the zemindary, without the title of Rajah, has been urged as a

* 2 W. R., p. 31.

strong argument in favor of the appellant's view of the case. But that the title was not absolutely essential to the tenure of the estate as a Raj is shown by the Tirhoot case (6 Moore's Indian Appeals, p. 191); and in 1837 the title was conferred on Chutterdharee, upon his application founded on the fact that it had been enjoyed by his predecessors and annexed to the zemindary. This act of the Government in 1837 could not alter the legal effect of what was actually done in 1790; but the grant of the title on this representation at least shows that the Government of 1837 did not dissent from the construction which Chutterdharee then put upon the acts of their predecessors in 1790.

Another argument for the appellant is founded on Regulation XI. of 1793. Mr. Field does not contend, in the face of the authorities cited by Mr. Leith, that, if the estate granted to Chutterdharee in 1790 were a Raj, descendible by family-custom according to the rule of primogeniture, it lost that character on the passing of the Regulation in question. But he insists on that Regulation as evidence of intention. He argues that, inasmuch as it was passed to reduce the number of estates descendible by special custom, the intention of Lord Cornwallis's Government was, presumably, to make the property restored to Chutterdharee subject to the ordinary law of succession.

Their Lordships, however, are of opinion that they cannot safely draw any inference concerning the intentions of Government in making a particular grant in 1790, from the passing, in 1793, of a general law, which confessedly does not affect the descent of the large zemindaries held as Raj, or subject to *kooloochar* or family-custom.

Upon the whole, then, their Lordships have come to the conclusion that the Courts below were right in holding that the estate granted to Chutterdharee in 1790 was the Raj of Hunsapore, and that the right of succession to it from him was to be governed by the law or custom which regulated its descent in the time of his ancestors.

This view of the case removes many of the objections to the testamentary power of the late Maharajah, which it is nevertheless necessary to consider, since the title of the respondent to at least part of Chutterdharee's estate may depend on the will.

It is too late to contend that, because the ancient Hindoo treatises make no mention of wills, a Hindoo cannot make a testamentary disposition of his property. Dec cases, too numerous to be now questic have determined that the testame power exists, and may be exercise least within the limits which the prescribes to alienation, by gift *inter* z Accordingly, it has been settled that, eve those parts of India which are gove by the stricter law of the Mitaksl a Hindoo without male descendants dispose, by will, of his separate and acquired property, whether moveable immoveable; and that one having r descendants may so dispose of self-acqu property, if moveable, subject, perhaps the restriction that he cannot wholly inherit any one of such descendants. I however, objected that a Hindoo in th provinces, who has sons or other male scendants, must, on the application of doctrine in question, be held to be incapa of making by will an unequal distribut amongst them of immoveable prope whether self-acquired or ancestral; becau by the law of the Mitakshara, his sons both cases take, on their birth, an inter in the property, which their father, with their consent, cannot displace.

For the respondent it is contended th this question is concluded by the Bithoor ca (9 Moore's Indian Appeals, p. 96). It cann be denied that, in that case, the testator bei a Mahratta domiciled at Cawnpore, a having real as well as personal estate, ma by will an unequal distribution of bo amongst his sons; and that his legal pow to do so was affirmed by this Committee, an by both the Courts below. The appellan however, insists that this decision is oppose to the law of the School of Benares, an relies on the texts of the Mitakshara whic show that a father cannot alienate his sel acquired lands, or make an unequal distri bution of them by partition, without th consent of his sons; and also upon passage in "Strange's Hindoo Law" and othe authorities. Mr. Leith, on the other hand has argued that all these authorities are to be reconciled with the decision in the Bithoor case, by holding that they relate to property acquired by the father, with the use or by the aid of ancestral estate; and that they have no application to separate and self-acquired property in the strict sense of the term. Their Lordships are relieved from the necessity of determining whether this distinction is well founded, or whether, if it be not so, the present case must be governed by the Bithoor case; for, if they are right in

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holding that the grant was of a Raj descendible according to custom to the eldest male heir, the question whether, according to the law of the Benares School, a Hindoo can by will make an unequal distribution of his self-acquired immoveable property amongst his male descendants without their consent, does not in this case arise. The only person entitled to impeach the disposition by will is Oogurpertab, the eldest grandson, who is a consenting party to it. There are no inchoate rights of inheritance in the junior members of the family. They did not by birth acquire that community of interest with their grandfather in his self-acquired lands, which is the foundation of the supposed restriction on his power. And *cessante ratione, cessat et ipsa lex*. (See the remarks of Sir William Macnaghten on the case of Esarchunder Rai, 1 W. Mac. 7.)

It follows, then, that either by the special law of inheritance, or by the will, the respondent was entitled to the estate of Hunsapore, and to whatever other wealth the late Maharajah could dispose of by his will.

Mr. Field has objected that this ruling does not cover that portion of the estate (if any) which came to Chutterdharee from his father Mohesh Dutt. This may be true, but their Lordships are of opinion that the pleadings and evidence in this suit do not properly raise such a case, and utterly fail to show what that property (if any) was. And the respondent being in possession of the whole, it was for the appellant, if he failed to establish his title to share in the whole, to show in what part he was entitled to share.

With respect to the questions raised by either appeal touching the amount of the *babooana* allowance, and the costs of the proceedings in the Courts below, their Lordships have only to say that they see no sufficient ground for interfering with the discretion exercised on those points by the High Court. The result is, that their Lordships will humbly advise Her Majesty to dismiss both the appeal and the cross-appeal with costs. The appellant and the respondent will each bear the costs of his appeal.

The 14th March 1868.

Present:

Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard T. Kindersley, Lord Justice Rolt, and Sir Lawrence Peel.

Hindoo widow's acquiescence in a third party's title—Alienation of her share—Husband's estate no part of widow's stridhun—Widow's power of disposition—Review.

On Appeal from the late Sudder Court at Agra.

Bhugwandeen Doobey

versus

Myna Baee.

A Hindoo banker dying intestate left two widows (*D* and *M*) as his co-heiresses. A document put forward by a third party (*H*) as a will of the deceased having been set aside by the Courts, an order was passed in a summary suit, under Act XIX., 1841, by which the property was equally divided between the widows. One of them (*D*) subsequently died, leaving a will disposing of her share to her relatives. Steps were taken during *D's* life by the other widow (*M*) and by *H* to resist the registration of the will; and after *D's* death, *M* applied for the attachment of *D's* share and the appointment of a curator. Her application being dismissed, she commenced a regular suit.

HELD that *M's* original acquiescence in the title set up by *H* did not deprive her of any rights which accrued to her as one of the co-heirs of her husband when that claim was decided to be untenable; nor could her alleged alienation of her share bar her present suit.

HELD that, according to the law of the Benares School, no part of her husband's estate, whether moveable or immoveable, to which a Hindoo widow succeeds by inheritance, forms part of her *stridhun* or peculiar property; and the text of *Katyayana* cited must be taken to determine, *first*, that her power of disposition over both is limited to certain purposes; and, *secondly*, that on her death both pass to the next heir of her husband.

HELD that Judges of the Sudder Court admitting an application for review were competent to make a qualified order, leaving in the Court which was to review the decision a discretion as to the extent to which the review should be carried.

THE following are the undisputed facts upon which this appeal arises: Rae Deena Nath, a Hindoo banker of great wealth, carrying on business at Benares, Hyderabad, and other places, died at Benares on the 7th

of June 1855, childless. He was separate in estate from his brethren, if he had any; his wealth is said to have been self-acquired; and consequently his co-heiresses, according to the Hindoo Law of the Benares School, were his two widows, *viz.*, the respondent and Doola Baee, since deceased. Immediately after his death, however, a document, purporting to be a will, executed by him in favor of one Hunwunt Pershad, to whom, jointly with a person named Bithul Pershad, it gave the management of the property, was propounded. The title of Hunwunt Pershad claiming under this alleged will, or as the adopted son of Rae Deena Nath, has since been litigated in the Indian Courts, which have uniformly pronounced against it. An appeal to Her Majesty in Council against their decisions is pending, but it has not yet been set down for argument in consequence of the death of one of the parties; and for the purposes of this appeal it must be assumed that Deena Nath died childless and intestate, and that the claim of Hunwunt Pershad was unfounded. Nor would it be necessary to refer to that claim but for the arguments which the appellant's Counsel have founded on the partition between the widows, which was in some measure caused by it, and upon the alleged collusion of the respondent with the claimant.

The first consequence of the claim was that a summary suit, under Act XIX. of 1841, to determine the right to the immediate possession of the property, was instituted in the name of Doola Baee, who was then a minor, by her uncle and guardian, in which a curator was appointed under that Act. When this suit came to a hearing, the Judge pronounced against the will, and directed that the whole estate of Deena Nath should be equally divided between the widows, and that the curator should carry out that order without delay. The property was thereupon divided according to the two lists set forth at pp. 51 and 58 of the record; each widow was put in possession of her share; and Doola Baee continued in the separate possession and enjoyment of her share up to the time of her death.

She died on the 10th of November 1857, having on the 21st of August 1857 made a will which was registered on the same day, whereby she disposed of her share of the property inherited from her husband in favor of her father (the appellant) and her infant brother Kalooram, who is also represented by the appellant on this record.

Some steps seem to have been taken by the respondent and also by Hunwunt Pershad to resist the registration of the will in the lifetime of Doola Baee; and upon her death the respondent applied for the attachment of the property in dispute being that taken by Doola Baee under the partition as specified in the list before referred to, and for the appointment of a curator under Act XIX. of 1841. Her application having been dismissed by the Judge, who on that summary proceeding upheld Doola Baee's will, she commenced the regular suit, out of which this appeal has arisen, on the 21st of December 1857, in the Court of the Principal Sudder Ameen of Benares.

The issues settled in the suit were:—

1. Whether there was any informality in the institution of the suit.

2. Whether the plaintiff (the respondent) was legally competent to institute it.

3. Whether Doola Baee was a minor or not at the date of the alleged execution of the will.

4. Whether the will was fraudulent or a *bonâ-fide* instrument.

5. If a person die leaving two widows, and one of the widows subsequently die leaving a will, who is entitled to succeed according to the Shasters—the surviving widow or the legatee of the will (supposing the husband's estate to have been divided between the widows, and also supposing no such division to have been made)? And is a widow competent to make a will in favor of her brother and father under the Shasters?

The third and fourth issues may be dismissed from consideration. Both have been found by the Courts below in favor of the appellant, and the correctness of this finding is not now impeached.

Upon the other issues the Principal Sudder Ameen found, *first*, that the respondent could not maintain her suit, because it was brought on grounds wholly inconsistent and irreconcileable with the averments made by her in the suit under Act XIX. of 1841, wherein she had supported the claim of Hunwunt Pershad; *secondly*, that by reason of the partition Doola Baee was fully competent to leave her property to whomsoever she pleased; and accordingly he dismissed the suit with costs.

There was an appeal to the Sudder Court of Agra. The first judgment of the Court was adverse to the finding of the Principal Sudder Ameen on the first and second issues, and held that the respondent, notwithstanding her former acts and averments, was competent to maintain the suit. But holding that Doola Baee was competent to dispose of the inheritance derived from her husband, when it had been distinct and divided, and had effectually done so, it dismissed the appeal. It treated her power to dispose of the moveable property as certain; her power to dispose of the immoveable property as more open to question.

The respondent applied for a review of this judgment. The nature of her application and the proceedings upon it will have to be more particularly considered hereafter. The result of it was that the case was reheard before a Full Bench, when the Court decided that, according to the law of the Benares School, Doola Baee was incompetent to dispose of either the moveable or immoveable property which she had inherited from her husband, and made a decree in favor of the respondent. This present appeal is against that decree.

From the foregoing statement it is obvious that the principal question between the parties is the broad and general one, whether, according to the law of the Benares School, a Hindoo widow is competent to dispose, by will or deed of gift, of either moveable or immoveable property inherited from her husband, to the prejudice of his next heirs.

The learned Counsel for the appellant have, however, contested the right of the respondent to have the present case decided on this issue upon various grounds. They contend—

1st.—That, if not precluded from maintaining the suit by reason of her acts and averments in former proceedings, as ruled by the Principal Sudder Ameen, she has so shaped her case on the pleadings that she cannot in this suit insist on her rights, whatever they may be, as next heir of her husband in succession to Doola Baee.

2ndly.—That it was not competent to the Sudder Court, having regard to the application for review and the proceedings thereon, to review its first decision, except as to the immoveable property.

Two other points were taken at the Bar, which it will be convenient to consider after, rather than before, the determination of the principal and general question of Hindoo Law. One was raised by Mr. Leith on behalf of the respondent, and was to the effect that, as one of two Hindoo widows taking as co-heirs to their husband, she is in a more favorable position than that of a person claiming as next heir of the husband in succession to a single widow deceased. The other, which was taken by the other side, is, what was the effect of the partition, either by way of enlarging the power of Doola Baee to dispose of the property, or affecting the right of the respondent to question her disposition. Their Lordships will consider all these questions in their order.

At the close of the argument for the appellant, they intimated that, in their judgment, the respondent was not precluded, either by her acts or averments, or by her form of pleading in this suit, from insisting on her rights as heir of her husband against the claims of Doola Baee. Their Lordships agree generally in that part of the first judgment of the Sudder Court which ruled that the respondent, because she originally acquiesced in the title set up by Hunwunt Pershad, had not lost any rights which accrued to her as one of the co-heirs of her husband when that claim was decided to be untenable. Nor do they think that her alleged alienation of her share can be urged against her by the appellant as a bar to the present suit. It may have been an improper act; it may be one which Doola Baee, had she been the survivor of the two widows, could have questioned, or which the next heirs of Deena Nath may yet question; but the improper alienation of part of her husband's estate cannot affect the respondent's right to recover other parts of it from those who, if her view of the law is correct, have no title to it.

And upon the argument founded on the pleadings, their Lordships have to observe that the plaint does not inaccurately state the respondent's claim to the right to succeed, on the death of Doola Baee, to that property which the latter took by inheritance from her husband. The replication and the petition of appeal from the decree of the Court of first instance are, no doubt, more open to the objection taken. In order to meet the case of *quasi estoppel* set up, they attempt to draw a distinction between the claim to the original share which the

respondent took on her husband's death, and her claim to that to which she became entitled on Doola Baee's death; and make some confusion as to the character of her heirship. But this mispleading has in no degree prevented the settlement of proper issues, or prejudiced the fair trial of the real question of right between the parties; and, that being the case, it would be contrary to the practice of this Committee to give effect to nice and critical objections founded on the inaccuracy of an Indian pleading.

The next question is whether the decree now under appeal ought to be reversed, so far as it affects the moveable property, merely on the ground that it was not competent to the Sudder Court to review its prior decree with respect to that portion of the property in question in the suit.

Their Lordships are not satisfied that the proceedings on review were not within the powers of the Sudder Court. Two objections have been taken to them, *viz*, first, that the respondent never petitioned for a review of judgment, except as to the immoveable property; next, that whatever was the scope of her petition, the order of Mr. Gubbins upon it must be taken to have conclusively confined the review to the immoveable property.

Upon the first point their Lordships think that the application for review at p. 84 must, on a fair construction of it, be taken to embrace the question as to the moveable as well as that relating to the immoveable property. Plea 1 seems to be confined to the latter, but plea 2 is more general. It insists that the opinion of the Calcutta Pundit ought to be accepted as correct. That opinion, which is at pp. 72 and 73, made (as he himself stated in his second opinion) no distinction between moveable and immoveable property, but denied the right of the widow to dispose of either, to the prejudice of her husband's heirs.

Again, as regards the acts of the Court, the article of the Code of Procedure which is supposed to have tied the hands of the Judges is the 378th. It is clear, however, that the final order contemplated by that Section was the order which, in the ordinary course, would have been made by Messrs. Ross and Pearson on the 15th of January 1863. (See p. 86.) The proceeding of Mr. Gubbins was merely his *fiat* for the issue of that notice to the opposite party which is required by the proviso of the Section.

It may be admitted that Mr. Gub understood the application to be limite the immoveable property; that he so lim the notice; and that, when the parties together *in presence* before Messrs. R and Pearson, the written grounds for rev "impugned the correctness of the decisi so far as it related to the real prop only." But the question still rema whether it was not competent to the Jud by whom the order allowing or rejecti the application for review was to be mad to enlarge those grounds on the oral app cation of the party, if satisfied that the was a proper case on the merits for so d ing. There seems to be nothing in the Co of Procedure which expressly prohibits the from so doing. And their Lordships are opinion that Messrs. Ross and Pearso though they might have made a final ord granting or rejecting the application *in h* or in part, were not incompetent to mak the qualified order which they did mak leaving in the Court which was to revie the decision a discretion as to the extent which the review should be carried.

They are also of opinion that, even if th Court below had been wrong in its proce dure, its miscarriage ought not to preve this Committee from deciding the questio touching the disposition of the moveabl estate on its merits. There has been n surprise. The question was fully argued be fore the Full Bench of the Sudder Court o ample notice to both parties. It has bee fully argued here. The objection, therefore is purely technical, and the result of yielding to it might be to place the respondent at a very unfair disadvantage. She had a righ to appeal to Her Majesty against the whol or any part of the first decree of the Sudde Court. She would not have lost that righ of appeal even if she had limited her appli cation for a review to the immoveable property. She was relieved from the necessity of appealing, by obtaining a final decree in her favor as to the whole of the property, whether moveable or immoveable. If this objection were to prevail, there could be no final determination of the question as to the former on its merit; unless, indeed, for the sake of doing substantial justice between the parties, their Lordships were now to allow her to appeal against that portion of the first decree of the Sudder. They are of opinion that no such formality is necessary, and that it is competent to the respondent, who has been brought here on appeal, to maintain, if she can, the decree which is under

peal, by showing that it is right upon the erits.

Their Lordships being, therefore, of opi-n that there is no obstacle to the deter-mation on this appeal, and between these rties, of the general question involved in e judgment under appeal, will now address emselves to the consideration of that estion.

The parties have brought together a large nount of conflicting authority concerning consisting partly of the *Byvaslas* or inions of Pundits, partly of decided ses, and partly of passages from ancient modern authorities, which are accepted as thoritative in the Courts of India.

It is impossible to reconcile the various inions of the Pundits which are to be und in the record. They are divisible to three classes, *viz.*, *first*, that of opinions ken in other suits; *secondly*, that of opi-ons taken by the parties themselves for the urposes of this suit; and, *thirdly*, that of pinions given in answer to the questions ut by the Sudder Court in this suit.

Of the first class are No. 10 at p. 9, pro-ably No. 11 at p. 19, No. 33 at p. 63, and o. 28 at p. 36. Three of these are not very aterial. As far as they go, the two first pport the contention of the respondent; e third seems to be good law, but it has ally no bearing on the question now under consideration. The point was, whether, on e death of the widow, the daughter or a ephew should succeed to property derived om the husband; and inasmuch as the idow could not have taken the property if had not been divided, it followed that it ust continue to descend in the course of ccession to separate estate, and therefore o a daughter before a nephew. The fourth s strong against the right of a widow to alienate immoveable property inherited from her husband; and the case in which the opinion was taken was decided in accordance with it. But the opinion being apparently that of the same Calcutta Pundit who was consulted in this case, it is material only as showing that he has in other cases rejected the doctrine that a widow has power to dispose of land inherited from her husband.

The second class consists of No. 12 at p. 19, being the opinion of thirty-seven Benares Pundits, filed by the respondent; and of No. 14 at p. 49, being the opinion of twenty-one Pundits of the same place, filed by the appellant. The first ruled that the surviving widow was entitled to succeed to the share of the deceased widow, and that that right could not be defeated by the disposition of the deceased widow. The other goes the length of contesting the right of one widow to succeed to another widow of her deceased husband in any case; it affirms the proposition that, the property being once vested in the wives, each had an absolute interest in her share, and might dispose of it as she pleased. It held also that, in the case of intestacy, the father and brother of the deceased widow would have been the persons entitled to inherit her share.

The third class consists of No. 4 at p. 72, being the opinion of Ram Nath, one of the Pundits at the Sudder Court of Agra; of No 7 at p. 73, being the opinion of four Benares Pundits, taken by the Judge of that place under orders from the Sudder Court at Agra; No. 5 at p. 72, and No. 3 at p. 85, being the two opinions of Heerna Nund, the other Pundit at the Sudder Court of Agra; and No. 6 at p. 72, and No. 2 at p. 84, being the two opinions of the Calcutta Pundit. All these, except the later opinions of Heerna Nund and of the Calcutta Pundit, which were taken on the proceedings in review, were given in answer to the question put by the Sudder Court before its first judgment.

The questions were prefaced by the following "Preamble" or statement.

A dies, leaving two wives, *B* and *C*, who inherit his property, real and personal. *B* and *C* make a complete partition of the property, and live separately from each other. *C* dies, having as blood-relations a brother and an uncle; and the questions were—

1st.—Does the property left by *C* descend by inheritance to the other widow *B*, or to the brother or uncle of *C*? and

2nd.—Would *C* be competent to bequeath by will to her blood-relatives the share of the property which she inherited from *A* (so divided) to the prejudice of *B*, who is still living?

It will be observed that this statement assumes a complete partition by the act or contract of the two widows, and it substitutes an uncle for the father of the deceased widow. The only variation in the references to the different Pundits was that, from accident or design, that to Heerna Nund was confined to *real* property.

To these questions the four Benares Pundits answered: *first*, that the brother of *C* was her foremost heir, and after him her uncle, and that, while these two existed, *B* could not succeed; *second*, that any testamentary disposition by the widow of the property which she had inherited from her husband should be held valid, the property having been exclusively her own, and that she was, therefore, at liberty to dispose of it in any way she thought proper.

Three out of the four consulted Pundits appear to be included amongst the twenty-one who had previously given the opinion above referred to, at the instance of the appellant; and accordingly the two opinions are, as might be expected, to the same effect; except, perhaps, that the second does not deny, so strongly as the first, the right of the surviving widow to succeed to the share of the deceased widow in any case.

The answer of Ram Nath to the first question was that *C's* share would descend by inheritance to *B*, because *C* could not be succeeded by her brother or uncle during the existence of her husband's *sapinda*; and, although, in his answer to the second question, he admits the power of *C* to defeat this right of *B* by her will, he rests that power of disposition solely on the partition assumed by the statement. He says expressly: "She could not have done so had the property been jointly held." He makes no distinction between real and personal estate.

The answers of Heerna Nund and the Calcutta Pundit, upon which the ultimate judgment was in great measure grounded, was, of course, in favor of the respondents on both points. They, too, make no distinction between real and personal property. The first opinion of Heerna Nund was confined to real property; but this, as he explained in his second opinion, was because the reference to him was so confined.

The following, then, is the result of the *Bywastas* of the Pundits. If the partition, the effect of which will be afterwards more fully considered, were out of the question, all the Court Pundits would agree in holding that the respondent, as the next heir of her husband, is entitled to take by succession the share of Doola Baee; and that that right cannot be defeated, either as to moveable or immoveable property, by the will of Doola Baee. Ram Nath, however, holds that, by reason of the partition, Doola Baee acquired the right of disposition. Again, the twenty-one or twenty-two Benares Pundits, who are in favor of appellant's title, are opposed by the twe seven Pundits of the same place, who h given their opinion in favor of the respo ent. And the *Bywastas* given in o cases are more favorable to the respond than they are to the appellant.

The Benares Pundits, who are in f of the appellant, refer only generally to Mitakshara; but the particular passage which they rely are probably the 10 11th Sections of the second Chapter, especially the second article of the 11th S tion. Those passages, and the argument favor of the widow's right of disposi which were deduced from them, were la under the consideration of this Commit in the case of Choteh Beebee, decided on 1st of February 1867. The following is conclusion to which their Lordships th came (see printed judgment, pp. 10 13): "The result of the authorities see to be that, although the widow may hav power of disposing of moveable prope inherited from her husband, which she not under the law of Bengal, she is, by one law as by the other, restricted fr alienating any immoveable property whi she has so inherited; and that, on her dea the immoveable property and the moveable, she has not otherwise disposed of it, pass the next heirs of her husband." To t authorities then cited and reviewed by th Lordships may be added Sir William Ma naghten's observations in his work o Hindoo Law, Vol. I., pp. 19 to 21; cas 14 and 15 in the second volume of th same work, pp. 31 and 37; and also som of the cases which will hereafter be men tioned, which, whilst they support th doctrine of the widow's power to dispose o moveable property, admit that she canno dispose of immoveable property inherite from her husband.

It must, then, be taken upon the authori ties to be settled law that, under the law o Benares, a Hindoo widow has not the powe to dispose of immoveable property inherited from her husband to the prejudice of hi next heirs; and the only question open t doubt is whether she has any such powe over moveable property.

It must be admitted that in favor of thi supposed distinction there appears at first sight to be a considerable body of positive authority. In the case of Cassinauth Bysack *vs.* Hurroosoondury Dabee, the leading case upon the rights and disabili-

of a Hindoo widow in Bengal, it was at supposed that the distinction was recog- d even by that school. The first decree at case declared the widow entitled to nterest for life in the immoveable, but to bsolute interest in the moveable, estate of late husband. That was altered by the ee made on a bill of review, which ared her entitled to the real and personal e of her husband, to be possessed, used, enjoyed by her as a widow of a Hindoo band dying without issue, in the manner scribed by the Hindoo Law. On an ap- l from that decree the whole subject was iewed by Lord Giffard. His judgment ich is reported in the Appendix to Mr. ngueville Clark's rules and orders), whilst establishes that, according to the law of ngal, there is no distinction between veable and immoveable property in re- ect to the widow's power of disposition er it, seems to proceed on the ground at the treatises known as the Vivada hintamani and the Ratnacara are over- led and qualified in this respect by the ayabhaga and Dayatutwa, which give the w to Lower Bengal, and that where the o former treatises prevail, the distinction ay exist. This judgment, therefore, fords some ground for the argument that e law of Bengal, which does not recog- ize the distinction, is an exception from the eneral Hindoo Law. Again, in Bijai Govind ing *vs.* Najunder Narain Rae (2 Moore's ndian Appeals 181), decided here in 1839, he right of the widow to dispose of moveable property inherited from her hus- band, and its devolution on her dying intes- tate, are treated as open questions under the law of the Mithila School.

Of decided cases affirming the distinction, we have that in the High Court of Bengal, which was cited at the Bar from the "Indian Jurist" of the 31st of March 1866, p. 128, and which appears to be a case govern- ed by the law of the Mithila School.

We have further the four cases cited in the judgment in that case, of which two show that the distinction has been recognized by the Sudder Court of Madras as prevailing in the Presidency of Madras; and two show that it has also been recognized by the High Court of Bombay as prevailing in that Presidency. And lastly, we have case 2, at p. 46 of the second volume of Sir William Macnaghten's Hindoo Law, in which the law which ought to have been applied was that of the Benares School.

If it were clear that the law upon the point in question was necessarily the same for all parts of India except those provinces of Lower Bengal which are governed by the Dayabhaga, these cases might afford ground for saying that the doctrine under consider- ation, however questionable originally, must be taken to be now established by a course of decisions.

Is, however, this uniformity of the law to be presumed?

The Judges, indeed, of the High Court of Calcutta say in the judgment just referred to: "This case comes from Tirhoot, one of the districts forming the ancient province of Mithila, but the law is admittedly the same in this particular, both for Mithila and for the provinces governed by the Mitakshara." Their Lordships, however, are not satisfied that this statement is correct.

The Mitakshara is, no doubt, accepted as a high authority by all the Schools, even by that of Bengal, when it is not controlled by the Dayabhaga and other treatises peculiar to that School. But the other four Schools have, like that of Bengal, though in a less marked degree, their particular treatises and commentaries which control certain passages of the Mitakshara, and give rise to the differences between those Schools. In proof of this, it is only necessary to refer to the "Preliminary Remarks" of Sir William Mac- naghten, pp. 21 to 23. From these it would appear that, whilst the Mithila School follows implicitly the Vivada Chintamani and the Ratnacara; the South of India, the Smriti Chandrika and the Madha- vya; and the Presidency of Bombay, the Vyavahara Mayukha; these works are by no means held in equal estimation at Benares.

Now, it appears from the judgment of Lord Giffard that the works which were supposed to go furthest towards establishing the distinction between moveable and im- moveable property, which is now under con- sideration, were the Vivada Chintamani and the Ratnacara. These may well be taken to establish such a distinction accord- ing to the law of Mithila, and yet fail to do so according to the law of Benares. Again, the Mayukha is cited as an authority for the decision of the case at p. 43 of the second volume of Macnaghten; and in the judgment under appeal it is expressly stated that that treatise is not accepted as an authority by the Benares School, and con- sequently that the case in question was

not binding on the Court. In like manner the law established by the two decisions at Madras, if it be so established, may depend on treatises and authorities peculiar to the South of India, and not accepted at Benares. From the reports of these, at p. 117 of the Sudder Decisions for 1849, and at p. 77 of the Sudder Decisions for 1850, it appears that both were decided on the *Bywastas* of Pundits. In the former case the authorities relied on by the Pundits are not given; but in the latter, mention is made of the books called Madhaveyen and Suraswati-vilasa, as well as of the Mitakshara (there called Vijnyaneswara); and it appears from Sir William Macnaghten's remarks that the two latter works are of paramount authority in the territories dependent on the Government of Madras, whilst they are not enumerated amongst the works accepted at Benares.

If this be so, it follows that, even if the above-mentioned cases were correctly decided, they are by no means conclusive on the present question. The decision of the High Court of Calcutta, in so far as it confirmed the title of the purchaser of the Government promissory notes, might have been rested on the general law relating to the transfer of negotiable paper, and that case, so far as it involved the question now under consideration, and the case in the second volume of Moore's Indian Appeals, were determinable by the law of Mithila; the two cases in the High Court of Bombay, and that at p. 46 of the second volume of Macnaghten's, were decided according to the peculiar law of the Bombay Presidency, including the Mayukha; and those at Madras, according to the law of that Presidency. None of them necessarily govern a case to be decided according to the law of Benares.

How, then, does the law stand independently of these decisions?

The startling differences of opinion amongst the Pundits show that the question cannot be taken to be clearly settled by the authorities accepted at Benares.

The text of the Mitakshara, on which, as has already been shown, the appellant must mainly rely, is the second paragraph of Section 11 of Chapter 2, which includes "property which she may have acquired by inheritance" in the enumeration of women's peculiar property. These words make no distinction between moveable and immoveable property; yet it is settled, beyond question, as we have already stated, that immoveable property which a woman inherits from her husband cannot be disposed of by her, and does not pass as her *stridhun*. The legitimate inference from this seems to be that neither moveable nor immoveable property inherited from her husband form part of a woman's *peculium* or *stridhun*. Sir William Macnaghten, indeed (Vol. I., p. 38), excludes from *stridhun* all the different kinds of property enumerated in the last clause of the paragraph in question.

On the other hand, it may be argued that the text is explicit; that it includes under the head of *stridhun* all property inherited from the husband; that from the fact of its inclusion the power of disposition over it is *primâ facie* to be inferred; but that the right to alienate immoveable property, whether inherited from the husband or given by him in his lifetime, having been taken away by positive texts, the distinction in this respect between moveable and immoveable property has arisen.

This argument, however, would fail to show why immoveable property inherited from a husband should not (and all the decided cases show it does not) descend as *stridhun*, but passes on the widow's death to the next kin of the husband. The truth seems to be that the texts which restrict a woman's power of disposition over immoveable property given to her by her husband in his lifetime are different from those which both restrict her power over immoveable property inherited from her husband, and regulate the course of its devolution.

To the former class belong the text of Nareda—"Property given to her by her husband through pure affection, she may enjoy at her pleasure after his death, or may give it away, except land or houses;" and the text of Katyayana—"What a woman has received as a gift from her husband, she may dispose of at pleasure after his death if it be moveable; but as long as he lives let her preserve it with frugality." To the second class belongs the text of Katyayana on which the judgment under appeal so much proceeds, *viz.*, "The childless widow preserving inviolate the bed of her lord, and strictly obedient to her spiritual parents may frugally enjoy the estate or property until she die; after her the legal heirs shall take it." We take these texts as rendered by Mr. Colebrooke (3 Dig. 575 and 576).

It is impossible to deny, as will be seen h reference to the Digest, that there has een a considerable conflict of opinion mongst the commentators concerning the xts. The better opinion, however, seems be that they relate to different subjects.

Again, the latter text certainly includes oth moveable and immoveable property; nd it seems to be only by reason of conounding the law as to property given by, ith that relating to property inherited rom, the husband, that the words "after er the legal heirs shall take it" can be retricted to the immoveable portions of the usband's estate. The preponderance of uthority is certainly in favor of the proosition that, whether the widow has or has not he power to dispose of inherited moveables, hey, as well as the immoveable property, if ot disposed of, pass on her death to the ext heirs of the husband.

It is also worth remarking that the loctrine that property inherited from her usband forms part of a woman's *stridhun*, eceives no color from two of the treatises urrent in other Schools which are supposed to recognize the widow's power to lispose of moveables so inherited. Both he Vivada Chintamani and the Mayukha onfine *stridhun* within the definitions of Menu and Katyayana. They exclude property inherited and the other acquisitions hich are comprehended in the last clause f the paragraph in the Mitakshara, but are xcluded by Sir William Macnaghten.

They have distinct chapters for "the eparate property of women," and "her ight of succession to a husband who leaves o son." The "Vivada Chintamani" expressly says (p. 262) that the text of Katyayana does not refer to the peculiar property f a woman; and although it cites from Katyayana, "let a woman, on the death f her husband, enjoy her husband's property t discretion," and explains that this refers o property other than immoveable; it also, t page 292, quotes from the Mahabarata, "For women the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth;" to which it adds by way of explanation—"Here waste means sale and gift at their own choice." (See Vivada Chintamani, pp. 256 and 266, and Mayukha, pp. 84 and 78.)

Another argument against including the wealth inherited from her husband in a woman's *stridhun*, as defined by the 2nd Clause of the 11th Section of the 2nd Chapter of the Mitakshara, may be derived from the Clauses 11 to 25 (both inclusive) of the same Section. These declare the husband to be, in default of the issue, the heir to "the whole property as above described." This is intelligible, if the words "property which she may have acquired by inheritance," in the second Clause, are considered to be property inherited in her husband's lifetime, or from some persons other than him.

The reasons for the restrictions which the Hindoo law imposes on the widows' dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income, as they are to land. The more ancient texts importing the restriction are general. It lies on those who assert that moveable property is not subject to the restriction to establish that exception to the generality of the rule. The diversity of opinion amongst the Benares Pundits is sufficient to show that the supposed distinction between moveable and immoveable property is anything but well established in that School. And the unanimous judgment of the five Judges of the Sudder Court, supported by the opinion of the Court Pundits, has, in this case, ruled that the distinction does not exist. Such a judgment ought not to be lightly overruled.

Their Lordships, therefore, have come to the conclusion that, according to the law of the Benares School, notwithstanding the ambiguous passage in the Mitakshara, no part of her husband's estate, whether moveable or immoveable, to which a Hindoo woman succeeds by inheritance, forms part of her *stridhun* or particular property; and that the text of Katyayana, which is general in its terms, and of which the authority is undoubted, must be taken to determine, *first*, that her power of disposition over both is limited to certain purposes; and, *secondly*, that on her death both pass to the next heir of her husband. They have already stated the grounds on which they think that the cases decided in India are not necessarily in conflict with those conclusions. It is unnecessary for them to express any opinion touching the correctness of those decisions, except that, in so far as they proceed, as that in the High Court of Calcutta unquestionably

does in part proceed, on a different construction of the passage in the Mitakshara, they cannot be supported on that particular ground.

Their Lordships have now to consider whether the effect of the so-called partition was to give Doola Baee any power of disposition over her share which she would not otherwise have had.

The case is wholly distinguishable from those in which a widow, having a right to an ascertained share upon a partition with co-parceners, who have an absolute interest in their shares, is put by them into possession of that share. In such case it may be a question whether her interest does not become absolute, though in a case coming from Lower Bengal the contrary was decided by this Committee on an appeal from the Supreme Court of Calcutta. But here the so-called partition was between two widows, each having the limited interest of a Hindoo widow in her husband's estate. It does not appear that it was made at the suit or on the application of either. It was made by order of a Judge who in the particular proceeding (one under Act XIX. of 1841) had no jurisdiction to determine questions of title, and who could only deal with the right to possession. It is difficult to see how such a partition could enlarge either widow's estate, so as to give her a disposition which she would not otherwise have had against the next heirs of her husband.

It may be said that the question here is only whether the respondent has not, by her partition, lost her right by survivorship. There is, however, no proof of any contract to make a partition, and, as part of that contract, to release the rights of survivorship, supposing it to have been competent to the widows to enter into such a contract. There was, as has already been shown, no jurisdiction in the Court to make a complete partition *in invitam*. The transaction seems to have been merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected. T acquiescence of the widows in the Jud proceedings cannot have done more t bind each not to disturb the oth possession.

If this be so, it follows that the opini of those Pundits which were given in fa of the appellant on the assumption of a co plete and regular partition lose much of t power. It follows also that the case the respondent is stronger than it wo have been had she claimed merely as heir to her husband in succession to Do Baee. For the estate of two widows, w take their husband's property by inherita is one estate. The right of survivorshi so strong that the survivor takes the wh property to the exclusion even of daugh of the deceased widow. (2 W. Mac. Hin Law, p. 38, note 1.) They are, therefo in the strictest sense co-parceners, a between undivided co-parceners there be no alienation by one without the con of the other. And, accordingly, this might have been decided in favor of respondent on this ground alone.

Upon the whole, then, their Lordships of opinion that the decree under appeal substantially right, and ought to be affirm Considering, however, that what has b been decided in respect to Doola Ba interest is equally applicable to that of spondent, and that the latter is said to h assumed a power of disposing of her ow share, they think it may be well to ins in the decree a declaration that the prope recovered by the respondent is to be posse ed and enjoyed by her as a widow of a Hi doo husband dying without issue, in t manner prescribed by the Hindoo l Their Lordships will humbly recomme Her Majesty, with that variation, to confi the final decree of the Sudder Court of Ag The appellant must pay the costs of t appeal.

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